

SMALL BUSINESS AND THE ROBINSON- PATMAN ACT

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT

OF THE

SELECT COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 66

A RESOLUTION CREATING A SELECT COMMITTEE TO CONDUCT
STUDIES AND INVESTIGATIONS OF THE PROBLEMS
OF SMALL BUSINESS

VOL. 3

APPENDIX

WASHINGTON, D.C., FEBRUARY 4, 5, 6, 26, 27;
MARCH 3, 4, AND 11, 1970

Printed for the use of the
Select Committee on Small Business



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(II)

PREFACE

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C., September 17, 1969.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: In further reference to Chairman Evins' letter of August 7, 1969, it would be appreciated if the following information could be provided:

1. Copies of all Trade Regulation Rules and Industry Guides (does not appear in appendix).

2. A representative sample of Advisory Opinions dealing with the Robinson-Patman Act.

3. A compilation of votes cast by each member of the Commission since January 1, 1961, on issues involving the Robinson-Patman Act. The compilation requested would include investigations, issuances of formal complaint, interlocutory rulings, cease and desist orders, advisory opinions, trade practice rules, trade regulation rules, etc. (partially contained in hearing record).

4. All (only selected material appears in appendix) information provided to Mr. Robert Pitofsky, Counsel for the Commission to Study the FTC, appointed by the President of the American Bar Association; also copies of any information provided to individual members of the ABA commission.

5. Copies of memoranda, including staff papers, letters and other documents, evidencing views of Commission members with respect to the proposed budget submitted by the FTC to the Bureau of the Budget for fiscal years 1970 and 1971 (including copies of proposed budget).

6. A résumé of each member of the Commission.

7. Copies of memoranda, notes, letters, etc., by members of the Commission indicating individual appraisal of the role, effectiveness, and enforcement of the Robinson-Patman Act by the FTC.

8. The personnel figures, by Bureau, on the turnover of young FTC attorneys with less than five years' experience since 1966.

9. Copies of Commission minutes in the matter of Associated Merchandising Corporation, Docket No. 8651.

It would appear that additional material may be necessary and your continued cooperation would be appreciated by Chairman Dingell.

Sincerely yours,

GREGG POTVIN, *General Counsel.*

(III)

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SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

A P P E N D I X

RESPONSE TO QUESTION 2

A Representative Sample of Advisory Opinions Dealing With the Robinson-Patman Act

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3. Total Number of Advisory Opinions Issued by Commission 1962 thru 1969.

4. Proceedings of The Seventh Annual Corporate Counsel Institute—October 10 and 11, 1968.

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6. Report Of Program Review Office, Federal Trade Commission, on Bureau of Industry Guidance: Division of Advisory Opinions; Division of Industry Guides; Division of Trade Regulation Rules—August 28, 1969.

FEDERAL TRADE COMMISSION

ADVISORY OPINION DIGESTS

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June 1, 1962 to December 31, 1968

(3)

**MEMBERS OF THE FEDERAL TRADE COMMISSION
AND STAFF AS OF JANUARY 1, 1969**

PAUL RAND DIXON, *Chairman*

PHILIP ELMAN

EVERETTE MACINTYRE

MARY GARDENER JONES

JAMES M. NICHOLSON

JOSEPH W. SHEA, *Secretary*

III

BUREAU OF INDUSTRY GUIDANCE

Chalmers B. Yarley

Director

DIVISION OF ADVISORY OPINIONS

Hugh B. Helm

Chief

ACKNOWLEDGMENT

Compiled by

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FOREWORD

"The businessmen of the country desire something more than that the menace of legal process . . . be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission."

—WOODROW WILSON, 1914

IX

ADVISORY OPINIONS EXPLAINED

On June 1, 1962, the Federal Trade Commission amended its Rules of Practice to provide an advisory opinion program for the business community for the purpose of determining whether an intended course of business action, if pursued, is likely to violate any of the Commission administered laws. In one of the most far-reaching innovations by an administrative agency in recent years, the Commission initiated a procedure through which it will render such advice, where practicable, with these exceptions: (a) where the course of action is already being followed; (b) where the same or substantially the same course of action is under investigation or is the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (c) where the proposed course of action is such that an informed decision could be made only after extensive investigation, clinical study, testing or collateral inquiry.

The revised Rules also provide that any advice given is without prejudice to the right of the Commission to reconsider the question presented and, where the public interest requires, to rescind or revoke the advice given upon notice to the requesting party. The Commission will not proceed against a requesting party with respect to any action taken in good faith reliance upon the opinion where all relevant facts were fully presented and where the action is promptly discontinued upon notification of rescission.

Digests of selected advisory opinions of general interest are published as news releases, subject, of course, to statutory restrictions against disclosure of trade secrets and names of customers and to considerations of the confidentiality of commercial, financial, and other facts involved and of meritorious objections made by the requesting party to such publication. Those seeking Commission advice are assured that every consideration will be given to the confidentiality of any submitted proposal and that in no event will their identity be revealed should the advice given be made generally available through publication of a digest. It is the Commission's firm policy that the digest will be the only material of public record and that the advisory opinion itself and all background papers will remain confidential.

While litigation has by no means been abandoned and remains the Commission's ultimate and sometimes necessary weapon, in recent years increasing reliance for correction of an industry evil has been placed on voluntary procedures falling short of formal proceedings. Compliance with Commission administered law is thus achieved with efficiency and economy. The advisory opinion function has made and will continue to make a vital contribution to this objective.

Under this program and subject to the provisions previously noted, anyone making application will be advised concerning the legality of his proposed course of business conduct. No particular format or form is required for this purpose. The application need only be in writing and identify the requesting party and his program in sufficient detail so that an informed opinion thereon can be appropriately rendered by the Commission.

Requests for advice are assigned to a senior Commission attorney for processing and ultimate disposition. On occasion this will involve consultation and discussion of the presented problem with the requesting party and a qualified inquiry of other governmental agencies. Commission attorneys are under instruction to cooperate with each requesting party to the fullest extent in order to obtain, insofar as this is possible, a result both satisfactory to the requesting party and acceptable to the Commission.

Provided full disclosure was made of all pertinent facts in the first instance, a favorable, or conditionally favorable, advisory opinion will insulate a recipient from formal Commission action. Only rarely has the Commission found it necessary, in the public interest, to revise or rescind an opinion once given. In such case, opportunity is thereafter afforded for informal disposition of any disputed matter covered by the rescinded opinion.

Advisory opinions, it should be emphasized, are not given as to business practices currently in use. These are dealt with by other Commission procedures.

Except for that uncommon request which is clear on its face, a Commission advisory opinion, of necessity, must depend upon an assessment of the specific facts which have been made available. The competitive background will frequently control the advice given. Commission administered statutes are not, for the most part, self-declaratory and often can be interpreted only as they apply to a particular industry. Almost without exception, therefore, the digests which follow are digests of opinions given against a rather complete factual background. The brief results here set forth should accordingly be applied with caution. A somewhat changed factual situation might have brought about a different or modified result.

On the other hand, advisory opinion digests should prove a useful tool in charting prevailing Commission views on a wide variety of subjects. They are official Commission actions and, when properly used, have considerable precedential value. If, however, there is doubt concerning the applicability of a rule announced by a particular digest to a different, though perhaps similar, set of circumstances, Commission advice is readily available.

The revised Rules additionally provide that any respondent subject to a Commission issued cease and desist order may request advice from the Commission as to whether a course of action he proposes to pursue will constitute compliance with such order. No particular format or form is required for this purpose. The request need only be in writing and should

describe the proposed program of compliance in full and complete detail so that an informed opinion thereon can be appropriately rendered by the Commission.

In the main the Federal Trade Commission draws its authority and powers from, and enforces the below listed statutes. Although most requests for advice to embrace only the Federal Trade Commission Act or the Clayton Act, as amended, an advisory opinion may be requested on proposed courses of action where other of the Commission administered statutes may be involved.

1. Federal Trade Commission Act (1914) as amended by the Wheeler-Lea Act (1938).
2. Clayton Act (1914) as amended by the Robinson-Patman Act (1938).
3. Webb-Pomerene Export Trade Act (1918).
4. Wool Products Labeling Act (1939).
5. Lanham Trade Mark Act (1946).
6. Oleomargarine Act (1950).
7. Fur Products Labeling Act (1951).
8. Flammable Fabrics Act (1953).
9. Textile Fiber Products Identification Act (1958).
10. Fair Packaging and Labeling Act (1966).
11. Truth-in-Lending Act (1968).

This publication, which will be supplemented from time to time as advisory opinion digests accumulate in sufficient quantity, is organized in the following manner:

1. Rules and Regulations for obtaining an Advisory Opinion.
2. Cross Index and Summary. This is a chronological arrangement with a capsule summary of each digest and reference to other publications where it is discussed.
3. Advisory Opinion Digests. This arranges the digests in numerical order.
4. Appendix:

Tripartite Promotional Program Amendment.—This modifying amendment, added by Commission action of July 11, 1968, to advisory opinions involving three-party promotional assistance plans, clarifies and makes more certain the duties and obligations of suppliers, intermediary promoters and recipient customers under Section 2(d) and 2(e) of the amended Clayton Act.

Commission Enforcement and Policy Statement.—This is a group of Commission issued statements touching on various subjects of special interest to retailers and the consuming public. These range from three-party (tripartite) promotional assistance programs to

deceptive practices used by some sellers of home repair products to a guide against the deceptive use of the word "Free".

Trade Regulation Rules.—These are formal announcements of Commission policy covering application of a particular statutory provision and are based on experience derived from studies, reports, investigation, hearings, and other proceedings. They may be nationwide in effect or limited to particular areas, industries, product, or geographical market.

Industry Rules and Guides.—These are administrative interpretations of Commission administered law for guidance of the public in conducting affairs in conformity with legal requirements and provide a basis for voluntary and simultaneous abandonment of unlawful practices by industry members. They deal with a number of problems which affect an entire industry or particular problems common to many industries.

5. Table of Commodities and Words. This is an alphabetical arrangement of products and words considered or referred to in the digests.
6. Index. This is arranged by topic and law involved.

Each advisory opinion digest is organized as follows:

1. The issued digest by number.
2. Date of issuance.
3. The applicable statute or statutes.
4. Text.

Further information may be obtained from the Division of Advisory Opinions, Bureau of Industry Guidance, Federal Trade Commission, Washington, D.C. 20580.

The COMPILER.

RULES AND REGULATIONS FOR OBTAINING ADVISORY OPINIONS

§ 1.1 *Policy.*

Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy to consider requests for such advice and, where practicable, to inform the requesting party of the Commission's views. A request ordinarily will be considered inappropriate for such advice: (a) Where the course of action is already being followed by the requesting party; (b) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (c) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

§ 1.2 *Procedure.*

The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. Conferences with members of the Commission's staff may be held before or after submittal of the request. Submittals of additional information may be required. The original submittal should affirmatively show that the proposed course of action is not currently being followed by the requesting party and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency. If the request is for advice as to whether the proposed course of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in § 3.61 of this chapter.

§ 1.3 *Advice*

(a) On the basis of the facts submitted, as well as other information available to the Commission, and if practicable, the Commission will inform the requesting party of its views and may take such other action as may be appropriate.

(b) Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will

be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

§ 1.4 *Publication*

Texts or digests of advisory opinions of general interest will be published by the Commission, subject to statutory restrictions against disclosure of trade secrets and names of customers and to considerations of the confidentiality of commercial, financial, and other facts involved and of meritorious objections made by the requesting party to such publication.

(Organization, Procedures, Rules of Practice, and Statutes. July 1, 1967.)

ADVISORY OPINION DIGESTS

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Cross Index and Summary

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3.....	Toy catalog, independently published; ad- vertising in by manufacturer.	223:A-5	17340	6537061
4.....	Product standard as industry goal.....	223:A-7	17345	6537043
5.....	Fixed minimum resale prices.....	228:A-18	17374	6537054
6.....	Three-way promotional program, outdoor advertising.	228:A-15	17375	6537050
7.....	Drug catalog, independently published; ad- vertising in by manufacturer.	228:A-14	17376	653049
8.....	Foreign origin; disclosure of imported parts on label.	228:A-16	17377	6537052
9.....	Foreign origin; absent material deception disclosure not necessary. "Manufacturing" in trade name.	229:A-3	17378	6537055
10.....	Advertising allowance: alternatives for customers unable to use preferred media.	231:A-11	17380	6537053
11.....	Foreign origin; "Made in U.S.A." marked on imported steel, affirmative representa- tion of domestic origin.	232:A-3	17401	6637011
12.....	Advertising allowance granted to one cus- tomer only.	235:A-7	17411	6637020
13.....	Discount buying, membership organization..	239:A-9	17431	6637029
14.....	Produce certification mark, grant of use in exclusive territory.	243:A-5	17452	6637012
15.....	Association resolution, prices for used parts..	243:A-19	17456	6637036
16.....	Drug catalog, independently published; advertising in by manufacturer.	245:A-4	17464	6637007
17.....	Descriptions "velvet" and "suede" for flocked fabrics.	246:A-7	17468	6637040
18.....	Exclusive franchise arrangements.....	246:A-2	17471	6637004
19.....	Promotion addressed to new mothers; re- deemable coupons.	246:A-26	17474	6635032
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21.....	"Free" merchandise offer.....	246:A-23	17477	6637008

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23.....	Establishment of buying corp. by broker and plan to share brokerage.	247:A-12	17481	6637002
24.....	Three-way promotional program, check stands as basis for proportionality.	247:A-20	17482	6337018
25.....	Impropriety of using "14K" for item not entirely gold.	247:A-16	17483	6637003
26.....	Advertising allowance based on annual volume of purchases:	248:A-8	17490	6637046
27.....	Foreign origin; "Made in U.S.A.", affirmative misrepresentation of domestic origin.	248:A-8	17491	6637042
28.....	Selection of customers by single trader.....	248:A-9	17493	6637045
29.....	Foreign origin; disclosure on brush handle not necessary.	248:A-11	17494	6637006
30.....	Foreign origin; misleading domestic address.	248:A-11	17495	6637001
31.....	Rebate pricing, photoengraving through advertising agencies.	248:A-10	17496	6337006
32.....	Unilateral advertising by seller; distance between customers.	249:A-13	17499	6337008
33.....	Foreign origin: "Made in U.S.A." affirmative misrepresentation of domestic origin.	249:A-12	17500	6337014
34.....	Three-way promotional program, sales message announcing device.	250:A-12	17507	6337022
35.....	Three-way promotional program, recipes, selected areas.	250:A-22	17508	6337032
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37.....	Foreign origin; "Made in U.S.A." affirmative misrepresentation of domestic origin.	251:A-15	17517	6637047
38.....	Advertising allowance based on purchase volume.	251:A-26	17518	6337021
39.....	Advertising allowance proportionalized as between competing customers.	251:A-10	17522	6336020
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41.....	Mail order sales, additional discounts for....	252:A-7	17526	6337041
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44.....	Uniform store hours, agreement among retailers.	253:A-3	17529	6337037
45.....	Lottery merchandising, pull tab seals, trading stamp books.	254:A-6	17538	6637049
46.....	Common sales agency; objective market stabilization.	254:A-2	17539	6337050
47.....	Leather terms on non-leather product: Foreign origin disclosure required.	254:A-8	17540	6337058
48.....	License and sublicense selling to competing jobbers.	254:A-6	17541	6337059

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
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51.....	Three-way promotional program, discount stamp advertising plan.	265:A-2	17555	6437004
52.....	Three-way promotional program, manufacturer to retailer display kit.	256:A-3	17556	6337062
53.....	Three-way promotional program, self-locating shopping guide.	256:A-5	17557	6337064
54.....	Publisher promotional assistance for news-stands.	257:A-9	17567	6637020
55.....	Trade association circulation of uniform warranty plans.	257:A-9	17568	6337063
56.....	Three-way promotional program, news-stand display card drawing attention to advertising in magazines.	258:A-11	17570	6437005
57.....	Three-way promotional program—lottery merchandising; grocery bags bearing advertising and prize-winning number.	258:A-8	17571	6437006
58.....	Foreign origin, ballons, labeling on display card.	258:A-10	17572	6637051
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60.....	Diamonds as "clear, pure color".....	258:A-17	17576	6437020
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62.....	Three-way promotional program, suppliers and grocery-chain exhibition, in-store promotion.	259:A-5	17578	6437022
63.....	Guarantee advertising, disclosure of terms and conditions.	259:A-3	17579	6437028
64.....	Trade association, membership applicants, adherence to TPC rules required.	259:A-2	17580	6437030
65.....	Three-way promotional program, broad-cast of supplier commercials in retail stores.	259:A-8	17583	6437031
66.....	Publisher promotional assistance for news-stands.	259:A-10	17584	6437033
67.....	Functional discount to premium book jobbers.	260:A-2	17586	6437027
68.....	Pseudonym for real name on radio program.	260:A-4	17587	6437035
69.....	Foreign origin marking on plastic blade dispenser.	261:A-4	17595	6637052
70.....	Lottery merchandising, offer to "drawn" contestant buying sewing machine cabinet.	261:A-3	17596	6637050
71.....	Ground leather described as leather without qualification.	263:A-4	17610	6637057
72.....	Franchise with fair trade price schedule. (Revoked 8/2/67).	263:A-6	17611	6637053
73.....	"Golden" for non-gold thimble.....	263:A-6	17617	6537004

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
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76.....	Foreign origin labeling on package containing imported and domestic textiles.	264:A-7	17625	6537042
77.....	Three-way promotional supplier programs for competing marketing area retailers.	264:A-14	17631	6537046 6537059
78.....	Lottery merchandising, weekly drawing for portable radio-phonograph.	264:A-12	17632	6537045
79.....	Deceptive firm name for skip-tracing operation.	265:A-10	17636	6537039
80.....	Trade Association, By-laws prohibiting certain advertising claims by members.	265:A-9	17637	6537035
81.....	Guarantee advertising.....	266:A-18	17649	6537002
82.....	Foreign origin, marking "U.S.A. Made" on items with substantial imported components, affirmative representation of domestic origin.	266:A-17	17650	6537022
83.....	Foreign origin: "Made in U.S.A." label on imported machine with domestic made parts added, affirmative representation of domestic origin.	267:A-6	17661	6537019
84.....	Rebuilt fuses, correct labeling.....	267:A-5	17662	6537028
85.....	Trade association, reference service for members.	268:A-6	17670	6537030
86.....	Lottery merchandising, refund given if purchased item listed.	268:A-7	17671	6637059
87.....	Lottery merchandising, extra merchandise if sponsor's product purchased.	269:A-3	17678	6637063
88.....	Three-way promotional program by radio station financed by suppliers and retailers.	271:A-10	17686	6637022
89.....	Three-way recipe promotional program.....	271:A-6	17687	6737001
90.....	Publisher promotional assistance for "full-cover" display.	272:A-4	17696	6737003
91.....	Export trade association members owning both foreign and domestic plants.	272:A-8	17697	6637025
92.....	Three-way promotional program, supplier advertising where product available locally.	275:A-11	17716	6737009
93.....	Newspapers right to reject advertising.....	275:A-10	17717	6637062
94.....	Three-way promotional program, shopping cart advertising, proportionally equal treatment.	275:A-15	17720	6637037
95.....	Foreign origin; "Made in U.S.A." tag on computer with 23% foreign-made parts, affirmative representation of domestic origin.	275:A-17	17721	6737007
96.....	Trade association, product quality certification.	276:A-3	17723	6737006

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<i>Digest</i>	<i>Summary</i>	<i>ATTR¹</i>	<i>CCH²</i>	<i>File³</i>
97....	Trade association code for dealing with customers.	277:A-9	17727	6737016
98....	Removal of foreign origin disclosure: use of "Manufacturing" in trade name.	277:A-10	17739	6737010
99....	Retailer advertising of "reward" for referral business.	277:A-11	17740	6737022
100....	"Lifetime" guarantee advertising for aluminum siding.	279:A-3	17757	6737014
101....	Three-way brand name promotion through recipe cards.	279:A-6	17758	6737018
102....	Weight reducing claims for plastic slimming garment.	279:A-12	17759	6737024
103....	Three-way in-store promotional program....	280:A-13	17763	6737012
104....	Descriptive firm name used by exclusive seller to U.S. Government.	282:A-11	17767	6737032
105....	Foreign origin labeling of chemicals with 45% foreign-made components.	287:A-17	17801	6737035
106....	Three-way promotional payments granted on basis of floor space: Lottery merchandising, "lucky" number flashed on screen.	287:A-20	17802	6737036
107....	Labeling of leather fibre and vinyl items as leather.	288:A-8	17810	6737033
108....	Holding company ownership of both auto parts distributor and jobber.	288:A-7	17811	6737042
109....	Use of manufacturer's price list to denote value in advertising.	289:A-11	17824	6737044
110....	Retailers agreement as to uniform store hours.	289:A-14	17825	6737034
111....	Functional discounts offered purchasing manufacturers.	291:A-7	17833	6737045
112....	Foreign origin labeling, origin visible on contents of package.	291:A-3	17834	6737048
113....	Pre-merger clearance, acquisition of money-losing competitor.	292:A-19	17850	6737057
114....	Retail discount selling organization.....	295:A-5	17863	6737031
115....	Code of Ethics; trade association, governing pricing and selling practices.	296:A-4	17878	6737053
116....	Advertising claim: "America's most warranted" building.	296:A-6	17879	6737058
117....	Misrepresentation: Hand cream described as "Medically Prescribed".	297:A-14	17888	6737067
118....	Reduced advertising rates to buyers of media combination.	298:A-13	17900	6737071
119....	Trade association code of ethics for members.	300:A-3	17907	6737029
120....	"New", general rule on use of term.....	301:A-19	17914	6737068
121....	Consignment sales agreement setting minimum price.	320:A-20	17924	6737074
122....	Propriety of publishing list prices for different marketing areas.	302:A-22	17925	6737081
123....	Lottery merchandising; sales promotion disguised as.	304:A-9	17926	6737085

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<i>Digest</i>	<i>Summary</i>	<i>ATTR¹</i>	<i>CCH²</i>	<i>File³</i>
124....	Agricultural cooperatives' use of common sales agent.	304:A-8	17937	6737082
125....	Retailers agreement as to uniform store hours.	305:A-15	17946	6737066
126....	Advertising claims for portable oxygen administration device.	307:A-11	17951	6737088
127....	Misrepresentation: raised printing described as embossing.	307:A-4	17954	6737040
128....	Trade association code of ethics for door-to-door salesmen.	307:A-1	17950	6737038
129....	"Solid" used with karat indication of gold...	309:A-17	17972	6737084
130....	"National" in organization name.....	309:A-19	17973	6737089
131....	Acceptance of free merchandise by grocery retailer.	311:A-20	17980	6737099
132....	Giving free merchandise to obtain new customers.	311:A-15	17981	6737100
133....	Agreement among members of trade association to comply with government ruling.	314:A-3	18022	6737104
134....	Proposed lease of patented industrial machine.	314:A-6	18023	6737108
135....	Three-way brand name promotion through contest books.	315:A-5	18024	6737096
136....	Selective leasing of shopping center space...	315:A-7	18025	6737105
137....	Trade association seeking firm price guarantees from suppliers.	320:A-4	18041	6837022
138....	Use of names and symbols having fur-bearing animal connotations in labeling textile fiber products.	320:A-3	18042	6837007
139....	Safety and effective claims for deodorant spray.	321:A-3	18048	6837004
140....	Advertising allowances by book publisher...	321:A-2	18049	6737107
141....	Proposed advertising for mink oil skin lotion.	322:A-2	18056	6837014
142....	Information required on label affixed to textile fiber products.	322:A-2	18057	6837008
143....	Promotional allowances by fabric supplier...	322:A-6	18060	6737103
144....	Proposed license agreement for process patent.	325:A-3	18069	6837016
145....	Aggregating purchases of multi-unit organizations for discount purposes.	327:A-10	18083	6837023
146....	Use of term "New"; Request for revision of AO #120 pertaining to.	328:A-23	18088	6837017
147....	"Back-haul" allowance to customers picking up their own orders.	328:A-22	18089	6837026
148....	Wood fiber corsages as wearing apparel under Flammable Fabrics Act.	330:A-10	18096	D-8217
149....	Payments for recruiting new students.....	332:A-12	18104	6837036
150....	Trade association publication for use by members featuring range of prices to be charged consumers.	332:A-12	18105	6837028

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
151....	Additional discounts on purchases above specified annual volume.	335:A-24	18121	6837054
152....	Trade association program to charge non-members high fee for use of product certification mark.	336:A-7	18125	6837042
153....	Discount based on percentage of increase in annual purchase volume.	336:A-9	18130	6837037
154....	Compliance with state milk marketing order fixing minimum resale prices.	337:A-3	18138	6837044
155....	Distributor recruitment through grant of override bonus.	338:A-7	18140	6837043
156....	"Blended with French oils in U.S.A." qualification for brand name indicating French origin.	338:A-7	18141	6837061
157....	Advertising allowances for customers in selected trading areas.	339:A-4	18147	6837035
158....	Trade association publication of service price and standard rate manual for use by members.	339:A-4	18148	6837045
159....	Method of treating athlete's foot represented as a cure in advertising.	340:A-8	18156	6837047
160....	Advertising promoting sale of information and a product for treating stomach ailment.	340:A-5	18157	6637009
161....	Advertising promoting sale of information and a product represented as a cure for athlete's foot.	341:A-7	18161	6737028
162....	Exchange of labor contracts among members of trade association.	342:A-29	18168	6837051
163....	Dealer policy of not selling to retailers who advertise "sale", "close out", "bargain" or "clearance" prices.	343:A-10	18174	6837063
164....	Pre-merger clearance granted—No anti-competitive effects foreseeable.	344:A-13	18186	6437025
165....	Pre-merger clearance granted—Deteriorating financial condition.	344:A-14	18187	6537003
166....	Pre-merger clearance granted—Declining industry.	344:A-14	18188	6437036
167....	Pre-merger clearance granted—Deteriorating Industry.	344:A-14	18189	6537005
168....	Pre-merger clearance granted—Imminent insolvency.	344:A-14	18190	6537025
169....	Pre-merger clearance granted—Financial distress.	344:A-14	18191	6537058
170....	Pre-merger clearance granted—de minimus competitive effects.	344:A-14	18192	6537060
171....	Pre-merger clearance denied—Probable adverse competitive effects.	344:A-14	18193	6537051
172....	Pre-merger clearance request given limited approval—Indiscernible competitive effects.	344:A-14	18194	6537057

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i>
173. . . .	Pre-merger clearance denied—Lack of competitive information.	344:A-15	18195	6637014
174. . . .	Pre-merger clearance denied—Vertical merger would raise economic questions.	344:A-15	18196	6737004
175. . . .	Pre-merger clearance granted—Declining industry.	344:A-15	18197	D-6124
176. . . .	Pre-merger clearance granted—de minimus competitive effects.	344:A-15	18198	6710615
177. . . .	Compliance interpretation of request for pre-merger clearance—granted—Imminent insolvency.	344:A-15	18199	D-6651
178. . . .	Compliance interpretation of request for pre-merger clearance—denied—other purchasers available.	344:A-15	18200	D-6495
179. . . .	Compliance interpretation of request for pre-merger clearance—granted—Imminent bankruptcy.	344:A-15	18201	D-6652
180. . . .	Compliance interpretation of request for pre-merger clearance—granted—Imminent insolvency.	344:A-15	18202	D-6651
181. . . .	Compliance interpretation of several requests for pre-merger clearances—Two granted—de minimus competitive effects.	344:A-15	18203	C-809
182. . . .	Compliance interpretation of request for pre-merger clearance—Granted—Liquidation probable.	344:A-16	18204	D-7880
183. . . .	Compliance interpretation of request for pre-merger clearance—Denied—Competitive considerations.	344:A-16	18205	D-6608
184. . . .	Compliance interpretation of request for pre-merger clearance—granted—Bankruptcy imminent.	344:A-16	18206	D-6651
185. . . .	Compliance interpretation of request for pre-merger clearance—granted—de minimus competitive effects.	344:A-16	18207	D-6651 D-6652
186. . . .	Compliance interpretation of request for pre-merger clearance—granted—de minimus competitive effects:	344:A-16	18208	D-6651
187. . . .	Compliance interpretation of request for pre-merger clearance—granted—Imminent insolvency.	344:A-16	18209	C-751
188. . . .	Pre-merger clearance denied—Merger of firms in same industry would raise anti-competitive questions.	344:A-16	18210	6337015
189. . . .	Pre-merger clearance granted—Precarious financial condition.	344:A-16	18211	6337040
190. . . .	Random distribution of bonus certificates to induce food purchases.	345:A-10	18212	6837065

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
191 . . .	Newspaper and magazine news-article format used for advertising purposes:	345:A-8	18213	6837080
192 . . .	Pre-merger clearance denied—Merger would increase market concentration.	345:A-13	18216	6837078
193 . . .	Substitution of merchandise similar to that ordered without prior notification.	345:A-18	18217	6837081
194 . . .	Uniform delivered price obtained by deducting freight allowance from fob price.	346:A-8	18224	6837077
195 . . .	Notification of display allowance program by advertisement in trade publication of general circulation.	346:A-9	18225	6837082
196 . . .	Advertising claim "it works . . . or we'll fix it free".	346:A-11	18226	6837089
197 . . .	"Hand Made" label to describe sealed sole footwear.	346:A-12	18227	6837087
198 . . .	Truckload discount for quantity purchases.	348:A-22	18237	D-7851
199 . . .	Agreements by milk processors to sell at prices higher than minimum set by state regulation.	348:A-19	18238	6837085
200 . . .	Promotion and sponsorship of price catalog by trade association under c & d order.	348:A-22	18244	D-5979
201 . . .	Publication of rate manual by automotive repair association for members use to determine labor charges.	348:A-23	18245	6837090
202 . . .	Actualities of resale competition as determinative of distribution levels.	349:A-9	18248	6837092
203 . . .	Establishment of common organization by public warehousemen to sell storage space.	349:A-12	18249	6837088
204 . . .	Guarantee with conditions other than time limitation cannot be represented as "unconditional".	352:A-6	18269	6837058
205 . . .	Computerized collection and dissemination of marketing information.	352:A-7	18270	6837103
206 . . .	Foreign origin—Marking requirements for wearing apparel assembled abroad from U.S. made components.	352:A-2	18273	6737095
207 . . .	Foreign origin—"Made in U.S.A." label on machine containing 30% foreign-made parts.	352:A-2	18274	6837093
208 . . .	Foreign origin—Disclosure of imported (8%-37%) components for golf clubs assembled in U.S.	352:A-2	18275	6737109
209 . . .	Foreign origin—Disclosure of imported component (under 50%) used in drawer slide assembly made in U.S.	352:A-3	18276	6837095
210 . . .	Foreign origin—Disclosure of imported mechanical pencil actions.	352:A-3	18277	6737002
211 . . .	Foreign origin—Disclosure of imported FM tuner rebuilt in U.S.	352:A-3	18278	6837010

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
212....	Foreign origin—Disclosure of imported components (40%) for shower heads assembled in U.S. as imposed by Bureau of Customs only.	352:A-3	18279	6637015
213....	Foreign origin—Disclosure of imported (35%) parts of bicycles assembled in the Virgin Islands.	352:A-3	18280	6737056
214....	Foreign origin—"Made in U.S.A." label on lamps containing 20% foreign-made parts.	352:A-3	18281	6737077
215....	Foreign origin—Percentage of <i>domestic</i> components required in order to properly describe item as "Made in U.S.A."	352:A-3	18282	6837091
216....	Foreign origin—Percentage of <i>imported</i> components allowable to permit item labeling and description as "Made in U.S.A."	352:A-3	18283	6837084
217....	Foreign origin—"Made in U.S.A." marking on imported component of cutlery finished and assembled in U.S.	352:A-3	18284	6837038
218....	Foreign origin—Disclosure of imported individual components in machinery assembled in U.S.	352:A-3	18285	6837009
219....	Foreign origin—Disclosure of imported contents on package bearing name suggesting domestic origin.	352:A-4	18286	6723717
220....	Foreign origin—Disclosure on imported hand tools at point of sale and in advertising.	352:A-4	18287	6637034
221....	Foreign origin—Disclosure on containers of repackaged spring clamps imported in bulk.	352:A-4	18288	6737026
222....	Foreign origin—Disclosure of imported component of ice cream spade bearing name suggesting domestic origin.	352:A-4	18289	6737070
223....	Foreign origin—Disclosure on containers of imported gloves repackaged in U.S.	352:A-4	18290	6837072
224....	Foreign origin—"Made in U.S.A." label on product, a significant component of which is foreign made.	352:A-4	18291	6837013
225....	Foreign origin—Labeling of material composed wholly of imported leather fibers.	352:A-4	18292	6837055
226....	Foreign origin—Necessary to disclose origin of imported honing stone where domestic firm's name appears on handle.	352:A-4	18293	6737046
227....	Foreign origin—Disclosure on containers of repackaged nails imported in bulk.	352:A-4	18294	6737017
228....	Foreign origin—Disclosure on display card <i>front</i> of repackaged, bubble-sealed, imported switchplates.	352:A-4	18295	6737090
229....	Foreign origin—Disclosure of imported braids used in domestic production of braided rugs.	352:A-4	18296	6737093

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
230....	Foreign origin—Disclosure on mounting card <i>back</i> of domestically packaged, imported false eyelashes.	352:A-4	18297	6737075
231....	Foreign origin—Disclosure on containers of repackaged chemicals imported in bulk.	352:A-5	18298	6837069
232....	Foreign origin—Disclosure of imported blades on knife assembled in U.S.	352:A-5	18299	6737059
233....	Foreign origin—Disclosure of imported radio at point of sale.	352:A-5	18300	6837046
234....	Foreign origin—Labeling partially imported (38%) textile product as "Made in U.S.A."	352:A-5	18301	6837071
235....	Foreign origin—"Made in U.S.A." label on garment manufactured domestically from imported cloth.	352:A-5	18302	6737102
236....	Foreign origin—Disclosure on imported picture components beyond that required by Bureau of Customs not necessary.	352:A-5	18303	6637061
237....	Foreign origin—Generalized disclosure on kits containing toys from various countries.	355:A-13	18325	6637038
238....	Pre-merger clearance of manufacturer and distributor of same product would eliminate potential competition.	355:A-20	18326	6837107
239....	Labeling on packages of mesquite chips....	355:A-15	18327	6837111
240....	Use of fur-bearing animal name and symbol in labeling textile product simulating a fur product.	355:A-12	18328	6837100
241....	Chain-letter type promotional program based on pyramiding sales.	356:A-9	18332	6837116
242....	Foreign origin—Disclosure on boxes and bottles of ink imported in bulk.	356:A-9	18333	6837114
243....	Discount in lieu of brokerage by wholesale food distributor.	356:A-9	18334	C-1201
244....	Foreign origin—Disclosure on imported medical device.		18341	6837104
245....	Joint venture corporation—Five competing manufacturers to bid on prime contract to furnish products of uniform specifications.	357:A-9	18342	6837118
246....	Trade association publication recommending procedures for freight prepayment by manufacturer-suppliers.	358:A-10	18343	6837106
247....	Foreign origin—Disclosure on imported covers of crib mattresses.	358:A-9	18344	6837105
248....	Validation of guarantee—Time requirement "Return at once".	358:A-8	18345	6837101
249....	Trade association code of ethics—Members not to advertise sales below cost.	359:A-2	18350	6837097
250....	Formation of local trade associations or groups by state-wide association.	359:A-5	18351	6837099

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
251....	Foreign origin—Disclosure on cartons of repackaged metal fasteners imported in bulk.	359:A-5	18352	6837120
252....	Foreign origin—Location of disclosure on cartons of imported fishing reels packaged domestically.	359:A-5	18353	6837121
253....	Extended credit terms for newly established retail stores in impoverished urban areas.	359:A-7	18358	6837115
254....	Exclusive operation of checking-cashing concession in retail stores.	360:A-14	18369	6837125
255....	Foreign origin—Disclosure on domestically gold plated imported flatware: Use of trade name suggesting domestic origin.	360:A-7	18370	6837109
256....	Use of unqualified term "Diamond" to describe abrasive disc containing other materials.	361:A-11	18392	6837122
257....	Trade association suggesting rental rates for cylinders containing commercial compressed gases.	361:A-11	18393	6837130
258....	Promotional assistance program limited in area and in value.	361:A-12	18394	6837117
259....	Pre-merger clearance for two non-competing quarry and building materials companies.	363:A-6	18410	6837126
260....	Use of term "X Grown Emerald" as descriptive of synthetic stones.	363:A-5	18411	6837128
261....	Availability of advertising allowance to all customers.	364:A-13	18416	C-1178
262....	Use of suggested list price accompanied by disclaimer.	364:A-5	18417	6837136
263....	Price differences between competing "stocking" and "non-stocking" dealers.	365:A-13	18425	6837086
264....	Proposal to grant special discounts for stocking, quantity orders and cumulative purchases.	365:A-14	18426	6837119
265....	Deodorant spray represented as a drug.....	365:A-9.	18427	6837004
266....	Magazine sponsored contest open to readers.	367:A-8	18433	6837094
267....	Tourmaline described as "Emerald Green" or "Precious".	367:A-7	18434	6837124
268....	Trade association code designed to discourage or prohibit price advertising.	367:A-5	18435	6837138
269....	Pooling of promotional allowances by retailers.	367:A-7	18436	6837147
270....	Origin disclosure on skies imported in raw and finished in U.S.	367:A-10	18444	6837135
271....	Plan to penalize competitors who do not offer free design services to customers.	371:A-3	18470	6837137
272....	Sales promotion plan approved so long as offered savings are real.	371:-13	18471	6837134
273....	Repair shop trade association publication of material resale price schedule.	371:A-2	18472	6837148

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<i>Digest</i>	<i>Summary</i>	<i>ATTR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
274....	Merchandising plan to offer smaller volume customers smaller discounts.	371:A-5	18473	6837146
275....	Origin disclosure of imported watch band parts assembled in the Virgin Islands.	371:A-9	18474	6837113
276....	Disclosure of foreign assembly of product made of domestic components (90%) unnecessary.	372:A-3	18478	6837140
277....	Consumer saving plan organized by local merchants.	372:A-6	18479	6837143
278....	Franchise agreement for chain of carry-out pizza shops.	372:A-9	18480	6837150
279....	Acquisition of financially troubled grain elevators by agricultural cooperative.	372:A-12	18481	6837154
280....	Acquisition of direct competitor in dried food industry.	372:A-14	18482	6837151
281....	Trade association plan to secure uniform discounts from suppliers and establish uniform clearance sales and alteration costs for retailers.	372:A-13	18483	6837141
282....	Origin disclosure of imported cloth (51%) for shirts domestically assembled and sewn.	372:A-11	18484	6837158
283....	Origin disclosure on sewing kit with contents of multiple foreign origin.	373:A-3	18491	6837156
284....	Origin disclosure of stainless cutlery on outside of package.	373:A-6	18492	6837155
285....	Formation of marketing agent by three agricultural cooperatives.	373:A-4	18493	6837129
286....	Origin disclosure of imported uppers on otherwise domestically-made (70%) tennis shoes.	373:A-5	18494	6837139
287....	Trade association voluntary advertising standards.	374:A-10	18499	6837159
288....	Receipt of promotional allowance without concurrent availability to competitors.	374:A-7	18500	C-1053
289....	Decomposed city garbage may not be described as "compost peat".	374:A-3	18501	6937010
290....	Membership in distributor association by Brewer under order for price fixing.	372:A-9	18502	D-8618
291....	No blanket approval for acquisition of small baker by anyone.	377:A-5	18528	6937003
292....	Paua shell described as "Marine Opal".....	377:A-12	18529	6937015
293....	Night soil material may not be described as "Humus".	377:A-12	18530	6937004
294....	Advertising on food product wrapper.....	378:A-5	18534	6937011
295....	"Made in U.S.A." label on bearing imported in part.	378:A-7	18535	6937001
296....	"Failing company" theory applied in sale of assets to competitor.	378:A-3	18536	6937023

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<i>Digest</i>	<i>Summary</i>	<i>ATRR</i> ¹	<i>CCH</i> ²	<i>File</i> ³
297. . . .	"Failing company" theory applied in improving sale of some fixed assets to keep firm solvent.	378:A-3	18537	6937030
298. . . .	"Made in U.S.A." description for imported lenses processed in U.S.	378:A-9	18438	6937026
299. . . .	Origin disclosure on repackaged merchandise imported in bulk.	379:A-2	18547	6937009
300. . . .	Promotional advertising with contest.	379:A-3	18548	6937031
301. . . .	Use of term "Danish" in advertising to describe furniture.	380:A-14	18555	6937034
302. . . .	Promotional program involving "cents off" coupons and demonstrators.	380:A-15	18556	6937018
303. . . .	Data processing for collection and dissemination of sales and production information.	380:A-11	18557	6937042
304. . . .	Three-party promotional program under investigation.	380:A-12	18558	D-8175
305. . . .	Below-cost sales provision in trade association advertising guide (see Advisory Opinion digest #249).	384:A-22	18578	6837097
306. . . .	Computerized sales data and product requirements projection must be made accessible to nonparticipants.	385:A-15	18584	6937025
307. . . .	Coined trade name and trademark connoting European origin deceptive even with disclosure.	385:A-15	18585	6937021
308. . . .	Dairy merger by agricultural cooperative. . . .	385:A-8	18586	6937046
309. . . .	Below-cost price limiting provision in cooperative advertising programs.	386:A-8	18594	6937045
310. . . .	Origin disclosure on imported watchbands and cases.	386:A-7	18595	6937022
311. . . .	Origin disclosure of imported upper material used in shoes. Use of renown firm name implies made domestically.	386:A-7	18596	6937033
312. . . .	Three-party promotional program, sale of TV advertising time to suppliers of products sold through grocery stores.	389:A-5	18613	6937029
313. . . .	Marking of white gold ring with platinum prongs as 18 K-Plat.	389:A-6	18614	6937041

¹ Antitrust and Trade Regulation Reporter.

² Commerce Clearing House.

³ Federal Trade Commission Files (Restricted for staff use only).

Advisory Opinion Digest No. 1

Statute Involved: Section 5, Federal Trade Commission Act.

Released: August 7, 1964.

Use of terms "chamois like" or "chamois type" to describe an oil-tanned, unsplit sheepskin product.

The Commission was requested to express an opinion concerning the legality of describing unsplit sheepskin as "Chamois-like Sheepskin" or "Chamois-type Sheepskin" on the basis, it is claimed, that the product looks and feels like chamois leather, and possesses the same qualities as the genuine product.

This problem has been before the Commission in different forms on several occasions. In each instance the Commission has taken the position that it will prohibit the branding or labeling of leather products as "Chamois," "Chamois Type" or "Chamois Like" unless such products are made (a) from the skin of the Alpine antelope, commonly known and referred to as Chamois, or (b) from sheepskin fleshers which have been oil-tanned after removal of the grain layer.

The word "chamois" has its origin in the common name of a small goat-like Alpine antelope whose skin was made into a soft, pliable leather used in the manufacture of gloves, and for polishing such articles as glass, jewelry, fine metals and wood. It possessed the additional feature of absorbing water readily and returning, when dry, to its original state of softness and pliability. The animal became virtually extinct for commercial purposes about 1890 and since that time the word acquired a secondary meaning after being widely used commercially to designate certain leathers produced from split sheepskin fleshers.

The necessity for splitting sheepskin is to remove the impervious grain layer so as to make the underside more receptive to tanning. Since the two layers do not react at the same rate, should an amount of the grain layer remain the skin will not stretch uniformly and will eventually rip and crumble. In any event, irrespective of the relative merits of the many processes which may be employed to produce the leather, the fact remains that the grain layer must be separated from the sheepskin flesher in order that an acceptable chamois will result. This requirement the requesting party's product does not fulfill.

The claim that the subject product is equal in all respects to genuine chamois is not true, since the grain layer has not been removed. The genuine

product has become firmly established in industry and elsewhere as herein defined, and such product is what the public is entitled to get when it purchases chamois even though the choice may be dictated by caprice or fashion, or perhaps by ignorance. The fact that the product is equal or will serve substantially the same purpose is wholly immaterial. *F.T.C. vs. Algoma Lumber Co.*, 291 U.S. 67, 78. To the same effect see *Benton Announcements, Inc. vs. F.T.C.*, 130 F. 2d 254.

The question posed herein is whether the word chamois might be a permissible designation for the subject product if qualifying terms as "like" or "type" were added. Use of the word in any manner is a representation that the product is that which has traditionally been sold as chamois and so accepted by the public after years of buying experience. Although the ordinary purchaser may not know how chamois is made, he is entitled to believe that the particular product sold under that name is in fact a chamois as it is understood in the industry, and such implication cannot be offset by qualifying words. After reading both, an ordinary consumer would still not know the truth about the product without resort to specialized information. In other words, the capacity and tendency to deceive through any other application of the word chamois would continue to exist.

The requesting party was advised that the definition of chamois has become firmly established in law, in industry, and in the public's mind to mean nothing less than those leather products made from the skin of the Alpine antelope or from the fleshers of sheepskin which have been oil-tanned after removal of the grain layer and that any other use of the word, whether or not modified by qualifying language, to describe leather made by other or incomplete processes would serve only to dilute its accepted meaning and would not be in the general public interest. Consequently, to label the subject product in the manner contemplated would be a deceptive practice and subject the requesting party to a charge of violation of Section 5, Federal Trade Commission Act.

Advisory Opinion Digest No. 2

Statute Involved: Section 2(d)	Toy catalog, independently published; advertising in by toy manufacturer.
amended Clayton Act.	
Released: October 30, 1964.	

The Commission was asked to express an opinion with respect to the equality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy manufacturer or toy jobber, and (2) affirmatively offered the catalogs for sale to all jobbers.

Previous Commission actions in this area have been concerned with catalogs which were at least in part owned by jobbers engaged in the sale of

the toys advertised in the catalogs. With respect to the instant request, the Commission advised as follows:

"Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes that the catalogs projected . . . are available at low cost to all toy jobbers and are apparently not designed to be usable only by particular jobbers, or classes or groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs are available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs."

Advisory Opinion Digest No. 3

Statute Involved: Section 2(d),	Toy catalog, independently pub-
amended Clayton Act.	lished; advertising in by toy
Released: October 12, 1965.	manufacturer.

The Commission was again requested to express an opinion with respect to the legality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy jobber or manufacturer, and (2) affirmatively offered the catalogs for sale to all jobbers.

With respect to this request, the Commission repeated its previous opinion which was published October 30, 1964, as follows:

Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes your statement that your catalogs are available at low cost to all toy jobbers and are not designed to be usable only by particular jobbers, or classes or groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs, however titled, are

available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs.

To obviate any possible misunderstanding, the Commission corrected an erroneous statement in the requesting party's communication to the effect that the Commission's previous opinion had ruled that since the catalogs were available in a practical business sense to all jobber customers of the manufacturers the payments would not be objectionable. The Commission advised the requesting party that the opinion set forth above and all previous Commission opinions ruling on this precise question have clearly stated that the payments would not be objectionable if the catalogs were available in a practical business sense to all jobbers. The Commission made no finding in its previous opinions that the catalogs were in fact available to all jobbers since such information was not available to it. Instead, the previous opinions simply took the position that the payments would not be illegal if the catalogs were actually so available.

Advisory Opinion Digest No. 4

Statute Involved: Section 5, Federal Trade Commission Act.
Released: October 14, 1965.

Publication of product standards by trade association as an industry goal.

The Federal Trade Commission announced today that it had recently rendered an advisory opinion informing a trade association that no objection will be raised to its distribution of product standards as an industry goal.

The Association had requested advice on whether it may legally distribute a booklet giving standards which represent the ideal of a top quality industry product. The booklet was prepared about two years ago but it was subsequently determined that the standards were so high as to make them impracticable as commodity standards for the whole industry.

The Association is now interested in distributing the booklet merely as an ideal and as a goal for which the industry should be striving, and questioned whether or not this might be considered as acting in restraint of trade.

The Commission's advice was that there could be no objection to the distribution of this booklet under the circumstances and for the purpose stated in the letter from the Association, provided it removes any procedure, practice or requirement that seals of approval be given to industry members who meet the standards.

Advisory Opinion Digest No. 5

Statute Involved: Section 5, Federal Trade Commission Act.
Released: November 23, 1965.

Manufacturer's setting of minimum resale price for dealers.

An advisory opinion made public today by the Federal Trade Commission notified a manufacturer that, in the circumstances presented, its establishment of a minimum resale price for its dealers would constitute unlawful price-fixing.

The facts related to the Commission by the manufacturer are these. It has three dealers in one city who submit bids for the business of one large consumer. Initially there was enough margin between the manufacturer's list price and the net price to the dealer to allow them to submit competitive bids. However, as competition between the dealers increased, the bid price became lower and lower until now the situation is that none of the three dealers can realize a profit on this business.

They have asked the manufacturer if it can do anything about the situation. One dealer suggested that the manufacturer should go on record as establishing a minimum price below which no dealer can quote. This limit would be in the form of a percentage below list or an actual dollar figure below list. The manufacturer stated to the Commission that this limit will assure the dealer receiving the order of a fair profit for his effort and would not destroy competition between the dealers, who would apparently be left free to compete above the minimum. The manufacturer asked if this can be done legally and if it would have the right to compel dealers to comply with this established limit.

Advisory Opinion Digest No. 6

Statute Involved: Section 2(d) amended Clayton Act.
Released: November 23, 1965.

Three-way promotional program set up by outdoor advertiser and financed by participating grocery chains and their suppliers.

The Federal Trade Commission announced today that it had recently rendered an advisory opinion dealing with the legality of a proposal by an outdoor advertiser to set up advertising displays featuring food products which will be financed by payments from food suppliers and chain grocery and drug stores.

The Commission said it has accumulated considerable experience with similar tripartite promotional programs in which the promoter of the plan places himself between the supplier and the retailer who indirectly receives the benefits of the payments made by the supplier to the promoter.

The fact that the promoter acts as middleman in the operation of the plan has been held to be of no legal significance, the Commission said. Instead, it views such plans as an integrated whole and treats them, under proper circumstances, as though the contracts or arrangements were made directly between the suppliers and the participating retailers.

Viewed in this light, the Commission advised, it would appear that the proposed program is expressly tailored to fit the needs of the participating suppliers' larger customers and therefore completely lacks the element of proportionally equal treatment of all those suppliers' competing customers which is required by Section 2(d) of the Robinson-Patman amendment to the Clayton Act.

The Commission said that it is "safe to assume that each of the suppliers who will be asked to participate in this proposal have customers in the area other than grocery and drug chains. Such suppliers would risk liability under Sections 2(d) and 2(e) of the Clayton Act by participating in any joint promotional venture which is not even offered to such customer or which, if offered, would be at a prohibitive cost to small retailers or which would be impractical for those retailers who may only handle a few of the products of the suppliers participating in the plan. The law requires that all of these customers must receive proportionally equal treatment."

"Thus, the suppliers who participate in . . . [this] plan must make certain that the smaller retailers are offered a chance to participate and must offer a suitable alternative to those retailers for whom the plan is functionally unavailable."

Advisory Opinion Digest No. 7

<p>Statute Involved: Section 2(d) amended Clayton Act. Released: November 23, 1965.</p>	<p>Resumption of advertising by a manufacturer in a trade buying guide formerly but no longer owned by a wholesaler customer.</p>
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The Federal Trade Commission has rendered an advisory opinion regarding the proposed resumption of advertising by a manufacturer of drugs and cosmetics in a drug trade buying guide which was previously published by a wholesaler customer but whose present owner-publisher is not connected in any way with any customer of the manufacturer.

The Commission's advice was that no objection could be raised to payments by a manufacturer for advertising in buying guides if the guides are available, in a practical business sense, to all of his wholesaler customers.

The advisory opinion noted: "Payments for advertising in a buying guide published by a firm which is not owned or controlled by, or in any way

directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission has been informed that the present owner-publisher . . . has no connection whatsoever with . . . any . . . drug or cosmetic company or group thereof; that the buying guide is available at low cost to all drug wholesalers and is apparently not designed to be usable only by particular wholesalers, or classes or groups of wholesalers; that every effort is made to distribute the buying guide as broadly as possible among drug wholesalers; and that distribution is not limited to any particular wholesalers or group or class of wholesalers."

Advisory Opinion Digest No. 8

Statute Involved: Section 5, Federal Trade Commission Act.

Foreign origin; disclosure of imported parts on label.

Released: November 25, 1965.

An American manufacturer has been advised that the Federal Trade Commission would have no objection to its proposed manner of disclosing the origin of an office machinery unit containing a foreign-made part.

The label considered by the Commission identifies the foreign part and the country in which it was made and states that the manufacturer in question has manufactured the remainder of the unit and assembled it in this country.

Advisory Opinion Digest No. 9

Statute Involved: Section 5, Federal Trade Commission Act. Released: November 25, 1965.

Foreign origin; absent material deception disclosure not necessary; use of "manufacturer" in trade name.

The Federal Trade Commission has rendered an advisory opinion regarding the labeling of containers for knives which are imported from Japan and to be stamped "Made in Japan" by an importer using the word "manufacturing" in his trade name.

The Commission's advice was that in the absence of any showing of material deception, a proceeding by it to require disclosure of Japanese origin of the knives on the containers would not appear to be warranted.

The Commission said the same advice would apply if the name of the importer is printed on the container provided the "Made in Japan" legend

on the knives is readily visible upon casual inspection by prospective purchasers prior to purchase. However, if the disclosure does not meet this condition, it will be necessary to make a clear and conspicuous disclosure of Japanese origin on the box in close proximity to the name and address of the importer.

The Commission made the following comments with respect to use of the word "manufacturing" by an importer in his trade name, but without in any way passing upon its propriety: The general rule is that a company may not use this word in its trade name unless it in fact owns, operates or controls a factory where the merchandise is manufactured. The reason is that there is a preference for dealing directly with the manufacturer, such preference being due in part to a belief that lower prices and other advantages may be obtained.

Advisory Opinion Digest No. 10

Statute Involved: Section 2(d), amended Clayton Act.	Cooperative advertising allowance; alternatives for customers unable to use preferred media.
Released: December 9, 1965.	

A recent Federal Trade Commission advisory opinion informed a manufacturer that the requirements of Section 2(d) of the amended Clayton Act will be satisfied where the proposed advertising allowance program reflects that alternative methods of promotion are available to customers unable to use the preferred method of advertising in the regular course of their business.

As explained by the manufacturer, all of its customers will be offered advertising allowances equal to 1% of net purchases to defray up to a maximum of 50% of the actual cost of advertising its branded, first-quality products in any ACB (Advertising Checking Bureau, Inc.) daily and Sunday newspaper. Where a retailer is unable in a practical business sense to advertise in such newspaper the program will provide him with adequate alternative methods of sales promotion such as, but not limited to, other newspapers, letter stuffers or handbills as will enable him to earn the allowances specified. A retailer may use up to 30% of his allowance in Christmas Catalog advertising where the brand name or label is prominently mentioned, payment for which is based on catalog circulation. New accounts and those with which the manufacturer has had less than one year's experience will be offered the same allowance, payment for which will be computed on the basis of purchases for the first full quarter year. All accounts will be notified of the program by first-class mail, by the manufacturer's sales representatives and by notices accompanying invoices.

Advisory Opinion Digest No. 11

Statute Involved: Section 5, Federal Trade Commission Act.
Released: December 17, 1965.

Foreign origin; "Made in U.S.A." marking on truss plate produced domestically from imported steel coils.

The Commission was requested to advise whether or not it would be permissible to label finished truss plates made from imported galvanized steel coils as a domestic product manufactured in the U.S.A. without any reference to the origin of the steel. The plates are cut and stamped to size in this country and further stamped to form tooth-like fastening devices as part of the finished plate.

The Commission advised that it would not be proper to label these plates as made in the U.S.A. since that would constitute an affirmative representation that they were entirely made in this country, which is not the fact unless, of course, the label also discloses in a clear and conspicuous manner the fact that the steel in said plates is imported.

Advisory Opinion Digest No. 12

Statute Involved: Section 2(d), amended Clayton Act.
Released: January 5, 1966.

Promotional assistance—Publisher payments to a single reseller of the publisher's periodical.

The Federal Trade Commission announced today that it had recently advised a publisher of a periodical that the proposed promotional assistance Plan described below would be violative of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his customer in reselling the supplier's product unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

Essentially, the proposed Plan provided for a payment of \$75.00 weekly to the operator of a chain of newsstands. In return, the operator would (1) place the publication on sale on the newsstands, (2) submit daily sales reports to the publisher for each newsstand, (3) favorably display the publication on the stands and (4) provide stock control to avoid sell outs.

The Plan was deemed violative of Section 2(d) because it was to be offered only to the one operator of newsstands. Under the Plan, his competitors in selling the publication were not to be offered promotional assistance—proportional or otherwise.

The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance Plans in considerable detail and will

be of assistance to persons contemplating their use. Copies of the Guides are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580.

Advisory Opinion Digest No. 13

Statute Involved: Section 5, Federal Trade Commission Act. Discount buying membership organization.
Released: February 1, 1966.

A recent Federal Trade Commission advisory opinion informed a promoter that there were no actionable trade restraints inherent in his proposed plan.

As explained by the promoter, the plan involved the formation of a membership organization. Membership, available at an annual fee to the general public without restriction, confers the right to purchase at a stated discount from the prevailing prices of retail merchants. Local retailers can participate in the plan without restriction.

The Commission pointed out that its approval was limited to the proposed plan itself and no views were expressed as to the plan's implementation. Without imputing any lack of good faith to the requesting party, the Commission noted that if, for example, members of the purchasing public were misled or deceived, or could be misled or deceived, as to benefits available under the plan, such result might be actionable.

Advisory Opinion Digest No. 14

Statute Involved: Section 5, Federal Trade Commission Act. Exclusive use of trademark in designated trading areas.
Released: March 5, 1966.

In an advisory opinion announced today the Federal Trade Commission disapproved a contemplated license agreement modification which would give a licensee the exclusive right within a designated trading area to use the licensor's trademark in connection with the licensee's sale of produce purchased from third-party growers.

As the request for an advisory opinion was presented, the requesting licensor, a state agency, owns a registered trademark or certification mark which it licenses through one (1) year, non-exclusive agreements with wholesale distributors for use in connection with their sale of repackaged produce purchased from third-party growers. The purpose of the mark is to advertise and encourage greater use of a particular product, and to protect its original identity.

As a condition for the renewal of a license agreement, the licensor is requiring that the requesting licensee submit his operations to continuous inspection by a designated inspection agency. The requesting licensee indicated that it will be necessary to remodel his plant facilities, and that the initial capital investment and expense of a resident inspector will be considerable. In return for this added expense, the licensee requested that the licensor revise the present license agreement to give him the exclusive right within a designated trading area to use the trademark in connection with his sale of certain produce. It was said that the proposed exclusive license is intended to prevent use of the trademark by competitors in the described trading area in connection with their repackaging and sale of similar produce.

Unlike the ordinary trademark owned by a single producer and applied solely to his goods, the mark here involved is a certification mark owned by a state agency. Such a mark is intended to identify goods produced by many competing growers. Since it is intended that the public take the certification mark as a representation that the only bona fide produce of that type is the produce sold under this mark, restriction of its use to the requesting licensee could result in giving him an unfair competitive advantage over other wholesale distributors who are in fact selling the same produce but who do not have the right to use the certification mark. The result could be to impose an unreasonable restraint, not upon intrabrand competition (as would be the case with the usual exclusive trademark license), but upon competition between competing brands of the produce involved.

The fact that the right to use the certification mark is conditioned upon utilization of the inspection procedure required by the licensor is no justification for insulating the requesting licensee's company from the competition of other repackers of similar produce.

The Federal Trade Commission advised that it is of the opinion that the proposed exclusive license agreement would probably be in violation of Section 5 of the Federal Trade Commission Act.

Advisory Opinion Digest No. 15

Statute Involved: Section 5, Federal Trade Commission Act.

Released: March 8, 1966.

Proposed trade association resolution by wholesalers suggesting pricing and business policies to their suppliers.

A trade association composed of wholesalers of rebuilt products has requested an advisory opinion from the Commission as to the legality of a proposed Resolution suggesting certain conduct to the trade association of rebuilders who supply the wholesalers. The Resolution would provide, among other things, that rebuilders should give wholesalers 120 days notice in writing of any change in the allowance to be granted for used products turned

in for rebuilding purposes; that during this period the wholesalers should receive credit at the old rate on such return products; and that the rebuilders should incorporate a 30% gross profit for the wholesalers when establishing prices for the used products in view of the fact that the wholesalers give an allowance to the retailers who turn in the used product for rebuilding purposes. The association added that there was no agreement not to do business with those rebuilders who declined to follow the practices contained in the Resolution.

The Commission advised that it could not give approval to the adoption of the Resolution. Though the Resolution may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish such result. Even if it were accompanied by disclaimers, there is implicit in the Resolution too grave a danger that it will serve as a device whereby the concerted power of the members of the association is brought to bear to coerce the members of the rebuilders' trade association to conform their pricing policies to the restrictive standards of the Resolution, or at the very least as an invitation to enter into agreements among themselves to do so.

Advisory Opinion Digest No. 16

Statute Involved: Sections 2(d)
and 2(e), amended Clayton Act.
Released: March 16, 1966.

Advertising by a manufacturer in a
customer-connected trade publi-
cation.

The Federal Trade Commission recently rendered an advisory opinion dealing with the proposed advertising by a manufacturer of drug items in a drug trade catalogue published by an organization of wholesale druggists.

The manufacturer was informed that several months previously the Commission had approved the organization's proposed plan of reorganization of the publication which provided that (1) the publication is to be published by a separate corporate subsidiary, (2) the advertising rates to be charged will be no higher than necessary to realize a normal profit for such a publication, and (3) in any event, the profits resulting from the publication will be donated annually to a charitable organization.

"Unless and until the Commission announces the rescission of such approval," the advisory opinion stated, "it will not take the position that any supplier's payment for advertising in . . . [the publication in question] constitutes a payment indirectly to the wholesaler members . . . [of the organization], subject to Section 2(d) of the amended Clayton Act."

However, the Commission pointed out that it will continue to regard a supplier who advertises in a publication such as this "as in effect furnishing, through the intermediary of the publisher, a promotional service to those wholesalers who make use of the publication. In order to assure compliance

with Section 2(e) of the amended Clayton Act, the supplier should ascertain whether in a practical business sense the publication is available for use by all of his wholesaler customers who are in competition with the wholesaler customers who do in fact use it; if it is not so available for use by some customers, the supplier must offer those customer a reasonable alternative."

Advisory Opinion Digest No. 17

Statute Involved: Section 5, Federal Trade Commission Act.
Released: March 22, 1966.

Use of descriptions "velvet" and "suede" for a flocked fabric.

A recent Federal Trade Commission advisory opinion informed a manufacturer that the unmodified terms "velvet" and "suede" could not properly be used to describe a flocked fabric.

The manufacturer had described the material in question as one formed of micro-cut flock fibers upstanding on end and adhered to a suitable backing. The resulting fabric, it was said, has the appearance and feel of velvet and suede.

The Commission believes the consuming public understands the unmodified term "suede" to connote leather and the unmodified term "velvet" to connote, among other things, a particular kind of warp pile fabric.

The fabric in question, therefore, may properly be designated only as "suede fabric," "suede cloth"; "velvet-like fabric" or "velvet-like cloth" or by words of similar import. The expressions "sueded fabric," "sueded cloth"; "velveted fabric" or "velveted cloth" or words of similar import are also unobjectionable.

Advisory Opinion Digest No. 18

Statute Involved: Section 5, Federal Trade Commission Act.
Released: March 23, 1966.

Exclusive franchise arrangements.

A concern proposing to establish a service in principal American cities through exclusive franchises was recently advised that, with two exceptions, the Federal Trade Commission has no objections to the program as now proposed by its exclusive license agreement.

The first exception involved the contractual provision requiring the licensees to purchase their equipment, supplies and services through a central procurement office operated by the licensor.

"On the facts which you have furnished us, we are not able to make a determination as to the reasonableness" of this requirement, the Commission said. "We cannot determine, for example, which of the various products subject to that clause require such a degree of uniformity as to justify such

a central procurement obligation. Similarly, as to those products where uniformity might be necessary, we cannot determine whether it could not be achieved by specifications or by some other less restrictive means than that provided for. . . . Accordingly, we cannot give you any opinion as to the lawfulness or unlawfulness of this provision.

The other exception noted in the advisory opinion concerned the article of the agreement providing that after termination, the licensee may not, for a period of three years, and without geographic limitation, engage in business in "similar fields."

The Commission said, "While the duration and geographic scope of this article are, in our view, reasonable, the term 'similar fields' is so general and ambiguous that, unless clarified and reasonably limited, it might impose an unreasonable restraint on the licensee."

The licensor was cautioned by the Commission, "With respect to the agreement as a whole, you should bear in mind that the legality of any franchise system depends to a large extent upon the manner in which such agreements are implemented. If apparently reasonable reservations of rights by the licensor are in practice administered in an unreasonable manner so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect."

Advisory Opinion Digest No. 19

Statute Involved: Section 2(e), Advertising promotions addressed
amended Clayton Act. to new mothers.

Released: March 24, 1966.

In a recent Advisory Opinion announced today the Federal Trade Commission informed an advertising agency that the Plan described below would not violate Commission administered law.

Having first made arrangements with suppliers, not retailers, an advertising agency proposes to mail new mothers, whose names would be obtained from public sources, an envelope containing a variety of "savings" coupons advertising products such as baby foods, powder, soap, lotions and the like. By redeeming the coupons at any stocking retail outlet of her choice, the mother would save five or six cents on a purchase of the advertised product. A line might appear on the cover of the envelope calling attention to the fact that it contains a coupon for an advertiser's product but no part of the mailing would mention the name of, or contain any coupons advertising "house brands" of, any particular outlet at which a coupon might be redeemed.

It is the Commission's view that advertisers participating in such a plan would not specifically, or implicitly, be furnishing promotional assistance to a particular outlet from which the advertiser's products could be obtained by the new mother.

An advertiser in interstate commerce who offers promotional assistance to *particular* outlets, specifically or implicitly, for his products is required under the laws administered by the Commission to make the offer to *each* of his competing customers so that the assistance is realistically available to each of them on proportionally equal terms.

The Commission's Guides for Advertising Allowances discuss the requirements for promotional assistance plans in considerable detail and will be of assistance to persons contemplating their use. Copies are available from the Secretary, Federal Trade Commission, Washington, D. C. 20580.

Advisory Opinion Digest No. 20

Statute Involved: Section 5, Federal Trade Commission Act.

Released: March 29, 1966.

Necessity to disclose foreign origin of strain release device if servomotor is labeled as "Made in U.S."

The Commission has issued an advisory opinion in which it advised a manufacturer that it would be improper to label its servomotors as "Made in U.S." since that would constitute an affirmative representation they were entirely made in this country, which is not the fact, unless the label also discloses in a clear and conspicuous manner that the strain release device is imported from West Germany.

The Commission's opinion was rendered in response to a factual situation where all components of the servomotor, except the strain release device, are of domestic origin. The strain release device is to be imported in an assembled state from West Germany, and it represents approximately 5% of the total cost of all the components. The servomotors will be sold in the United States and in foreign countries.

In its opinion the Commission also took the position that the disclosure requirement would also be applicable, even though the manufacturer decided at a later date to import the strain release device unassembled and assemble it here in the United States.

Finally, the Commission's opinion noted that it would have authority to impose the same requirement in connection with the sale of servomotors in foreign countries, provided they were being sold in competition with other American manufacturers.

Advisory Opinion Digest No. 21

Statute Involved: Section 5, Federal Trade Commission Act. "Free" offer of merchandise.

Released: March 29, 1966.

The Federal Trade Commission recently rendered an advisory opinion on a retailer's proposal to offer a stereo record player for "absolutely nothing" with the purchase of one stereo record a week for fifty weeks.

The concern had asserted that it does not retail the record player by itself for less than \$249 and that the records are high quality stereo records which it retails for \$4.98 and it does not know of anyone else selling them for less. Thus, it stated, the customer would pay \$249 for the record player and the record, which is the price normally paid for the set alone.

The Commission informed the retailer, "Since the matter you have presented is wholly dependent upon the facts, it is difficult to render a categorical opinion. When a seller offers to supply one article 'free,' or 'at no extra cost,' or for 'absolutely nothing' in conjunction with the purchase of another article, he is thereby representing to prospective customers that the article required to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. You will note that we are not dealing here with abstract evaluations, but rather with concrete selling prices.

"Thus, if the records which are to be offered those who accept this offer are currently being sold in substantial quantities for \$4.98, there could be no objection to the offer on that score. On the other hand, if such records are what is known in the trade as 'low cost,' 'cut-outs,' 'budget lines,' etc., which normally command a much lower selling price, the offer would be deceptive even though the records may be listed at \$4.98 for advertising or preticketing purposes. In that event instead of purchasing current records at the prevailing market price and receiving a record player at no extra cost, the purchaser would be paying a high, nationally advertised, price for records worth a fraction of that value, the substantial markup thereby defraying the cost of the record player.

"Although the sample of the promotion letter you furnished contains no representation of the value of the record player, the same general principles would apply if such representations are made. Thus, to avoid any basis for deception, representations of price or value of the record player must reflect the actual or prevailing market price at which sales of that product are currently being made in substantial quantities."

The Commission also noted that the promotion letter states "Have you ever been called 'Lucky'? Well Congratulations" and urges the customer to "come in before the expiration date."

"If, in fact," the advisory opinion commented, "the offer is available to more than a few selected persons, or continues for an extended or indefinite period of time, then the representations in the promotion letter would be false and deceptive."

Advisory Opinion Digest No. 22

Statute Involved: Section 5, Federal Trade Commission Act.
Released: March 30, 1966.

Impropriety of Description "Made in U.S.A." for kit with substantial amount of foreign components.

A recent advisory opinion made public today by the Federal Trade Commission notified a marketer of toys that it would not be permissible to use the labeling description "Made in U.S.A." for a tool kit containing two Japanese components.

The kits will contain 20 items, 18 of American origin and 2 imported from Japan which will represent 16% of the total value of the entire kit.

The Commission advised that "the claim 'Made in U.S.A.' would constitute an affirmative representation that the entire kit was of domestic origin. Since a substantial portion of the components therein would be of foreign origin, the Commission is of the opinion that it would be improper to label the kits as 'Made in U.S.A.'"

Advisory Opinion Digest No. 23

Statute Involved: Section 2(c), amended Clayton Act.
Released: April 1, 1966.

Establishment of buying corporation by broker.

An advisory opinion rendered recently by the Federal Trade Commission notified a broker-distributor of fresh fruits and vegetables that either of his proposed alternative plans to establish a buying corporation would involve grave risk of illegality.

The businessman had inquired whether or not under the Perishable Agricultural Commodities Act and FTC law he may lawfully:

- (1) establish a corporation as an exclusive buying company for a purchaser for resale, this corporation to buy and be billed in its own name. The purchaser for resale would own one or more shares of the common stock of the buying company and would participate in the brokerage received by that company, or
- (2) establish a corporation as above for the above described purposes, the difference being that shippers would directly invoice and be paid by the purchaser for resale rather than the proposed corporation.

The Commission advised him that it had no comment on the Perishable Agricultural Commodities Act because it does not administer this law.

"The immediately applicable statute is," continued the advisory opinion, "as you know, Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, which makes unlawful the payment or receipt of brokerage or allowances in lieu thereof in certain commercial contexts.

"In the Commission's view, either of the plans you propose, if adopted, would carry with them grave risk that the statute will be violated.

"Absent any indication to the contrary, they appear to amount merely to a means whereby both the letter and the spirit of the statute are to be avoided."

Advisory Opinion Digest No. 24

Statute Involved: Section 2(e), amended Clayton Act.	Tripartite promotional assistance program; advertisement reprint distribution by promoter.
Released: April 1, 1966.	

An advisory opinion made public today by the Federal Trade Commission informed a company of the "very serious possibility" that a proposed promotional plan would subject participating food supplier advertisers to a charge of law violation.

The plan involved the distribution of reprints of advertisements to the public through retail food stores, the cost of the reprints to be shared by participating suppliers. No mention would be made of any specific retailer in the advertising and 10,000,000 reprints would be offered at no cost. Each retailer would receive the number requested provided the total ordered did not exceed this available supply. If the orders exceeded 10,000,000, this number would be divided by the total number of checkstands in stores requesting copies to determine how many each store would receive.

It appears, the FTC's advisory opinion stated, "that no problem would arise under the laws administered by this Commission unless and until the requests for reprints exceed the available supply of 10,000,000. In such event, it is doubtful that the basis chosen for distribution of the reprints among competing retailers would result in the proportional equality required by the law [Section 2(e) of the Robinson-Patman Act]. While the Act does not specify any single standard for proportionalizing merchandising services and facilities, it does not appear that the required result will be achieved when the standard selected is the number of checkstands in the stores requesting copies. This standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. In fact, it could result in a situation in which retailers who have a small volume with the participating suppliers would receive more reprints than competing retailers with a much larger volume solely because of a greater number of checkstands. We cannot conclude

then that the plan as it is presently proposed would necessarily result in the proportionally equal treatment of all competing customers that the law requires. Consequently, there is a very serious possibility that it would subject the participating suppliers to a charge of violation of Section 2(e) of the Robinson-Patman Act."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 25

Statute Involved: Section 5, Federal Trade Commission Act. Impropropriety of description "14 K" for item not entirely gold.
Released: April 2, 1966.

The Federal Trade Commission recently rendered an advisory opinion that it is improper to mark or describe an earring as having a "14 K post" when the post is not entirely gold.

"Under Rule 22 (c) (1) of the Trade Practice Rules for the Jewelry Industry," the Commission advised, "an article may not be so designated unless it is 'composed throughout of an alloy of gold'; since this article will contain substantial electroplatings of base metals, it plainly is not composed throughout of gold."

The requesting party had stated that the earring in question would be constructed as follows:

1. The ornamental front part would be basically brass, but no quality claim is contemplated as to this part of the article.
2. The front part is attached to a post made for penetration of pierced ears and held in place by a clutch type back made basically of brass. No quality claim for the clutch type back is contemplated.
3. The post will be 14 karat gold. After being soldered to the ornamental front the entire article will be electroplated with copper, then electroplated with nickel, and finally electroplated with high karat gold.

Advisory Opinion Digest No. 26

Statute Involved: Section 2(d), amended Clayton Act. Paying advertising allowances based upon certain percentage of purchases from the supplier.
Released: April 8, 1966.

The Commission announced today it had given approval to a proposed promotional plan which called for the payment of advertising allowances to all competing customers based upon 5% of the customer's annual dollar volume of purchases from the supplier paying the allowance. Its approval was granted after it had pointed out several steps which must be followed in the implementation of the plan.

Under the terms of the plan which is designed to stimulate the sale of

couch throws, the customer must place local advertisements promoting the sale of said products before he is entitled to the advertising allowance. Noting that no single way to proportionalize is prescribed by law and that any method which treats competing customers on proportionally equal terms may be utilized, the Commission pointed out that one of the most widely used and acceptable methods is to base the payments on the dollar volume of goods purchased during a specified period of time. Since that is precisely what the party requesting the advisory opinion proposes to do, namely, make advertising payments which amount to 5% of the customer's annual dollar volume of purchases of couch throws, the Commission gave its approval to the plan.

Advisory Opinion Digest No. 27

Statute Involved: Section 5, Federal Trade Commission Act.	Foreign origin matter—Affirmative misrepresentation of domestic origin.
Released: April 8, 1966.	

The Commission was requested to advise whether or not it would be permissible to label boxes containing toy sets as "Made in U.S.A." when some of the parts or components inside the box were imported.

The Commission advised that it would not be proper to label these boxes as made in U.S.A. since that would constitute an affirmative representation that the contents were entirely made in this country, which is not the fact, unless, of course, the label also discloses in a clear and conspicuous manner the fact that certain of the contents are imported.

Advisory Opinion Digest No. 28

Statute Involved: Section 5, Federal Trade Commission Act.	Selection of customers by a single trader.
Released: April 12, 1966.	

A recent Federal Trade Commission advisory opinion informed a publisher that no actionable trade restraints appeared to be involved in his proposal to select the customers to whom he will sell a menu and recipe pamphlet.

As explained by the requesting party, the pamphlet will be published weekly and will contain authoritative information on buying, preparing and serving food products. It will be sold to selected food chains operating fewer than 500 retail outlets, whose general trading areas do not overlap. Copies of the pamphlet will be given free to customers of the food chains as a promotional device. The pamphlet will not mention any products by brand name, and will not be available as a medium for advertising by any supplier

or association of suppliers, nor will any of them contribute financially towards its publication or distribution.

The Commission pointed out that the antitrust laws do not restrict the right of a seller who does not have monopoly power to select those customers to whom he will sell his product, provided that the right is not exercised for the purpose of monopolization or is otherwise linked to an unlawful course of conduct in restraint of trade.

Advisory Opinion Digest No. 29

Statute Involved: Section 5, Federal Trade Commission Act. Disclosure of foreign origin not necessary.
Released: April 12, 1966.

An American concern proposing to market shaving brushes containing plastic handles imported from England has been informed by the Federal Trade Commission that it will not be necessary to disclose the English origin of the handles, assuming there is no affirmative representation they are domestic.

The Commission added that its advisory opinion, of course, "does not relieve one from complying with any applicable statutes or regulations administered by the Bureau of Customs."

The company intends to insert and cement the bristle into the imported handles here in the United States. The cost of the completed brush is \$2.25 and the cost of the imported handle will be 35c.

Advisory Opinion Digest No. 30

Statute Involved: Section 5, Federal Trade Commission Act. Origin disclosure on package for Canadian-made automotive part.
Released: April 13, 1966.

An American concern has been advised of the Federal Trade Commission's disapproval of its proposal to use a modified version of its present cardboard containers to distribute in this country a replacement automotive part to be manufactured in Canada.

The advisory opinion noted that the part will be marked "Made in Canada" but that, under normal conditions, the ultimate purchaser is not likely to observe this marking prior to purchase. On the cardboard container appear the company's American address plus a legend which it proposes to obliterate, "Made in USA."

The Commission's advice was that permanent obliteration of this legend "on the outside of the cardboard containers would not be sufficient since the presence of your company's address on the container may lead many

persons to believe that the . . . [products] were manufactured in the United States. Thus it would also be necessary to disclose the Canadian origin on the container in a clear and conspicuous manner."

Advisory Opinion Digest No. 31

Statute Involved: Section 2(a), Rebate pricing plan.
amended Clayton Act.
Released: April 13, 1966.

The Federal Trade Commission has informed a photoengraving company that its proposed rebate pricing plan granting a ten percent discount to all purchasers to whom it provides photoengraved plates through advertising agencies will not violate Section 2(a) of the amended Clayton Act.

As it understands the plan, the Commission said, the concern will offer a direct year-end across-the-board rebate of ten percent of the dollar value of purchases of photoengraved plates to all purchasers to whom it provides photoengraved plates through advertising agencies. The rebate is to be contingent upon the advertisers specifying the use of the engraver's facilities to their respective advertising agencies. The concern will provide photoengraved plates to the extent of its facilities to all purchasers classified as buying photoengraved plates through advertising agencies, and will affirmatively disclose and offer this rebate to all customers and prospective customers in this classification.

Advisory Opinion Digest No. 32

Statute Involved: Section 2(e) Advertising by manufacturer plan-
amended Clayton Act. ning to make both wholesale and
Released: April 15, 1966. direct mail sales.

The Federal Trade Commission has made public an advisory opinion on whether a supplier selling by direct mail, to a retail chain and to individual retailers, all of whom are located 10 or more miles from any chain outlet, may properly feature only his own direct mail operations and his chain customer in his national advertising.

The applicant specifically queried as to whether or not the 10 miles or more distance between the individual retailers and the chain outlets negates the possibility of competition between them.

"As a general rule," the Commission said, "a supplier's ordinary unilateral advertising expenditures are not subject to the Clayton Act, as amended by the Robinson-Patman Act. In consequence, a supplier's advertising which makes clear the direct mail availability of a particular item through the supplier, without more, would raise no questions under the Act.

"Whether or not the chain outlets and the other retailers supplied are competitive, however, is a matter of fact to be determined by the facts. A particular distance between them is not determinative of whether they do or do not compete. If they in fact compete then under the statute the advantages to be accrued from the supplier's advertising program, if accorded at all, must be proportionally accorded. If they do not in fact compete, then otherwise."

Under the circumstances, the Commission concluded, "it is not practicable" to answer that part of the applicant's question dealing with mention of chain store availability in his national advertising.

Advisory Opinion Digest No. 33

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 15, 1966.

"Made in U.S.A." label on film containing an essential, but foreign-made, component.

The Federal Trade Commission has rendered an advisory opinion that it would not be permissible to label dental X-ray film as "Made in U.S.A." if it consists in part of a raw safety base film imported from a foreign country, the remaining ingredients to be made in the United States.

The Commission's advice was that the imported raw safety base film "is the principal and essential component of the finished product. Without it there can be no X-ray picture." The manufacturing and packaging processes described in the letter from the requesting party "would not change the basic structure or composition of the imported film to such an extent that its identity would be lost. It is concluded, therefore, that it would not be proper under Section 5 of the Federal Trade Commission Act to label the dental X-ray film as 'Made in U.S.A.'"

Advisory Opinion Digest No. 34

Statute Involved: Section 2(e), amended Clayton Act.
Released: April 23, 1966.

Tripartite promotional assistance—Use of sales message announcing device in retail stores.

In an advisory opinion made public today the Federal Trade Commission gave qualified clearance to the proposal by a manufacturer of an electronic device to offer selected manufacturers an opportunity to present a sales message to the public in retail stores by means of the device.

The proposed plan provides that any manufacturer contracting for use of this device will supply its manufacturer with a list of all retailers of his products in a geographic area to be selected by him. The device producer, upon receiving such list, will within a reasonable time effectively offer all

retailers located in the selected geographic area an opportunity to avail themselves of the use of the electronic device at equal rates determined by the number of units to be installed in a particular location.

The advisory opinion called attention to the admonition in the FTC's Guides for Advertising Allowances that a seller must be careful not to discriminate against customers located on the fringes but outside the area selected for the special promotion, since they may be actually competing with those participating.

With this caveat, the Commission advised, "the above-outlined plan will not offend Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. * * * Since under the facts available to us we have no way of knowing whether or not fringe area competing customers will exist in the actual operation of your proposed plan we expressly exclude this point from our opinion that your proposed plan is unobjectionable."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 35

Statute Involved: Section 2(e) Tripartite promotional assistance
amended Clayton Act. plan in selected geographic areas.
Released: April 23, 1966.

A sales promotion company has been advised by the Federal Trade Commission that with one reservation its proposed promotional plan is not violative of law.

Under the plan, the promoter will sell to food processors booklets containing recipes featuring the processors' products together with additional promotional and advertising materials. The promoter will directly or indirectly give all food retailers within a selected geographic area an effective opportunity to obtain a continuing supply of such booklets plus file boxes and a display rack at what amounts to administrative costs.

"With one reservation," the FTC's advisory opinion stated, "the plan does not appear to offend the provisions of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. From the facts presented, however, it is impossible to determine the nature and extent of the competition, if any, which may exist between retailers close to, but on different sides of, the boundaries of the selected geographic area. As to this particular point therefore, we withhold our opinion."

Noting that the plan may be extended to manufacturers of household and housekeeping items other than food the Commission said it is impracticable to provide an opinion on this point because "the nature, importance and

extent of competition between food retailers and non-food retailers selling the same items is unknown to us and cannot readily be ascertained.”

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 36

Statute Involved: Section 2(e), Functional discounts, meeting competition.
amended Clayton Act.

Released: April 26, 1966.

The Federal Trade Commission announced today that it has recently answered inquiries from a manufacturer of items used in the automotive, trucking and marine trades regarding functional discounts and meeting competition.

The Commission advised the inquirer that:

It may sell to fleet truck operators at regular jobber prices, but that competing truck fleet operators must be accorded non-discriminatory treatment.

It might establish a “specialized” classification for jobbers selling to fleet operators—entitling such jobbers to discounts which the manufacturer’s distributors are afforded—but that it may not discriminate against any of its other resale customers which compete with the “specialized” jobbers.

It could offer such discounts to meet the lawful price of a competitor provided the offer is in response to an individual competitive situation rather than in response to a pricing system.

Advisory Opinion Digest No. 37

Statute Involved: Section 5, Federal Trade Commission Act. Foreign origin matter, affirmative misrepresentation of domestic origin.

Released: April 29, 1966.

The Commission was requested to advise whether or not it would be permissible to describe as “Made in U.S.A.” imported black angle iron which had been cleaned in this country and then galvanized to required specifications by means of submerging in hot molten zinc, the finished product to be known as galvanized angle iron.

The Commission advised that it would not be proper to describe the finished galvanized angle iron as “Made in U.S.A.” since that would constitute an affirmative representation that the entire product was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the black angle iron is imported.

Advisory Opinion Digest No. 38

Statute Involved: Section 2(d), Promotional allowance program.
amended Clayton Act.
Released: April 29, 1966.

The Federal Trade Commission announced today that it has advised a men's clothing manufacturer that a proposed two-part promotional allowance program "would satisfy the requirements of the law," but that a subsequently proposed modification of one part of the plan "would be clearly illegal."

Under one part of the originally proposed plan—participation in cooperative advertising allowances—the manufacturer would offer an advertising allowance of 2% of net sales at regular prices up to a maximum of 50% of the actual cost of advertising its products in newspapers, magazines and other printed media. New accounts and customers of less than one year would be offered the same allowance based upon their first quarter's purchases. If this offer is made known and offered to all competing customers, the Commission said, this part of the plan would not violate the law.

Under the other part of the plan—participation in sales or promotions—the manufacturer would make available to all customers a total of 20% of their net purchases of basic products at regular prices at a special reduced price of \$4.00 off the net price, which the customer may accept at one time or in two installments during the year for sales in January and/or June. In other words, if a customer purchased \$1,000 worth of such products during the year at regular prices, he would be entitled to purchase 20% or \$200 worth of this product at the stated reduction for sales purposes during January and/or June. Likewise, this would not violate the law, the Commission said.

However, subsequent to Commission approval of the plan, the manufacturer proposed a modification of its cooperative advertising program. The concern proposed to increase its advertising payments by offering a 3% allowance to accounts whose yearly volume is \$50,000 minimum, a 4% allowance to accounts whose yearly volume is \$75,000 minimum and 5% to those whose yearly volume is \$100,000 and over. To receive the increased payment, the customer would have to match the allowance and use either the manufacturer's label or that label in combination.

The Commission said that "under no circumstances can a program which pays a higher percentage to larger volume buyers when buyers in smaller quantities receive smaller percentage of net sales be held to meet the proportionally equal requirement of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Substantially identical programs have previously been held illegal."

Advisory Opinion Digest No. 39

Statute Involved: Sections 2(d) Cooperative advertising program.
and 2(e), amended Clayton Act.

Released: April 30, 1966.

The Federal Trade Commission announced today that it has advised a manufacturer of women's wear that its proposed cooperative advertising allowance program and a furnishing of services or facilities, "if in practice worked out as presented, would be unobjectionable under Sections 2(d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act."

Under the supplier's first offer, all vendees (who are to be effectively informed of the offer) will be paid, on request and on proof made, for one-half their cost of cooperative advertising. Supplier's contribution at any one time will be limited to, and will amount to, 10% of the dollar value of a single sale to a requesting vendee. Over a year's time, however, supplier's contribution is to be restricted to 2.5% of the dollar value of a vendee's annual purchases. Any vendee who has received in excess of this amount will be billed therefor and a refund will be required.

The Commission cautioned the manufacture, however, "that should one or more, but not all, competing vendees fail to refund an excess allowance as determined by your plan, Robinson-Patman Act questions would arise."

Upon supplier's second offer, statement enclosures will be provided, the number furnished being based on the number of items purchased by a vendee. Enclosures will be imprinted for those entitled to quantities of 5,000 or more; unimprinted enclosures will be furnished to those entitled to fewer than 5,000 enclosures.

Advisory Opinion Digest No. 40

Statute Involved: Section 5, Federal Trade Commission Act. Sales promotion plan as a lottery in the sale of merchandise.

Released: April 30, 1966.

The Federal Trade Commission announced today that it has advised a processor of a grocery item that its proposed sales promotion plan would constitute a lottery and its use would be actionable under Section 5 of the FTC Act.

Under the plan, the concern proposed to insert at random either certificates of no value or of varying redeemable cash values in containers of its product to be sold at retail. At the time of retail sale, equivalent certificates in equal proportions would be made available at wholesale distributors to the general public without cost or obligation.

The Commission said that "In our view the existence of the free certificates will not cure the difficulty presented by the transactions at the retail level which, standing alone, clearly involve a lottery in the sale of merchandise of a kind often heretofore made subject to a Commission order."

Advisory Opinion Digest No. 41

Statute Involved: Sections 2(a), Additional discounts to mail order
2(d) and 2(f), amended Clayton sellers of paperback books.
Act.

Released: May 10, 1966.

A seller of paperback books planning to obtain additional discounts from publishers for selling through a mail order catalogue has been advised of the possible law violations involved in the plan and that the Federal Trade Commission is unable to give him an unqualified opinion on its legality.

The Commission pointed out that any plan which results in discriminations in price or allowances between different resellers immediately raises problems of possible violation of the Robinson-Patman Act, and that on the basis of the information supplied, there appear to be two possible ways of viewing this plan.

Firstly, the Commission said, "If the plan involves simply the granting by the publishers of a lower price to you than to their other customers, its legality from the publishers' point of view would be governed by Section 2(a) of the Robinson-Patman Act which prohibits discriminations in price which may adversely affect competition. In spite of the fact that your sales would not be made through the same channels of distribution as those of other purchasers of paperback books, it seems likely that you would nevertheless compete with these purchasers to some extent, and that this competition might be lessened by the proposed price discriminations, in violation of Section 2(a). Although price discriminations otherwise unlawful under Section 2(a) may be justified by cost savings on the part of the seller, the information which you have submitted does not indicate the presence of such 'cost justification' in your plan. If the discounts granted to you by sellers should violate Section 2(a), your knowing inducement or receipt of such discriminations would also violate Section 2(f) of the Act."

Continuing, the Commission said the problem would be somewhat different if the discounts granted to the requesting party were considered as promotional or advertising allowances for his listing of the publishers' books in his catalogue.

Granting or receiving such allowances would be unlawful "if they were not made available on proportionally equal terms to competing customers," the Commission advised. "Thus, if your suppliers of paperback books granted proportional advertising or promotional allowances or facilities, such as cooperative advertising allowances, display racks and the like, to their other purchasers, their granting to you of an allowance for the listing of their books in your catalogue would not be unlawful."

Advisory Opinion Digest No. 42

Statute Involved: Section 2(e), Advertising service disclosing where
amended Clayton Act. manufacturers' products are sold.
Released: May 10, 1966.

The Federal Trade Commission today made public its advice that a plan to furnish manufacturers a new form of advertising service disclosing where their products are sold would not be illegal.

Under this proposed plan, a manufacturer will publish an advertisement in a national magazine, and will furnish to the proposed corporation represented by the requesting party a complete listing of all retailers selling the advertised product, classified according to the major shopping areas throughout the country. The advertisement will contain a descriptive symbol for the proposed service, with a reference to the page in the same publication containing a telephone number list, also classified according to the major shopping areas throughout the country. Each answering service included in this list will be equipped by the proposed corporation with the manufacturer's list of his retailers in that trade area, which will be given to any consumer who reads the advertisement and calls the number provided to learn where he can purchase the product. The cost of the entire service will be borne by the manufacturer.

The FTC's advisory opinion said, "Since it appears that any potential customer calling will be furnished with the names and addresses of all dealers handling a particular product in a trade area, it is our opinion that the proposed plan described would not subject participating manufacturers or your client to a charge of violating the law. We should caution, however, that great care must be exercised in defining the boundaries of the various trade areas into which the country is to be divided so as not to discriminate against customers located on the fringes but outside the area served by the answering service, since they may be in actual competition with those who are within the area and thus receive the benefit of the service."

Advisory Opinion Digest No. 43

Statute Involved: Section 2(a), Goods of like grade and quality.
amended Clayton Act.

Released: May 11, 1966.

The Federal Trade Commission announced today that it had advised a manufacturer producing iron castings to special order of its customers that such goods are not of like grade and quality within the meaning of that section of the amended Clayton Act prohibiting price discriminations.

The Commission was informed by the manufacturer that:

Its castings are produced in accordance with individual customer specifications;

It submits samples to the customer for approval;

The customer further processes the casting prior to use; and

Castings are not shipped off the shelf but are produced to order with several weeks lead time.

Advisory Opinion Digest No. 44

Statute Involved: Section 5, Fed- Agreement among retailers as to
eral Trade Commission Act. uniform shopping hours.

Released: May 11, 1966.

A retail dealers association of a certain city of substantial size has been advised that a proposed agreement among downtown retailers to establish uniform store hours would not, under the circumstances presented, be in violation of any laws administered by the Federal Trade Commission.

The stated existing downtown shopping hours are 9 A.M. to 5:30 P.M. with Monday and some Thursday hours from 9 A.M. to 9 P.M. The proposed change would make the hours from 11 A.M. to 8 P.M. weekdays and 9 A.M. to 5:30 P.M. on Saturday.

The basic reason advanced for the proposed change in hours is to place the downtown retailers in a more effective competitive position with suburban shopping centers by establishing more convenient shopping hours for office workers and by enabling spouses to meet for dinner and shop. Any business establishment will have the free choice as to whether or not to conform to the proposed change in shopping hours.

Advisory Opinion Digest No. 45

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: May 18, 1966.

Merchandising by means of a
chance or gaming device.

The Commission was recently requested to furnish an advisory opinion with respect to a proposal to distribute prizes to users of trading stamp books. Under this proposal, distributors of trading stamps would receive from the stamp company not only trading stamps that are to be pasted in the books but the books as well. The books would bear a seal which when broken after the book is completely filled and presented to the store manager would reveal a prize ranging from \$1.50 to \$100.00. Books carrying prizes larger than \$1.50 would represent approximately 10% of the total books distributed. The stamp user would also have the option of not breaking the seal and receiving \$2.00 in cash or \$2.15 in merchandise.

It was contended that of the three essential elements of a lottery, namely, consideration, chance and prize, the first would be missing since the merchants would distribute the stamps not only to their customers in proportion to purchases made, as is normal for trading stamp operations, but also to anyone who would register in the merchant's store whether a purchase was made or not. Extensive advertising would inform the general public that they may receive eighty stamps per week by just registering with the merchants without the necessity of making a purchase.

The Commission advised that it did not need to decide the question of whether or not consideration would exist, so that the proposal could be held to constitute a technical lottery, for it was still of the view that the plan would involve an illegal effort to sell or dispose of merchandise by means of a chance or gaming device. In the Commission's view, lotteries are not the only method by which the public's gambling instinct may be aroused, for other methods are comprehended within the general concept of merchandising by gambling. This proposal appeared to fall into that category, for even though each participant would always receive something of value if he persisted long enough to fill the book with stamps, the amount of his return would vary greatly with his willingness to "take a chance." Consequently, the Commission declined to give its approval to the proposed plan.

Advisory Opinion Digest No. 46

Statute Involved: Section 5
Federal Trade Commission Act.
Released: May 18, 1966.

Common sales agency—objective
market stabilization.

The Federal Trade Commission has advised a manufacturers' agent that its proposed plan to be the sales agent for a number of producers of the

same product involves grave risk of illegality because one of its stated objectives is marketing stabilization.

"The mere use of a common sales agency will not, in and of itself, result in a violation of law," the FTC's advisory opinion stated. However, it continued, in view of the requesting party's statement that one of the plan's purposes is to stabilize the market, "it is reasonable to conclude that the use of a common marketing agency by a number of different producers of the same product would inevitably lead to a violation of the Federal Trade Commission Act as well as the Sherman Act. This is especially true when the common agent would be quoting a common price for all the producers he represents."

The Commission pointed out it is common experience that any arrangement aimed at stabilizing the market, "even if not initially so designed, has within it the seeds of price fixing, allocation of markets, or restriction of production, all of which are classic antitrust violations."

Advisory Opinion Digest No. 47

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 19, 1966.

Leather terms may not be used for non-leather gloves even if true composition is disclosed—Manner and place of disclosing foreign origin.

The Federal Trade Commission has made public its advice to a marketer of gloves that it would be improper to use a leather-connoting description for gloves which in fact contain no leather, even though qualifying language is used to describe their true composition.

Noting that the gloves are to be imported from Japan and the requesting party intends to disclose their origin on the paper bands and box labels, the Commission further advised that to avoid possible deception, disclosure of the Japanese origin must also be made on each pair of gloves by marking or stamping or on a label or tag affixed thereto. This disclosure must be readily visible upon casual inspection of the gloves and of such permanence as to remain on them until consummation of sale to the ultimate purchaser.

Advisory Opinion Digest No. 48

Statute Involved: Section 2(a), amended Clayton Act.
Released: May 19, 1966.

Legality of licensee and sublicensee selling to competing jobbers.

An exclusive licensee of a patented article has requested advice from the Federal Trade Commission concerning the legality of his sales and those of a manufacturing sublicensee to competing jobbers.

The licensee proposed to sublicense a manufacturer to produce the article and sell it to its own jobbers. At the same time, the licensee, on his own account, would sell the same article under a different name to his own jobbers. The sublicensee manufacturer would ship direct to customers of the licensee, some of which may be in competition with its own jobbers, and bill the licensee at an agreed price.

The Commission advised that in general, the Robinson-Patman Act "does not apply unless there is a discrimination attributable to the *same* seller in dealing with different purchasers."

Consequently, it said, if the manufacturer, a separate business entity, has and exercises sole and independent control over the prices at which it sells and the licensee has and exercises sole and independent control over the prices at which he sells, "questions cannot well arise under Section 2(a) of the Robinson-Patman Act."

However, the Commission pointed out that on the basis of the facts available it is unable to say that the plan "would not violate *any* of the trade regulation laws. For example, we do not know what, if any, price agreements are contemplated between . . . [the licensee] and the manufacturer or the nature thereof or whether such agreements may hereafter come into being."

Advisory Opinion Digest No. 49

Statute Involved: Section 2(d), amended Clayton Act.	Cooperative advertising program with no ceiling on suppliers' pay- ments.
Released: May 20, 1966.	

A retailer has been advised by the Federal Trade Commission that its proposed standard cooperative advertising agreement with its suppliers is not objectionable.

The contemplated agreement states that the supplier (1) agrees to pay a fixed percentage of the requesting retailer's cost of advertising and (2) is offering proportionally equal allowances to the retailer's competitors.

The Commission noted that the plan provides for promotional payments without limitation as to amount and that it is more customary for suppliers to limit their obligation by a percentage of a dealer's purchases.

"However, this might be," the advisory opinion said, "the Commission has concluded that no objection will be raised if suppliers decide to eliminate . . . [this] limitation and undertake to pay a stated percentage of all the advertising conducted by their dealers. This presupposes, of course, that the suppliers will make the same offer available to all competing customers and that the offer is functionally usable by all competing customers."

The plan, the advisory opinion added, "does contain features which might conceivably be used to greater advantage by larger retailers. But these prospects appear so remote, the Commission is not inclined to object unless and

until future experience should produce presently unexpected evidence that some customers actually received favored treatment. Objection then would be taken only after proper and adequate notice that the plan had not developed as anticipated."

Advisory Opinion Digest No. 50

Statute Involved: Sections 2(d) or 2(e), amended Clayton Act.	Tripartite promotional assistance, furnishing and servicing projec- tion equipment in grocery stores.
Released: May 20, 1966.	

A marketer of projection equipment has been advised by the Federal Trade Commission that his proposed plan to lease equipment and furnish associated services to suppliers of grocery products for advertising purposes in grocery outlets would not subject him to a charge of violation of law.

Suppliers would lease space from grocery store operator-customers they select. The marketer would prepare advertising of the supplier's product and install and maintain the equipment in the selected stores. He would take no part in the selection of retail stores and would not act as agent or intermediary for the suppliers in making the necessary contracts or agreements for the placement of leased projection equipment in the stores.

The Commission advised the marketer that his leasing of the projection equipment plus the preparation of advertising material and performance of installation and maintenance services would not subject him "to a charge of violation of Sections 2 (d) or (e) of the Robinson-Patman Amendment to the Clayton Act, which sections are set forth in the Commission's Guides for Advertising Allowances."

However, the Commission said that it "should be clearly understood . . . that participation in this plan by suppliers may involve a violation of Law on their part unless the payments made and the services or facilities furnished, are made available to all competing purchasers in a non-discriminatory manner."

NOTE.—Modified by Commission Action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 51

Statute Involved: Sections 2(d) and 2(e), amended Clayton Act.	Tripartite promotional assistance, discount stamp advertising plan.
Released: June 1, 1966.	

The Federal Trade Commission has advised that a proposed promotional plan involving the use of discount stamps would not be illegal if properly implemented.

The requesting party proposes to issue a set of stamps to customers in grocery stores and other types of retail outlets in certain trading areas. The

stamps will feature particular brands of products. When forwarded affixed to labels, wrappers or boxtops of the products featured, the requester will send a check to the customer in an amount equal to ten cents for each stamp plus ten cents additional if an entire set has been forwarded.

Suppliers or products featured would pay the requester for managing the promotion. Grocery store and other operators of retail outlets competing in and on the fringes of the trading areas in which the plan is attempted would be offered the opportunity to participate. To this end, such retail outlet operators would be furnished the stamps, promotional kits and money allowances on the basis of their annual dollar volume of sales.

The advisory opinion said it is the Commission's understanding that although the requesting party would concentrate its promotional efforts on operators of grocery stores it would also offer the plan to operators of other types of retail outlets competing in the sale of the products of supplier-advertiser-participants in the promotion and would admonish all such supplier-advertiser-participants of their responsibility to accord proportionally equal treatment to *all* of their competing customers, whether engaged in grocery retailing or other fields. The Commission further assumed that the proposed notices would adequately inform all prospective participants of all details of the offer.

The Commission advised that its opinion is that "implementation of the plan as outlined would not be violative of Sections 2 (d) or (e) of the Robinson-Patman Amendment to the Clayton Act."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 52

Statute Involved: Sections 2(d)
and 2(e), amended Clayton Act.
Released: June 1, 1966.

Tripartite promotional assistance,
food manufacturer-retailer pro-
motion program.

In an advisory opinion, the Federal Trade Commission has informed a promotional concern that its proposed advertising program to be utilized by food manufacturers and retailers would not be in violation of existing law if the program is modified to take into account "exceptions and caveats" pointed out by the Commission.

The promoter proposed to design a number of aisle-end displays, each promoting the name of a food manufacturer and a seasonal recipe incorporating a product of that manufacturer. Displays for twelve participating manufacturers and decorative material would be packaged in a kit (which may be divided into 12 segments) for distribution to retail stores taking part in the program.

According to the plan, each manufacturer would pay a proportionate share of the cost of the program, retailers would bear none of the cost but

must agree to provide aisle ends for displays and stack the manufacturers' products, and the number of kits each retailer would receive would be determined by the number of retail stores each owns.

The Commission advised the promoter, among other things, that if all retailers sell the products of all the manufacturers and all can use the entire kit, he would not be required to break down the kit just because a particular retailer so desired. However, the Commission said, if there are certain customers who do not sell the products of all the manufacturers or who cannot, because of space limitations, use the entire kit, then the law would be violated if the promoter insists the retailer take the entire kit or nothing.

After pointing out the requirements concerning notice to all competing customers that the plan is available, the Commission said participating manufacturers would not be obligated to meet the demands for cash by retailers, who could utilize the program, simply because they refuse the kit or sell products of only one manufacturer.

As to manufacturers requiring signed agreements from retailers who wish to receive the kits, the Commission advised that the law permits manufacturers to require that dealers who are to receive the benefit of such promotions must agree to reasonable display requirements so that the purposes of the promotion may be carried out. However, it noted, retailers desiring less than the full kit could not be expected to sign an agreement which would require them to accept the full display kits.

Concerning a manufacturer limiting the program to only one of his products and his responsibility to retailers who handle his products only on a "sporadic basis," the Commission said the law imposes no requirement that a seller must give advertising allowances or services on all his products if he elects to accord them on one or more articles. Problems concerning products of like grade and quality which differ in only minor respects or trade names can be avoided if the suppliers include entire product lines and thus avoid fine distinctions between products. As to the second query, the Commission stated that it would not be safe to exclude any retailer who was in fact a customer of one or more of the manufacturers during the course of this promotion.

The Commission pointed out that if there are some grocery outlets which are too small to use the entire kit—or that part of it which represents all the manufacturers with whom they do business—because of actual space limitations, then some alternative must be provided to keep the plan from being one which is tailored primarily for large retailers. If the plan results in any of the manufacturers furnishing facilities to some customers which are not readily usable by others, the suppliers are likely to find themselves in violation of the law. By furnishing an alternative method of participation to the smaller customers, such as posters and counter displays, this result can be avoided.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 53

Statute Involved: Section 2(d) and Tripartite promotional assistance,
2(e), amended Clayton Act. self-locating shopping guide pro-
gram.
Released: June 2, 1966.

The Federal Trade Commission has advised a sales promotion company that its proposed plan, to furnish self-locating shopping guides to wholesalers for redistribution to their competing retail customers, would not be objectionable provided that smaller retailers are able to obtain proportionally equal treatment.

The Commission noted that some of the aspects of the plan are of interest only to relatively large retailers, and that it appears likely that some, at least, of a participating wholesaler's competing customers may be quite small retailers for whom the proposed plan would have little practical value.

The Commission advised that the "statute requires that any services or facilities made available to the larger of two competing customers must be made proportionally available to the smaller."

Assuming the existence of small competing customers, the Commission said, "it appears clear that if [the] plan is to conform to statutory requirements some provisions should be included therein which would provide for the needs of the smaller customers."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 54

Statute Involved: Section 2(d), Promotional assistance offered quar-
amended Clayton Act. terly by printed notice on maga-
Released: June 11, 1966. zine cover.

The Federal Trade Commission recently rendered to the publisher of a magazine a favorable advisory opinion regarding his promotional assistance plan providing basically for payments of 99¢ per issue, per newsstand and alternatively, at the newsstand operator's option, payment at a rate of 1/2¢ per copy sold, per issue. Payments would be subject to a \$75 maximum per issue to any single newsstand operator. Payments would be made quarterly provided the operator had reported daily sales and permanently displayed the magazine in a high traffic location full cover exposed within easy reach of customers. The plan would be offered each calendar quarter by a notice on the magazine's cover with details printed on an inside page.

Plans such as this come within the purview of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his reselling customer unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance Plans in considerable detail and will be of assistance to persons contemplating their use. Copies of the Guides are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580.

Advisory Opinion Digest No. 55

Statute Involved: Section 5, Federal
Trade Commission Act.
Released: June 11, 1966.

Dissemination of uniform warranty
plans by trade association to its
members.

In an advisory opinion announced today the Federal Trade Commission informed a trade association of manufacturers that its dissemination to members of a bulletin outlining two warranty plans and encouraging each member to adopt its own individual warranty would not be violative of any laws administered by the Commission, provided the association uses no coercion for the adoption of either plan.

Advisory Opinion Digest No. 56

Statute Involved: Section 2(d) and
2(e), amended Clayton Act.
Released: June 16, 1966.

Tripartite promotional assistance,
legality of plan to display signs at
newsstands calling attention to
advertisements in magazines.

An advisory opinion made public today by the Federal Trade Commission informed an advertising company that its plan for display on newsstands of signs relating to specific magazine advertisements will not subject the company itself or participants to adverse action by the Commission, if the plan is carried out as outlined below.

It is proposed that the requesting company will arrange for the display of advertising promotional signs directly below or adjacent to copies of magazines on newsstands in high traffic areas, which will remain on the newsstand for the same period of time as the magazine. This sign will direct attention to an advertisement which appears in the magazine in question. The cost of the signs will be borne by the manufacturer or seller of the product advertised, who will also assume the cost of rental payments to the operators of the newsstands for the display of the signs. All payments are to be made through the requesting company, which will act as an intermediary between the advertisers and the newsstands. All signs will be of a uniform three and one-half inches in height and of the same width as the magazine involved.

It is understood, the Commission advised the requesting party, "that there

will be no business relationship, direct or indirect, between you and the magazines involved, other than may be necessary to secure permission to refer to the magazines in your signs; it is further understood that you in no way participate in any price concessions, direct or indirect, made to your advertisers by the magazines as a result of your program."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 57

Statute Involved: Section 5, Federal Trade Commission Act; Sections 2(a) and 2(e), amended Clayton Act.

Tripartite promotional assistance plan involving lottery merchandising and discriminatory pricing disapproved.

Released: June 16, 1966.

An advertising company has been informed by the Federal Trade Commission that implementation of its proposed sales promotion plan would result in several law violations.

The requesting party explained it would sell paper bags to retail grocery outlets for use in bagging customer's purchases. There would be no variation in price between customers purchasing the same quantity; however, purchases of different quantities would result in different prices. The bags would have advertising of products sold in the store, plus a serial number, printed on them. A drawing would be held periodically and the holder of the "lucky number" would win a prize. Advertiser-suppliers would pay the requesting company for the advertising and it would make the bags available to any grocery operator wishing to purchase them. Grocery store operators would provide the bags free to customers.

In its advisory opinion the Commission raised the following objections to the plan:

The fact is that competing purchasers of different quantities of the bags would be paying varying prices apparently arrived at on the sole basis of the quantity purchased rather than on differences in the cost of manufacture, sale or delivery of the bags. Unless the differences were cost or otherwise justified it is likely that implementation of the plan would be violative of Section 2(a) of the amended Clayton Act.

Advertiser-suppliers would be furnishing a service or facility within the meaning of Section 2(e) of the same statute to those of their customers purchasing bags from the requesting party, and thus would be under an obligation to provide customers which compete with those buying the bags with a realistically available alternative. "The feasibility of participating advertiser-suppliers fulfilling this requirement is believed remote."

The "lucky number" feature of the plan would constitute a lottery, since consideration (the customer's patronage), chance (the periodic drawing) and prize (the reward to the "lucky number" holder), make up all the essential elements of a lottery; hence an unfair trade practice violating Section 5 of the FTC Act.

Advisory Opinion Digest No. 58

Statute Involved: Section 5, Federal Trade Commission Act. Foreign origin labeling of toy balloons on display card.
Released: June 17, 1966.

The Commission was recently requested to furnish an advisory opinion concerning the labeling as to origin of toy balloons mounted on display cards. The balloons were to be imported from England mounted on 8"x16" display cards, with either 36 or 72 balloons to a card, which will sell for 5¢ or 10¢ per balloon. The card is to be clearly marked as "Made in England," but the individual balloons will not be so marked.

The Commission advised that if the display card is clearly marked "Made in England," no real purpose would be served by requiring each individual balloon to be similarly marked so long as the balloons are not removed from the card prior to sale.

Advisory Opinion Digest No. 59

Statute Involved: Section 5, Federal Trade Commission Act. Private group advertising review board disapproved.
Released: June 17, 1966.

The Federal Trade Commission today announced an advisory opinion disapproving a proposed private group advertising review board to control advertising practices in a particular locality.

The requesting party stated that the review board is to consist of not more than 20 representatives of business and trade groups in the area, and its function is to consider complaints of violations of advertising standards established by the organization representing such business and trade groups.

Hearing on such complaints are proposed to be held by a panel of 7 or more members of the review board, none of whom shall be in direct competition with the advertiser. This procedure is to be invoked only after other efforts to correct the practice have been exhausted. Decisions on the merits of each case will be made by the panel and shall be considered as setting precedent for succeeding panels. Where an advertiser has been cited by a panel for violating the standards and fails to comply within a specified time, a letter is to be sent to local media requesting them to require the advertiser to comply with the decisions of the panel.

Although expressing sympathy with the laudable motives of the requesting party, the Commission advised that "approval cannot be given the proposed Advertising Review Board in its present form. Long ago the courts recognized that voluntary action to end abuses and to foster fair competitive opportunities were in the public interest and could be even more effective than legal processes. However, the law has also long recognized that this right of businessmen to police themselves is not without limitations and is certainly not a license for private groups to employ illegal methods in the pursuit of desirable objectives."

The Commission pointed out that "absolute regulation of all advertising practices down to and including the determination of individual rights and the imposition of a penalty in the form of interference with the individual's right to advertise * * * is the ultimate authority which can only be exercised pursuant to legislative grant and subject to proper judicial review.

"Were a private group to assert this power for itself it would mean that the judicial process of interpretation and enforcement would be carried on without the carefully developed safeguards which the law normally imposes upon the process. Unlike the government agency and the courts, the only restrictions private bodies are subject to are those restrictions they see fit to impose upon themselves."

Advisory Opinion Digest No. 60

Statute Involved: Section 5, Federal Trade Commission Act.	Advertising of diamonds as "clear, pure color".
Released: June 18, 1966.	

The Federal Trade Commission has advised a jewelry firm proposing to advertise diamonds as "clear, pure color" that a substantial segment of the purchasing public would understand the claim to mean a top grade white (or colorless) diamond, and that it should not be used to describe a diamond which shows any color when viewed under normal, north daylight or its equivalent.

Advisory Opinion Digest No. 61

Statute Involved: Section 5, Federal Trade Commission Act.	Improper use of terms such as "Gold Filled" or "Rolled Gold Plate".
Released: June 18, 1966.	

The Federal Trade Commission has informed a marketer of jewelry that it would be improper to use terms such as "gold filled" or "rolled gold plate" in describing gold filled jewelry articles which are electroplated with nickel and finished with either gold flash or gold electroplate.

The Commission said that a purchaser of such an article would not get the

type of performance expected from gold filled articles because points of wear would expose the coating of white nickel at a very early stage and the ornamental value would be seriously reduced.

"Being electroplated with nickel," the Commission said, the "gold filled material would not serve its function and a person buying the article on that basis would not get what he had been led to believe he was getting. In fact, Rule 22(b) (4) of the Trade Practice Rules for the Jewelry Industry specifically contemplates that the *surface* coating, not the inner portion, be made of 'gold filled' or 'rolled gold plate'."

Advisory Opinion Digest No. 62

Statute Involved: Section 5,
Federal Trade Commission Act;
Sections 2(d) and 2(e),
amended Clayton Act.

Tripartite promotional assistance,
suppliers and grocery chain exhibi-
tion with leased display space
and in-store promotions.

Released: June 21, 1966.

The landlord of an exhibition building has been advised by the Federal Trade Commission that a proposed promotional plan in which suppliers and a grocery chain would lease exhibition display space with the chain also providing in-store promotion of suppliers' displayed products would probably result in violation of Commission administered statutes.

According to the proposed plan, part of the exhibit in the building would be displays provided and maintained by manufacturers, processors and distributors of food products and grocery store items. These exhibitors, the suppliers, may give away samples, take orders for "off premise" delivery and sell at retail. The grocery chain's contract with the landlord would provide that the chain would conduct one-week, chain-wide, in-store promotions of the exhibitors' products; that exhibitors may be required to furnish the chain with materials for the promotion; that the landlord and the chain would cooperate in setting up the exhibitors' displays; and that the chain would have the right to approve only exhibitors whose products are sold in its stores.

The Commission advised the landlord that implementation of the plan probably would result in violation of Sections 2 (d) and (e) of the Robinson-Patman Amendment to the Clayton Act and Section 5 of the FTC Act unless promotional payments or services were made available to the exhibitor-suppliers' competing customers on proportionally equal terms.

The 2 (d) and (e) aspects, the Commission said, stem from the fact that exhibitor-suppliers would be vulnerable to a charge that they were illegally discriminating between their customers in according promotional benefits. The Section 5 aspects involve questions as to whether the chain and the landlord would be inducing a violation of Section 2(d) by participating exhibitor-suppliers.

Advisory Opinion Digest No. 63

Statute Involved: Section 5,
Federal Trade Commission Act.

Disclosure of terms and conditions
in guarantee advertising.

Released: June 22, 1966.

A television station has been advised by the Federal Trade Commission that it would be improper in commercials it produces for local automobile dealers to mention the manufacturer's guarantee but to refer viewers to the manufacturer's national advertising for a description of the guarantee's terms.

"In brief," the Commission's advisory opinion stated, "the law requires that when a guarantee is mentioned in the advertising of a product all the material terms and conditions of the guarantee must be clearly and conspicuously disclosed in the same advertisement. The objective is to avoid the possibility of a reader or hearer being misled by concluding, erroneously, that the guarantee is broader or affords more protection than is in fact the case, and, obviously, this objective is not attained by a mere reference in the advertisement to the fact that one may ascertain the terms and conditions of the guarantee by looking elsewhere.

"The Commission is aware of the fact that the advertising of automobile guarantees may present complications because of the numerous conditions which the guarantees contain. But this factor alone makes the disclosure all the more important in order to avoid deception of consumers."

Advisory Opinion Digest No. 64

Statute Involved: Section 5, Fed-
eral Trade Commission Act.

Pledge of adherence to FTC Trade
Practice Rules as a condition to
membership in trade association.

Released: June 22, 1966.

A trade association proposing to require applicants for membership to certify to it that they are following the Federal Trade Commission's Trade Practice Rules for the industry involved, as a condition of membership, has been advised by the Commission that this would not be illegal.

The association informed the FTC it is aware of the fact that it is not authorized to enforce the law, but that it feels those who do not observe the rules are not operating their businesses in a manner which is strictly in the public interest and therefore should not be eligible for membership. It stated that it contemplates no enforcement program beyond requiring the pledge and referral of appropriate cases to the Commission.

"On the basis of the information you have presented," the FTC's advisory opinion said, "the Commission has concluded that the inclusion of this pledge

on the application for membership would not, in and of itself, appear to violate any of the laws administered by the Commission. This, of course, assumes that the pledge will be required of all applicants alike."

Advisory Opinion Digest No. 65

Statute Involved: Section 2(d) and	Tripartite promotional assistance
2(e), amended Clayton Act.	plan to broadcast in-store music
Released: June 25, 1966.	and supplier commercials in re-
	tail stores conditionally approved.

In an advisory opinion announced today, the Federal Trade Commission has given conditional approval to the proposal of a promotional concern to arrange for the broadcast of suppliers' commercials in retail stores.

The concern presently provides—for a monthly charge—retailers with a tape player unit, necessary speakers and tapes for retailer controlled in-store background music.

The concern proposes to add on the tapes commercial messages of various manufacturers who supply products sold by retailers. The commercials will play at timed intervals. The concern will solicit various manufacturers for the commercials on a contract basis, record the messages, retain all money paid by suppliers for the service, and offer the background music-commercial tapes and equipment free of charge to all retailers on a nondiscriminatory basis in particular classifications of retailers in each geographic area in which the promoter markets his service.

The Commission said the issue here "is whether this particular program is likely to result in the discriminatory furnishing of services or facilities by the manufacturers who might participate. The answer is wholly dependent upon the manner in which it is administered."

The Commission pointed out that the proposal as submitted would not be subject to objection if (1) all customers entitled to participate are notified of the program's availability, (2) the selection of trade areas and the definition of the same, in fact, include all customers competing in the distribution of the products of all participating manufacturers, and (3) the classification of retailers chosen to participate, such as food stores, does not exclude any retailers in another classification who in fact compete in the distribution of the products of the participating manufacturers.

"Simply stated," the Commission said, "the law in this area requires a seller to treat his customers with fairness, whether in respect to the prices he charges, the allowances he pays, or the services he furnishes. This objective cannot be achieved by resort to mechanical formulas, but only by constant attention to the prevailing facts in any given situation. What may look fair on the drawing board may be found unfair in the market and, if so, the

market must prevail. With the reservations above as to actual market conditions, it is the Commission's opinion that this proposal is not otherwise subject to objection."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 66

Statute Involved: Section 2(d), Magazine publisher's promotional
amended Clayton Act. allowance program approved.
Released: June 25, 1966.

In an advisory opinion announced today, the Federal Commission approved a promotional allowance program proposed by the publisher of a magazine.

The publisher intends to grant newsstand operators an allowance of ten cents per copy sold upon their certification that the magazine in question was displayed flat on a magazine stand or full cover vertical in a rack at each checkout position. The publisher will communicate this offer to magazine retailers by printing the display offer on an inner page of the magazine with an appropriate and conspicuous notice "slug" on the outside cover alerting the retailer to the availability of the plan, details of which may be found on a page specified.

"Since it appears," the Commission advised, "that all newsstand operators handling your publication would be alerted to the availability of the display allowance by reason of the conspicuousness of the 'slug,' it is our opinion that your promotional program, so long as it is implemented as described, complies with the requirements of Section 2(d), amended Clayton Act, and newsstand operators receiving payments thereunder would not be liable to a charge of violating the law. In reaching this conclusion the Commission has assumed that the promotional allowance offer will be repeated in like manner from time to time so that its availability will be made known to newsstand operators who begin selling your magazine subsequent to the date of the initial offer."

Advisory Opinion Digest No. 67

Statute Involved: Section 2(a), Functional discount to "premium"
amended Clayton Act. book jobbers.
Released: June 28, 1966.

The Federal Trade Commission today announced that it has advised a publisher of soft cover books that its proposed plan—if implemented as outlined—to grant an extra discount to "premium jobbers" would not violate the law.

The publisher distributes its books through retailers, wholesalers and book jobbers and grants identical discounts to the latter two who are in competition with each other.

According to the plan as submitted to the Commission, the publisher proposes to grant an extra discount to all premium jobbers who sell books to institutional customers (savings banks, insurance companies, industrial corporations, etc.) for use as promotion pieces, premiums or prizes on a giveaway basis. To the extent that any premium jobber also sells to the regular trade in competition with other wholesalers and retailers, the publisher will either refuse to fill orders or grant only a normal wholesale discount.

The proposed extra discount, the Commission advised, "is obviously functional in nature" and while the Clayton Act, as amended by the Robinson-Patman Act, "does not mention functional pricing the Commission has held that a seller is not forbidden to sell at different prices to buyers in different functional classes provided that injury as contemplated in the law does not result. . . . Applying the law to the facts presented by this request, it would appear that the granting of the extra discount to the premium jobbers would not result in a violation of law if the facts are exactly as represented . . . and if the proposal is implemented precisely as outlined."

The "discount must be granted only for those sales made to the institutional customers described who use the books as giveaways and not for resale" and the "discount must be made available" to all customers of the publisher who in fact compete with each other in the resale of the publisher's books to institutional accounts, the Commission continued.

It cautioned, however, that if the publisher should classify "certain distributors or wholesalers as premium jobbers and permits no one else to sell to the institutional customers, which could be accomplished by granting the extra discount only to those so classified, a serious question could be raised if the so-called premium jobbers also sell to regular retailers in competition with other wholesalers."

Advisory Opinion Digest No. 68

Statute Involved: Section 5, Federal Trade Commission Act.
Released: June 28, 1966.

Clearance given for use of pseudonym for doctor's real name on radio programs.

The Federal Trade Commission has issued an advisory opinion that it would not object to the use of a pseudonym in lieu of the doctor's real name on radio programs under the following circumstances.

The requesting party proposes to produce two radio feature programs offering medical advice to be written and supervised by licensed physicians whose ethics prohibit the use of their real names. Both programs will be

sponsored commercially but the commercials will be separated distinctly and clearly from the medical advice being given, and there will be no endorsement, express or implied, of the product by the doctor.

Advisory Opinion Digest No. 69

Statute Involved: Section 5, Federal Trade Commission Act.

Released: July 6, 1966.

Foreign origin disclosure of imported razor blade dispensers.

The Commission recently rendered an advisory opinion advising an American manufacturer of razor blades that it would not be necessary to disclose the country of origin of imported plastic razor blade dispensers and end clips into which were packed domestically manufactured blades, nor was there any objection to labeling the completed package as made in this country. The Commission was of the view that such a description would be taken as applying to the blades and that the purchaser would have no real concern with the origin of the dispenser which is designed to be thrown away after the blades are used.

The facts were that after the dispenser cases and end clips were received in this country, a spring and the blades would be inserted, a pusher slide added and the end clip put in place. The spring, slide or pusher and the blades would be manufactured in the United States.

Advisory Opinion Digest No. 70

Statute Involved: Section 5, Federal Trade Commission Act.

Released: July 6, 1966.

"Free" or bargain offers based upon purchase of other merchandise.

The Commission announced today it had rendered an advisory opinion disapproving a retailer's proposal to offer a free sewing machine with the purchase of a cabinet.

Under the terms of the proposed plan, the retailer intends to place one sewing machine on display in various locations, such as bowling alleys, supermarkets, shopping centers, etc. A nearby sign will invite one to fill out a registration card and deposit same in a box. Each month one name will be drawn from the box in each location where the machine is on display and the winner will receive a free sewing machine with cabinet. In addition, 50 names will be drawn from each box and these persons will be sent a letter informing them they can obtain a free sewing machine head simply by purchasing the cabinet. According to the letter to be sent to the 50 winners, the cabinets range in price "from \$39.95."

In its opinion, the Commission concluded as follows:

“ . . . that part of your plan which provides for prospective customers to win a free sewing machine with cabinet is unobjectionable. However, the Commission is of the opinion that that part of the proposed plan which offers to 50 persons a ‘free’ sewing machine head for the price of the cabinet involves the sale of merchandise by means of a lottery or by means of a chance or gaming device and therefore would be illegal as an unfair trade practice under Section 5 of the Federal Trade Commission Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form.”

Commenting upon other features of the proposed plan, the Commission said:

“When a seller offers to supply one article ‘free’ or ‘at no extra cost’ in conjunction with purchase of another article, he is thereby representing to prospective customers that the article which is to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. Accordingly, if you should eliminate that aspect of your proposed plan appealing to the public’s gambling instinct, then the price of the cabinets which the consumer is to purchase in order to obtain a ‘free’ sewing-machine head must meet this standard.”

“Finally,” the Commission’s opinion concluded, “there must be a bona fide effort to sell the merchandise offered and a plan of this nature may not be used simply as a means to obtain leads which will be used to sell more expensive cabinets and/or sewing machines.”

Commissioner Elman, dissenting: The Commission holds that “that part of [the] plan which provides for prospective customers to win a free sewing machine with cabinet is unobjectionable.” This holding—in which I concur—seems to me to be inconsistent with the Commission’s other holding that “that part of the proposed plan which offers to 50 persons a ‘free’ sewing machine head for the price of the cabinet involves the sale of merchandise by means of a lottery or by means of a chance of gaming device and therefore would be illegal as an unfair trade practice under Section 5 of the Federal Trade Commission Act.” There is no essential difference between the first-prize part of the plan, which gives prospective customers the opportunity to win a free sewing machine and cabinet, and the second-prize part, which gives prospective customers the opportunity to win a free sewing machine if they buy a cabinet. The only difference I can see is in the value of the prize.

A lottery embraces three elements: chance, prize, and consideration. *F.T.C. v. R. F. Keppel & Bro.*, 291 U.S. 304; *J. C. Martin Corp. v. F.T.C.*, 242 F.2d 530 (7th Cir. 1957). If one of these is absent, it is not a lottery. The plan here does not contain the element of consideration. Anyone may enter and become eligible for the drawing by merely filling out a registration card. No payment or purchase is necessary.

The requirement that the 50 second-prize winners must purchase a cabinet in order to obtain a free sewing machine does not make this plan a lottery. The Supreme Court has defined a lottery as "a device whereby the amount of the return . . . [the entrants] receive from the expenditure of money is made to depend upon chance." *F.T.C. v. R. F. Keppel & Bro., supra* at 313. In the plan here the second prize is simply the opportunity to buy a sewing machine and cabinet for the price of the cabinet alone. A winner is not obligated to buy the cabinet. If he chooses to buy the cabinet, at the time he pays for it there is no longer any element of chance or the receipt of a prize which depends on chance. He knows exactly what he will get for his money, viz., a cabinet plus a free sewing machine; his expenditure of money is for making a purchase, and not for receiving a prize depending on chance.

Advisory Opinion Digest No. 71

Statute Involved: Section 5, Federal Trade Commission Act.
Released: July 20, 1966.

Products composed of ground leather may not be described as "leather" without proper qualification.

In an advisory opinion recently issued by the Commission, it said that a rubber. In its opinion the Commission said, "the use of the word 'leather,' without proper qualification.

The product in question involved a manicure case, the outer portion of which was composed of 85%–90% ground leather combined with latex rubber. In its opinion the Commission said, "the use of the word 'leather,' without qualification, means top grain leather." "Since the manicure case is composed of ground leather," the Commission added, "it would be improper to describe it as leather without proper qualification." The Commission opinion then pointed out several ways in which this could be done, such as:

"Ground leather" (or "shredded leather" or "pulverized leather")
"Composed of ground leather"
"Contains ground leather"

The Commission's opinion further pointed out that, if the requesting party decided not to disclose the ground leather composition of the case, it would be necessary to disclose that the outer portion is not leather by such language as:

"Not leather"
"Imitation leather"
"Simulated leather"

"This reason for this," the Commission added, "is that the outer portion of the case has the appearance of leather and in order to remove the potential deception inherent in its appearance, it is necessary to disclose the fact the material is not leather."

Advisory Opinion Digest No. 72

Statute Involved: Section 5, Federal Trade Commission Act. Franchise agreement with fair trade price schedule attached.

Released: July 20, 1966.

Revoked: August 2, 1967.

A distributor of electronic equipment requested the Commission to render an advisory opinion with respect to the legality of proposed franchise agreement with its dealers. A Schedule of Fair Trade Prices was to be attached to and made a part of the agreement and the dealer must agree that he will not advertise, offer for sale or sell any products at less than the fair trade prices, nor make any refunds, discounts, allowances or concessions which will have the effect of decreasing those prices, nor offer any of the fair traded items in combination with other merchandise at a single, combination or joint price. The agreement further provided that this provision should be applicable only in those states where agreements of this character are lawful.

The Commission advised that in view of the McGuire Act amendment to Section 5 of the Federal Trade Commission Act it could see no objection to inclusion of the provision in the agreement. However, the Commission added, the responsibility rests squarely upon the seller exacting such agreements from his dealers to see that they are not given effect outside those areas where permitted by state law, for them no exemption would exist to protect the agreements from established antitrust rules applying to resale price maintenance.

Even though the contract provides that this provision shall be applicable only in those states where such agreements are lawful, it would appear that to some extent the burden is placed upon the dealer to ascertain whether or not the agreement is lawful in his own state before he can know whether or not he is obligated to honor it. If this has the effect of creating a situation whereby the Schedule is generally adhered to in states where fair trade is not legal, the presence of the provision in the franchise agreement could raise a serious inference of an unlawful resale price maintenance program in those states.

The Commission further advised that such pitfalls can be avoided in the franchise agreements with dealers in non-fair trade states by specifically eliminating therefrom provisions relating to the maintenance of fair trade prices. If the distributor desires to circulate price schedules to dealers in

non-fair trade states, it would be more appropriate to circulate them under the heading "Suggested Prices" rather than "Fair Trade Prices." In the alternative, the danger of involving dealers in illegal resale price maintenance could be avoided by expressly noting on the franchise agreement those states wherein the provisions relating to maintenance of fair trade prices cannot be given effect.

Additionally, the Commission noted the provision that the distributor will establish, with the aid of the latest marketing information, a reasonable yearly sale volume objective of \$----- and this volume will be a consideration in yearly franchise renewal. The Commission advised that it could see no objection to the establishment of such quotas so long as they are reasonable. However, the distributor was advised that much of the legality of any franchise system depends upon the manner in which the agreements are implemented and enforced, for if apparently reasonable reservations of rights by the distributor are in practice administered in an unreasonable manner, so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect.

NOTE.—The Commission revoked the Advisory Opinion reported in this digest as of August 2, 1967. This action was based upon the belief that the Opinion was being abused by the party to whom it was issued, not because of any concern over accuracy of the advice contained therein.

Advisory Opinion Digest No. 73

Statute Involved: Section 5, Federal
Trade Commission Act.

Rejection of description "Golden"
for non-gold thimble.

Released: July 22, 1966.

The Federal Trade Commission has rendered an advisory opinion objecting to both the description "golden" for a non-gold thimble, and the accompanying explanatory phrase "electroplated with real gold."

"Since the thimble in question is not composed throughout of 24 karat gold, unqualified use of the word 'golden' would be improper," the FTC's advisory opinion stated.

Further advising that "the phrase, 'electroplated with real gold,' would constitute neither adequate qualification of the word 'golden,' nor a proper representation standing alone," the Commission pointed out that the gold flashing on the thimbles is between three and seven millionths of an inch thick and that "a coating of gold of less than 7/1,000,000 of an inch in thickness is too thin and insubstantial to warrant the description 'gold electroplate.'"

Advisory Opinion Digest No. 74

Statute Involved: Section 2(d) and
2(e), amended Clayton Act.
Released: July 22, 1966.

Tripartite promotional assistance
program involving background
music and reproducing equip-
ment.

The Federal Trade Commission has given conditional approval to a promotional concern's plan to provide a music service to supermarkets which would include "spot" advertisements paid for by their suppliers.

The requesting party would set up a background music network specializing in supermarkets. It would own the equipment and install same without charge to the store operator. About every 2½ minutes a "spot" advertisement paid for by advertiser-suppliers to the store would be made over the network, for each of which, each participating store outlet would receive a small commission.

In addition, the requesting party will offer an in-store promotion service to advertiser-suppliers so that they may provide proportionally equal treatment for nonparticipating stores, who will receive either in-store advertising materials or cash payments based on a designated formula.

Most of the advertisements would feature products sold in the stores. In some stores, announcements regarding house brands could be made by means of separate circuits. Advertisers would pay for the service on a per spot-per store basis. The contracts between the parties are to contain a clause to the effect that suppliers agree not to discriminate between participating and nonparticipating customers.

In the advisory opinion the Commission said that "implementation of the plan probably would not result in violation of Commission administered statutes. This approval is being given conditionally and is contingent on the plan when in operation actually providing on a realistic basis for promotional assistance to all competitors entitled to it under Sections 2 (d) and (e) of the Robinson-Patman Amendment to the Clayton Act."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 75

Statute Involved: Section 2(d)
amended Clayton Act.
Released: July 27, 1966.

Publisher's display allowance plan
given conditional approval.

A magazine publisher has received conditional approval from the Federal Trade Commission of its promotional assistance program proposed for the New York City area.

The Commission said its understanding is that the program would operate substantially as follows:

Each competing retail magazine seller in or out of the area would be notified of the program by first class mail by the publisher and afforded the opportunity to choose either of two plans for each publication of the publisher he sells.

Under Plan 1, the dealer would be given a rebate of 10% of the cover price for each copy of a magazine sold, provided he maintained two displays (full cover exposed, flat stack or vertical display) of the publication through its "on sale" period in (1) the maximum traffic area of his newsstand and (2) on the main or auxiliary racks. Under Plan 2, the dealer would be given a rebate of 5% on the same basis as under Plan 1 for maintaining one display in the maximum traffic area. "Maximum traffic area" means: where the retailer sells most of his magazines—where the largest display of magazines is located.

In the event of a sell-out of an issue, the dealer would agree to re-order immediately. Both the publisher and its distributor would spot check on dealer compliance. A dealer would submit quarterly reports together with statements of performance to the publisher to claim his rebate.

The Commission's advice was that "implementation of the Program as described probably would not result in violation of laws administered by the Commission provided (1) the program is offered to eligible new entrants into magazine retailing when they receive their initial shipment of magazines and (2) the notice to dealers is changed to include a definition of 'maximum traffic area' conforming to the meaning set forth above."

Advisory Opinion Digest No. 76

Statute Involved: Textile Fiber	Foreign origin labeling of imported
Products Identification Act.	textile and non-textile fiber prod-
Released: July 27, 1966.	ucts repackaged and commingled.

The Federal Trade Commission today announced that it had recently rendered an advisory opinion dealing with disclosure of foreign origin of imported novelty items which will be repackaged in various combination sets in this country.

The items, both textile fiber and non-textile fiber products, which are labeled as to specific country of origin at the time of their importation, will be repackaged in sets in such a manner that the labels will not be visible to prospective purchasers.

As to sets composed entirely of imported non-textile fiber products, the Commission said "that a proceeding by it to require disclosure of origin on the package would not appear to be warranted, in the absence of any showing of material deception."

However, as to any combination set containing only imported textile fiber products, the Commission said the specific country of origin of these products must be disclosed in such a manner that it would be observed upon casual inspection by prospective purchasers before, not after, the purchase. The necessity of this disclosure is based upon the requirements of the Textile Fiber Products identification Act and the rules issued thereunder. The disclosure, the Commission said, "does not necessarily have to be on the outside of the package; it could be inside the package, provided it would be clearly visible through the cellophane cover. The point is that the disclosure must be in some position on the package where it would be observed prior to the purchase, not afterward."

If imported textile fiber products are packaged in the same combination set with imported non-textile fiber products, the Commission advised that "it would also be necessary to disclose the foreign origin of the non-textile fiber components. Otherwise, prospective purchasers are likely to be misled into the mistaken belief, through the affirmative disclosure of the foreign origin of the textile fiber products, that the non-textile fiber products packaged therewith are of domestic origin."

Advisory Opinion Digest No. 77

<p>Statute Involved: Section 2(d) and 2(e), amended Clayton Act. Released: August 2, 1966.</p>	<p>Tripartite promotional assistance programs—Recipe racks and a jigsaw puzzle with trading stamps as prize involved.</p>
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In advisory opinions announced today by the Federal Trade Commission, two promotional assistance programs devised by third parties for grocery retailers and suppliers have been approved if the proposed plans are implemented as represented.

Under the one plan, an independent promoter would supply food retailers with racks in which to display recipe cards and uniformly pay the retailer for providing space for each rack used. Manufacturer-suppliers (1) would furnish participating customers with cards—containing recipes calling for the use of the manufacturer's product and a picture of the finished recipe item or of the manufacturer's product—on a proportionally equal basis related to the retailer's volume of sales of the product, (2) pay the promoter for the cards at a per-card-supplied rate, and (3) offer the plan to each customer by means necessary to insure complete notification of the plan to all competing customers. After each initial distribution, retailers would receive as many additional cards as requested up to 1,000 per month per product.

The other plan, proposed by a separate promoter, would utilize a variation of the "jigsaw puzzle." Each time a shopper would pass the check-out

stand (no purchase would be required) of a participating grocery retailer, she would receive a card from which four assorted pieces of a reproduction of a label could be removed. Upon collecting pieces necessary to form a complete facsimile of either a private or name brand label, she would be awarded a prize of trading stamps, cash or merchandise. In each eight-week period the plan would be in operation, eight different products will be involved, six of which will be name brands of participating suppliers and two private labels selected by participating retailers. If the retailer does not have private labels to enter in the program, his cost will be reduced on a pro-rata basis or he may select eight name brand products and pay the regular price which will be the same to each retailer or supplier per product per 1,000 cards (the cost of the program will be defrayed out of this charge). Each retailer will receive the same in-store displays and advertising material and each supplier will have his product pictured on each give-away card. Necessary notification of the proposed plan will be given, and all competing retailers will be afforded the opportunity to participate.

The Commission pointed out to the promoters that "it remains the supplier's responsibility to assure that in fact the retailers who compete with one another are dealt with on proportionally equal terms." If the plans are implemented in such a manner, they "would appear to satisfy the supplier's obligation of proportionally equal treatment and the suppliers participating . . . would not thereby violate any Commission administered laws."

In reaching this conclusion, the Commission advised that it had relied particularly upon the below-described three representations by the promoters as to the manner in which the plans will be implemented.

In each of the two promotions, the requesting party informed the Commission that:

(1) All competing retailers would be notified of their right to participate in the plan; and

(2) The plan would be made available to all competing retailers and offered to those located on the periphery of a given marketing area who compete with the participating retailers.

The third representation relied upon by the Commission in the respective matters was that:

(Puzzle promotion) A reduction in cost or alternative choice of either name brand products would be provided participating retailers unable to enter two brand labels in the plan.

(Recipe card promotion) Small retailers who, for space or other reasons, cannot utilize the larger racks but wish recipe cards featuring one or two profitable items, will be provided with a "snap-on" shelf rack for this purpose.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 78

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: August 2, 1966.

Disapproval of merchandising plan
involving lottery.

A retailer has been advised by the Federal Trade Commission that its proposed weekly drawings for portable radio-phonographs would be an unlawful lottery.

Participants would be required to pay two dollars a week for twenty weeks. The winner each week will be awarded a radio and will not be required to make any further payments. The participants who do not win will each receive a radio-phonograph at the end of the twenty weeks for which they would have then paid forty dollars. The retailer advised that it regularly sells these instruments for forty dollars.

This proposal, the FTC's advisory opinion stated, "would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under laws administered by this agency. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable."

Advisory Opinion Digest No. 79

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: August 6, 1966.

Rejection of deceptive firm name
for skip-tracing operation.

The Federal Trade Commission has rejected a proposal by a debt collection concern to send out skip-tracing material under a firm name such as Missing Heirs, Inc., requesting delinquent debtors to contact the company on a matter of importance and furnish information concerning jobs, addresses, etc.

Advising that "this proposal would be clearly illegal under previous Commission and court decisions dealing with skip-tracing practices," the Commission pointed out that its first "case involving a skip-tracing device was decided in 1943 and dealt with an identical subterfuge to that here proposed, that is the attempt to deceive debtors into believing they were being contacted in connection with the settlement of estates. No matter what the device employed, and there have been many down through the years, the law has set its stamp against this type of deception."

Consequently, the advisory opinion continued, the FTC "cannot approve the use of any representations or trade names which would have the effect of deceiving others as to the true nature of your activity or which fail to reveal that the purpose for which the representations are made or the information requested is that of obtaining information concerning delinquent debtors."

Advisory Opinion Digest No. 80

Statute Involved: Section 5, Federal
Trade Commission Act.
Released: August 6, 1966.

By-law prohibiting certain advertising claims by members of trade association.

The Federal Trade Commission has informed a trade association that it cannot give its approval to a proposed amendment to the association's by-laws which prohibit a member from advertising that its service is faster and better in other towns than that of members who actually are in business in these towns.

The Commission said in its advisory opinion that "the adoption of this proposal would be highly questionable under the antitrust laws for the reason that advertising is an element or form of competition and any agreement among competitors to refrain from legitimate and truthful advertising restricts competition.

"If . . . [an industry member] wishing to compete in another city is denied the right to advertise that despite his geographical disadvantage he can furnish faster and better service than his local competitors, assuming the representation to be truthful, he is to that extent denied the right to compete effectively and local . . . [industry members] are thus insulted from outside competition.

"If competition in an industry is to survive, the members must be left free to exploit in a lawful manner such advantages as they actually possess. Consequently, the proposed amendment to the Association's by-laws cannot receive Commission approval."

Advisory Opinion Digest No. 81

Statute Involved: Section 5, Federal
Trade Commission Act.
Released: August 12, 1966.

Advertising a "10 day trial" satisfaction guarantee.

In an advisory opinion announced today the Federal Trade Commission gave qualified approval to the proposal by a marketer of a facial cream to advertise a "10 day trial" satisfaction guarantee.

Its approval, the Commission said, "is based upon the assumption that there are no material limitations or conditions whatsoever attached to the guarantee. If there are any such conditions or limitations, they must be disclosed."

Advisory Opinion Digest No. 82

Statute Involved: Section 5, Federal Trade Commission Act.	Disapproval of the marking "US Made" for items with substantial imported components.
Released: August 12, 1966.	

A Federal Trade Commission advisory opinion made public today disapproved the marking "US Made" for two electric devices, one consisting of an imported motor assembled with an American-made casing and cord, and the other of which both the motor and the cord are domestic.

The Commission stated that "it would be improper to label either of the finished products as 'US Made' because this would constitute an affirmative representation that the entire product was of domestic origin, when in fact a substantial part thereof was imported."

Advisory Opinion Digest No. 83

Statute Involved: Section 5, Federal Trade Commission Act.	Impropriety of labeling foreign-made machine with American-made parts added to it as "Made in U.S.A."
Released: August 19, 1966.	

The Federal Trade Commission has advised an American manufacturer that a machine made in a foreign country with certain American-made parts added to it by the domestic manufacturer may not be labeled "Made in U.S.A."

The Commission said that it would be "improper to label the machine in question as 'Made in U.S.A.' because this would constitute an affirmative representation that the entire machine was of domestic origin, when in fact a substantial part thereof was imported."

Advisory Opinion Digest No. 84

Statute Involved: Section 5, Federal Trade Commission Act.	Proper Labeling of rebuilt fuses.
Released: August 19, 1966.	

The Federal Trade Commission today made public an advisory opinion concerning the proper labeling of rebuilt fuses to be used by public utilities and commercial consumers of electricity.

The requesting company inquired as to whether it will be necessary to label a fuse "rebuilt" or "remanufactured" if it is broken down to its smallest components and all parts that are used are inspected to meet new parts standards.

Advising that the concern's "rebuilt fuses would have to be labeled as such," the Commission cited its frequent holding, "in connection with a variety of products, that in the absence of an adequate disclosure to the contrary, merchandise which resembles and has the appearance of merchandise composed of new materials but which is, in fact, composed of reclaimed materials, will be regarded by purchasers as being entirely new and that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials. This has been held to be so without regard to the comparative quality of the new and rebuilt products, for in such matters the public is entitled to get what it chooses no matter what dictated the choice."

Answering other questions posed by the company, the Commission stated:

All "advertising material promoting the sale of these fuses should also contain a disclosure of their used or rebuilt nature, [but] it is not necessary, once this disclosure is clearly and conspicuously made, to repeat the word over and over again even where technical instructions are being given. Technical instructions for the use of these fuses are not ordinarily part of the advertising designed to induce customers to buy and, if not, there would be no requirement for disclosure in the instructions as distinguished from advertising."

"Generally speaking, * * * the disclosure must be on the cartons, invoices and in advertising literature, as well as on the fuses themselves. However, the disclosure need not be placed on the fuses themselves if you can establish that the disclosure on the bags, boxes or other containers is such that the ultimate purchasers, at the point of sale, are informed that they are rebuilt fuses. The question of informing the ultimate purchasers here becomes important in the event any of your customers also resell the fuses to others under circumstances where those ultimate purchasers are not informed as to their rebuilt nature."

Advisory Opinion Digest No. 85

Statute Involved: Section 5, Federal Trade Commission Act.

Reference service for members of trade association.

Released: August 26, 1966.

A national trade association has been advised by the Federal Trade Commission that its proposed reference service for members concerning problems encountered by them would not be unlawful "so long as the program embraces only an interchange of information and experience among mem-

bers of the Association, and is not used as a device for a concerted boycott of particular sellers."

The Association stated the purpose of the program is to assist its members to communicate with each other so that there may be a greater availability of the knowledge and experience acquired by them on materials used in the industry. Especially of interest is the experience of members with materials that have been newly developed and the properties and suitability of which are not yet widely known. Under the reference service members would be invited to write the Association advising it of any special experience or knowledge they have had with materials, either favorable or unfavorable.

Advisory Opinion Digest No. 86

Statute Involved: Section 5, Federal Trade Commission Act. Merchandising plan involving a lottery rejected.
Released: August 26, 1966.

In an advisory opinion which it recently issued, the Federal Trade Commission informed a retailer that his proposed sales promotion is illegal because it involves the sale of merchandise by means of a lottery and therefore is an unfair method of competition and an unfair practice.

The retailer planned to list certain selected items with the local bank. After the customer makes his regular purchase at the retail store, he checks with the bank, and if that particular item is listed with the bank, the customer is entitled to keep the merchandise without charge. On the other hand, if the item is not listed at the bank, the purchaser must pay the regular price for it.

In reaching its conclusion that the plan was illegal, the Commission reasoned that "the mere fact that a purchaser receives a thing of value for his contribution does not negate the existence of a lottery."

Advisory Opinion Digest No. 87

Statute Involved: Section 5, Federal Trade Commission Act. Merchandising plan involving a lottery rejected.
Released: September 2, 1966.

The Commission issued an advisory opinion today in which it disapproved a silverware manufacturer's plan because it involved the sale of merchandise by means of a lottery.

Under the terms of the proposed plan, advertisements will be published inviting the reader to complete a contest entry form specifying his preference among certain flatware featured therein, together with his name and address. The reader will be invited to leave said form with the manufacturer's dealer,

or, in lieu of using the form featured in the advertisement, he can obtain the same form at his dealer or print the same information on a blank piece of paper and leave it with the dealer. At the conclusion of the contest, each dealer will draw the name of one contestant who will receive a free 4-piece place setting in the pattern specified on his entry form.

There is absolutely no requirement on the part of any participant or winner to purchase or promise to purchase any merchandise. However, the rules further provide that if the winner purchased other settings in his particular pattern during the period of the contest, the dealer will donate additional pieces in that pattern equivalent in retail to those purchased.

In its advisory opinion, the Commission took the position that "the portion of the plan which awards a 4-piece place setting to the winner is unobjectionable."

"However," the Commission added, "the matching provision on the part of the dealer creates the element of consideration on the part of participants and therefore constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to the provisions of Sec. 5 of the FTC Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form."

Advisory Opinion Digest No. 88

Statute Involved: Sections 2(d)	Tripartite promotional assistance
and 2(e), amended Clayton Act.	plan set up by radio station and
Released: September 14, 1966.	financed by participating retailers
	and their suppliers.

A radio station has been advised by the Federal Trade Commission that its proposed three-party promotional plan as originally presented would be unlawful because it would not be available to all competing customers in a practical business sense, but that subsequent revisions in the basic plan, coupled with the addition of an alternative plan, now bring the basic plan within the requirements of functional availability. However, the revised plan contains one defect which will be discussed later, and which will require correction before Commission approval can be given.

The proposal involves the furnishing of background music and in-store commercial announcements to retail establishments. The radio station would install, without cost, the necessary receiving equipment in each participating retail store. The products advertised will be limited primarily to grocery store items. Each store would pay a fixed amount for the background music, depending upon the number of speakers (one speaker for every 600 square feet of floor space). The value of the in-store message to the participating supplier will be measured and paid for on the basis of the total number of persons exposed to the in-store commercials at a fixed rate per thousand

estimated weekly transactions. As originally submitted, no alternative plan or plans would be offered.

In its first advisory opinion, the Commission said that the legality of the proposed plan raised the following two questions: (1) Did it meet the requirement of functional availability since there was no provision for an alternative plan or plans? (2) Did it provide for payments to all competing purchasers on proportionally equal terms if the method of payment for the in-store commercials is based upon the number of customers who are exposed to said commercials?

With respect to the first question, the Commission noted that a promotional plan must be within the reach of all competing customers of the supplier in a practical business sense, otherwise it does not comply with the requirement of functional availability. After having examined the plan, the Commission concluded it would not be available to all competing customers in a practical business sense for a variety of reasons.

"In the first place," the Commission said, "retail outlets such as drug and department stores which may carry some food products but which may also carry a variety of other products may find it impractical to participate in the plan, since due to the layout of these stores, the broadcasting of commercials limited primarily to food products, may interfere with their sales of other products. Second, retailers who already have existing contracts for background music from other sources would find it difficult, if not impossible, to operate under the proposed plan. Third, those food stores which do not carry all participating brands could not be expected to broadcast in-store commercials promoting the sale of products which they do not stock and which may be carried by their competitors. We have doubts that the alternate solution offered under the plan would resolve these difficulties. In the first place, an assumption of contracts of competitors by the radio station under the circumstances might raise other antitrust problems. Second, although the proposed plan provides that any store may discontinue the plan at the end of the first year without any obligation for outstanding charges if the credits earned for in-store commercials do not offset music and speaker charges, this provision would in no way eliminate possible discrimination against such stores during subsequent years."

The Commission was of the opinion that the foregoing examples "clearly demonstrate that the basic plan would not be available in a practical business sense to a substantial number of competing retailers and therefore would not meet the requirements of functional availability." Under these circumstances, and in the absence of an alternative plan or plans for those who cannot use the basic plan, the Commission concluded that the proposed plan, if enacted, would not be in conformity with the requirements of Sections 2(d) and (e) of the Robinson-Patman Act. It cited with approval the following portion of its announcement of September 21, 1965, setting forth certain guidelines for three-party promotional assistance plans:

“ . . . a reasonable alternative means of participation must be included in such plans for eligible customers who are unable to use the basic plan.”

Having concluded in its original opinion that the proposed plan does not meet the test of functional availability, the Commission did not find it necessary to discuss or reach a conclusion with respect to the second question presented by the request as to whether the method of payment for the in-store commercials, which is to be based upon the number of customers exposed to said commercials, meets the requirement of proportionality.

Shortly after the Commission issued its original opinion, counsel for the requesting party filed an amendment to the original plan. The amended plan made provision for an alternative plan for those who could not use the basic plan, and also made certain revisions in the basic plan.

Revisions of the basic plan provide for the installation of broadcast equipment in drug and department stores in such a manner that the in-store commercials will not interfere with the sale of other products. Retailers who presently subscribe to background music from other sources may have equipment installed by the requesting party, without cost, which would permit interruption of the music by spot announcements (alternative plan 1). Retailers who do not carry all products sponsored under the plan can have in-store announcements which merely urge customers to buy those products identified by the sponsor's marker, rather than promoting specific brands (alternative plan 2). A third alternative plan has also been proposed under which the facilities of retail stores will be provided with promotional and advertising service at the point-of-sale of the sponsor's products.

Under both the basic plan and the alternative plans, the value of the services performed by the retailers for the participating supplier will be measured and paid for on the basis of the total number of persons exposed to the in-store commercials and point-of-sale material at a fixed rate per thousand estimated weekly transactions.

After having reviewed the plans as now proposed, the Commission was of the opinion that the basic plan now meets the requirement of functional availability. The Commission was also of the opinion that under the circumstances of the intended use of this plan, the proposed method of payment for the in-store commercials and point-of-sale advertising, which is to be based upon the number of consumers exposed to said advertising, meets the requirement of proportionality under Sec. 2 (d) and (e) of the Robinson-Patman Act.

Insofar as using the number of consumers exposed to the commercials as the standard for measuring payments to retailers, the Commission felt that this method accords with the value of the service to the supplier and in the long run will probably correspond fairly closely to the amount of purchases of the supplier's product. One reason for this is that suppliers probably will

not join the plan or stay with it if they find they are making payments to stores without any corresponding increase in their volume of sales by those stores. Therefore, under these circumstances the Commission felt it was reasonable to permit proportionalization to be based on the estimated number of customers, particularly where, as in this case, the measure for estimating the number of customers is weighted in favor of the smaller stores.

The Commission, however, was of the opinion that the proposed plan must be rejected because the rate of payment under the alternative plans is one-half the amount paid under the basic plan and is therefore clearly not proportionally equal to the payments to be made under the basic plan. The Commission feels that such discriminatory payment provisions cannot be justified on the ground that the services rendered under the basic plan may be more valuable to the supplier. In a typical case under the basic plan, a store with 20 speakers would clear approximately \$65 per month over and above the amount it would pay for music charges, whereas an equivalent size store utilizing the alternative plan would clear approximately \$5. Thus, if a supplier were to furnish free music to one store and not to its competitor, it would be clear that Sec. 2(e) would be violated; the discrimination herein would be equally unlawful. The Commission felt, therefore, that this substantial disparity in payments must be eliminated before the plan can be approved. If this is done, the Commission would give its approval to the plan.

Advisory Opinion Digest No. 89

Statute Involved: Sections 2(d)
and 2(e), amended Clayton Act.
Released: September 14, 1966.

Tripartite promotional assistance
program involving recipes show-
ing products of participating sup-
pliers.

The Commission announced today it has approved, with qualification, the use of a tripartite recipe plan promoting the sale of food products.

Under the terms of the proposed plan, recipes will be supplied without charge to all food stores in a given marketing area for free distribution to the stores' customers. Each store which participates in the plan will have its name imprinted on the recipe card, together with the names of the participating food suppliers and their products. Availability of the plan will be publicized in a monthly trade magazine.

No money will be paid to retail stores which participate in the plan, and it will be supported solely on the basis of the sale of advertising to various food suppliers who will pay a certain fee per 1,000 recipe cards to the promoter of the plan. The promoter will in turn have the recipe cards printed and distributed to the participating retailers.

In its opinion the Commission said that Sec. 2(e) of the Robinson-Patman Act "requires a supplier to treat all of his competing customers on a

nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers." The Commission also pointed out that the courts have affirmed the principle that a "supplier must comply with this provision of the law [Sec. 2(e) of the R-P Act] irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

In giving its qualified approval to the proposed plan, the Commission said that the following conditions must be met:

1. All competing retailers must in fact be notified of their right to participate in the proposed plan. (The Commission did not pass upon the adequacy of the proposed means of notification because it did not have the facts upon which to base a judgment.)

2. The plan will be offered to all competing retailers. This means that some retailers who, geographically, are not in a given marketing area must be offered the plan if they are on the periphery of that marketing area and in fact compete with the favored retailers.

3. The plan will be made available to all competing retailers irrespective of their functional classification. Thus, nonfood stores which handle food items sold in grocery stores must also be accorded the same opportunity to participate in any promotional assistance given by the food suppliers to competing grocery outlets.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 90

Statute Involved: Section 2(d), Publisher's promotional assistance
amended Clayton Act. program approved.

Released: September 21, 1966.

The Commission recently advised the publisher of a monthly magazine that implementation of the promotional assistance plan outlined below would not result in violation of Commission administered law.

Under the plan, a notice would be printed quarterly on the cover of the magazine calling attention to the page in that issue on which the payment and the essentials of the retailers' service obligations would be set forth in an item in the same size type as the magazine's textual material. The item would also reflect that the retailer must write to the magazine distributor to obtain a copy of the Agreement containing full details. A retailer would obtain quarterly payments of 10% of the cover price of copies sold after certifying to the distributor that he—the retailer—had complied with the terms of the Agreement. The Agreement requires display of the magazine full cover flat or full cover prominent position on the principal magazine rack or full cover vertical in a rack at each checkout counter for the entire sales period of an issue.

Advisory Opinion Digest No. 91

Statute Involved: Section 2, Export Trade Act. Export trade association membership eligibility.
Released: September 21, 1966.

In an advisory opinion made public today, the Federal Trade Commission stated that an export trade association loses its statutory exemption from the antitrust laws if domestic prices are artificially or intentionally raised or lowered by the foreign operations of members with both foreign and domestic plants.

The Webb-Pomerene Act authorizes American exporters to engage collectively in foreign trade through cooperatively organized trade association registered with the FTC and subject to its supervision. The statute qualifiedly exempts such associations from the antitrust laws in joint foreign trade ventures. For example, they may fix prices and quotas, pool products for shipment, and establish terms and conditions of sales to foreign markets.

The requesting association said that certain American companies have both foreign and domestic plants producing the product involved, and asked whether a Webb-Pomerene association might include such companies as members if the membership only discuss the price of their exports from their domestic plants.

The Commission's advisory opinion noted that some of these American-owned foreign plants "are shipping a substantial proportion of their output into the United States and are supplying a substantial share of the domestic consumption * * *. Although it has been held that members of Webb-Pomerene associations may own plants located outside the United States, the use of such plants to supply the domestic market raises a possibility that domestic prices may be intentionally or artificially enhanced or depressed in contravention of the Webb-Pomerene Act."

In short, the Commission advised, "while membership in a Webb-Pomerene association by firms owning foreign establishments is permissible the statutory exemption enjoyed by the association is lost if artificial or intentional enhancement or depression of domestic prices is in any way traceable to the foreign operation of member firms."

Advisory Opinion Digest No. 92

Statute Involved: Section 2(e), Tripartite promotional assistance amended Clayton Act. cooperative advertising program.
Released: October 13, 1966.

The Commission was requested to furnish an advisory opinion concerning a proposal by an advertising agency to solicit suppliers of products sold

in drug stores to permit the agency to place some of their money for advertising in one trade area. Suppliers were to be charged at the rate of \$3.00 per each store which agrees to participate. The agency will notify all drug stores in the area that, for example, supplier A wants to participate in the plan and ask each store to mark a self-addressed card as to whether they either displayed the item and/or if they would purchase additional products either for the display or in anticipation of the advertising campaign of that product. If 700 stores return the card as evidence of their in-store cooperation, the supplier would then pay the agency \$2,100.00 at the rate of \$3.00 per store. The agency will then take this sum and place the money in an advertising campaign for the supplier. In return for the pharmacists' cooperation, the agency will tag each supplier's advertising with "this product available at your local pharmacy." No specific names will be mentioned.

Although each supplier's advertising will be run separately and there will be no joint advertising, each will be able to buy advertising under discounts earned from collective buying of space under the contract for all participating suppliers. There will be no payment to any individual druggist or association of druggists. Payments to the agency will be by the media in the form of agency commissions. Further, none of the advertisements to be published will contain selling prices for any of the products featured therein.

The plan was subsequently amended so that the offer would be extended to all competing retailers of the products advertised instead of just to drug stores. However, the agency advised that it had already received negative answers from a number of food chains and other retailers and, consequently, it proposed to leave the tag reading as above, but that if any of the others subsequently indicated they would like to participate, the tag would be amended to read "available at your local pharmacy and grocery store" or "variety store" as the case may be. All of these stores will continue to be notified periodically.

The Commission advised that while no specific customer will be named in the proposed advertisements, the fact that a class of customers will be specified, namely, pharmacies, means that the principles of Section 2(e) of the Robinson-Patman Act apply and each supplier would owe a duty to make his proposal available on proportionally equal terms to all of their competing customers. The Commission further advised that it appeared the agency proposed to operate the plan in such manner as to meet the test of that Section, assuming, of course, that all competing retailers will be notified of the availability of the plan and offered an opportunity to participate and that the tag will be changed in an appropriate manner if other than pharmacies evidence an interest.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 93

Statute Involved: Section 5, Federal Trade Commission Act.

Newspaper right to reject advertising.

Released: October 13, 1966.

The Commission was requested to render an advisory opinion with respect to the right of a newspaper to reject advertising which it regarded as false and misleading. While the question propounded involved the right of the paper to reject an advertisement by an automobile dealer which impliedly represented that a used car in its stock was a repossession when it was not, the Commission noted that the question presented went far beyond the fate of the particular advertisement and involved the basic question of whether or not a newspaper has the right under the antitrust laws to reject advertisements which are submitted to it for publication.

The Commission further noted the fact that the newspaper, which is in open competition with other newspapers in the same area, is acting in accord with the exercise of its own independent judgment and not in concert with others in proposing to reject the particular advertisement.

Under these circumstances, the Commission advised that it could see no objection to the exercise by the newspaper of its right to refuse to accept the advertisement.

Advisory Opinion Digest No. 94

Statute Involved: Section 2(d) and 2(e), amended Clayton Act.

Tripartite promotional assistance program with basic and proportionized alternative plans.

Released: October 18, 1966.

The Commission recently issued an advisory opinion regarding the obligations of a supplier in offering alternatives to his basic plan for providing promotional assistance to his competing, retailer-customers by placing advertisements on shopping carts.

The requesting party, a promoter, had a basic promotional assistance plan which some competing retailer-customers of suppliers participating in the plan were functionally unable to use because the retailer-customers did not have or use shopping carts. The plan provided that such competing retailer-customers were to be offered a reasonably usable alternative way of obtaining the proportionally equal assistance to which they are entitled under the provisions of Sections 2 (d) and (e) of the Robinson-Patman amendment to the Clayton Act.

The question presented was whether a retailer-customer, whose business operation was such that he was functionally able to use and benefit from the basic—shopping cart—plan could demand the alternative form of assistance, if he so desired.

In its opinion, the Commission stated that whether a supplier's promotional assistance plans are reasonable and nondiscriminatory in their application is essentially a question of fact. The Commission held that if the retailer-customer was able, in fact, to use and benefit from the basic plan offered, but rejected same, the supplier need not offer such retailer-customer the alternative plan. The Commission pointed out that the burden of proof on this issue of fact as it may arise in particular cases will rest upon the supplier. The Commission added that if a competing retailer-customer is unable to use the basic plan, because of the nature of his business operation, he must be offered an alternative plan. However, if he rejects the alternative plan for reasons of his own and said plan could be reasonably used to his benefit, then, the supplier would incur no liability for declining to offer another alternative.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 95

Statute Involved: Section 5, Federal Trade Commission Act.	Foreign origin disclosure—Computers—"Made in U.S.A." label.
Released: October 18, 1966.	

The Commission recently issued an Advisory Opinion to the effect that it would be improper to use the "Made in U.S.A." designation in labeling or advertising a computer of which 23% of the factory cost was accounted for by imported parts and 77% was accounted for by domestically produced parts, assembling and factory testing in the United States.

Advisory Opinion Digest No. 96

Statute Involved: Section 5, Federal Trade Commission Act.	Product certification program by trade association.
Released: October 19, 1966.	

The Federal Trade Commission recently advised a producer association that its proposed certification program for its industry product, including the award of a certification mark, would not be objected to under Commission-administered law provided certain conditions are met.

Under the proposed program, certification would be based on availability of production personnel with defined minimum training and experience, the possession of minimum test and quality control equipment, and the use of recognized production techniques. A certification mark could be awarded to, and used by, those qualifying.

Certified producers would be subject to periodic checks to ensure that the required standards were being maintained. Failure to maintain stand-

ards could result in de-certification and withdrawal of the right to use the mark.

The Commission opinion contained the following conditions:

(1) all present or future producers are to have free, unrestricted, and non-discriminatory access to the program, whether association members or not,

(2) the association will affirmatively offer and accord to non-members an equal opportunity for certification at a cost no greater than, and on conditions no more onerous than, those imposed upon comparably situated association members for whom comparable services are rendered,

(3) a uniform certification mark will be awarded to all who qualify,

(4) general supervision of the certification program will be vested in a policy board, or committee, substantially representative of all producers, such board, or committee, to have, among its other duties, the responsibility for ensuring non-discriminatory access to the program.

Finally, the Commission noted (1) that it expresses no opinion as to the validity of the standards which are adopted, and (2) that its approval would be of no force or effect should be proposed program be implemented in a way which contravened Commission-administered law.

Advisory Opinion Digest No. 97

Statute Involved: Section 5, Federal Trade Commission Act.

Trade association code governing dealings with customers.

Released: October 26, 1966.

The Commission recently rendered an advisory opinion advising a trade association of suppliers that a number of serious questions would be likely to arise from an agreement by its members as to a code or set of conditions governing the members' dealing with their customers.

Among the conditions singled out by the Commission for question was one creating uniformity in the terms of delivery. The Commission stated its view to be that the method and manner of delivery can be an element of competition among the members of an industry which this provision would at least have a tendency to eliminate. The creation of uniformity in the terms of delivery may be convenient for the members of an industry but this factor is outweighed by the benefits to the public of competition among those members and it is this competition which the law seeks to protect and preserve.

Much the same objection was raised to the sections which provided that by accepting goods the purchaser shall be deemed to have approved them and no action shall lie against the vendor except as regards hidden defects; that claims for defects must be made within thirty days; and that the pur-

chaser shall not be entitled to any compensation for any consequential loss whatsoever. The Commission advised that while it may be that a unilateral agreement among the members could not change the legal liabilities as between the parties when disputes arise, entering into this agreement could result in the suppliers presenting a solid front to their customers. In the Commission's view, such matters are best left to the business judgment of the individual suppliers.

The Commission then singled out the provision dealing with prices, which provided that the purchaser shall pay the prices current in the relative trade area at the time of delivery and that the vendor shall, if so requested, send to the purchaser a list stating the prices of goods and the period for which such prices are to apply. Noting that the section was ambiguously worded and susceptible of more than one interpretation, the Commission concluded that the suppliers might well feel justified thereunder in agreeing among themselves to adhere to their published price lists until such are changed. Under well settled principles of antitrust law, such an agreement would clearly be illegal.

The Commission also expressed some concern with the section dealing with payments, which provides that the purchaser shall pay the invoiced amounts within thirty days after date of delivery and if payment is made at a later date the vendor shall be entitled to interest. The Commission advised that it could not put its stamp of approval upon an agreement by the members of an industry as to the length of time during which credit is to be extended, stating that it would seem such matters are best left to the independent judgment of each supplier and should not be determined adversely to the interests of the customers by agreement among those suppliers.

Finally, the Commission took note of the provision dealing with contracts, which stated that all or part of the conditions could be declared applicable to a contract entered into for a specific period, which could be a calendar year unless otherwise agreed. Such contract shall imply that the purchaser agrees that during the period specified in the contract all and any goods specified "or as customarily purchased from such suppliers will be obtained solely from the vendor. . . ." The Commission felt that this clearly sanctions full requirements contracts for periods of one year or more and that such contracts are nothing more than exclusive dealing agreements for limited periods of time. Whereas they are not *per se* illegal, generally, the law may be stated to be that they are illegal if they foreclose competition in a substantial share of the market. This would naturally require knowledge of a number of factors not known to the Commission and not likely to be known when dealing with a proposed course of action. In the case of any particular supplier, the Commission would need to know the duration of the agreements, the number of customers covered by such agreements and the percentage of the total market which would thereby be foreclosed to competi-

tors. In view of these uncertainties, the Commission felt the best it could do would be to advise that the problem exists but no opinion could be expressed on a prospective basis because of lack of knowledge of the essential factors which would need to be known before an opinion could be rendered.

Advisory Opinion Digest No. 98

Statute Involved: Section 5, Federal Trade Commission Act.
Released: October 31, 1966.

Removal of foreign origin disclosure and use of word "Manufacturing".

The Commission announced today it had advised a distributor of imported time clocks that the "removal or obliteration of foreign origin disclosures on imported products is under certain circumstances a violation of the Tariff Act which is administered by the Bureau of Customs" and invited the distributor to contact that Bureau on this particular point. The distributor wanted permission to remove the foreign origin label prior to reselling the time clocks in the United States. "Regardless of the position of that Bureau," the Commission added, "such removal or obliteration in the circumstances you describe may result in a deception of the purchasing public as to the country of origin" and might be found to be in violation of the FTC Act.

Permission was also requested to use the word "manufacturing" in the trade name of the company and in advertising, even though the time clocks are imported in their finished state. The Commission was of the opinion that the use of such word "would have the tendency to lead consumers and others into the belief, contrary to fact, that they are dealing directly with the manufacturer and so to mislead or deceive them. In these circumstances, it would not be proper to use the word 'manufacturing' or any other word of similar import in your trade name or in your advertising or to otherwise represent your company as a manufacturer."

Finally, the distributor wanted to know if it would be proper to represent his company as a manufacturer if it performed a "small part" of the manufacturing process on the time clocks. In regard to this question, the Commission reached the following conclusion:

"The amount of manufacturing which a concern must engage in to justify representing itself as a manufacturer will vary from case to case, depending on the specific circumstances. Your question, however, indicates you intend to operate as a manufacturer only in the technical sense and not in a substantive way, in an attempt to justify the use of a term not otherwise a correct description of your business. We likewise do not believe, in these circumstances, that it would be proper to represent your company as a manufacturer."

Advisory Opinion Digest No. 99

Statute Involved: Section 5, Federal Trade Commission Act.

Retailer's advertising of "reward" approved.

Released: October 31, 1966.

The Commission recently advised a retailer of mobile homes and house trailers that he might properly advertise a \$100.00 "reward" to be paid to anyone referring a purchasing prospective customer provided such offer was a bona fide offer implemented in good faith. In the Commission's view, such advertisement would amount to the offering of a finder's fee or, perhaps, a commission on a sale.

The Commission pointed out that the prospective purchaser might himself claim the "reward." In such case, the purchaser must realistically benefit in the amount of \$100.00.

Advisory Opinion Digest No. 100

Statute Involved: Section 5, Federal Trade Commission Act.

Lifetime guarantees for aluminum siding.

Released: November 9, 1966.

A seller of aluminum siding recently requested the Commission to render an advisory opinion concerning the legality of its proposed use of a "Lifetime Guarantee" for aluminum siding.

The proposed guarantee would represent that the siding will not rust, peel, blister, flake, chip or split under conditions of normal weathering for the lifetime of the original owner. If, after inspection, the seller determines that a claim is valid under the guarantee the seller will within three years after installation furnish all materials and labor necessary to repair or replace, at the seller's option, all siding at no cost to the owner. For the next seven years, the seller will furnish all materials and labor at a cost to the owner of 8% of the then current price for each year or part thereof after the third year. For the next ten years, the seller will furnish all materials and labor at a cost to the owner of an additional 3% of the then current price for each year or part thereof after the tenth year. Thereafter, the seller will furnish only the material necessary to repair or replace, at the seller's option, at a cost to the seller of 10% of the then current price. The owner must assume all other costs, including 90% of the cost of materials and 100% of the cost of labor.

In addition, the seller furnished the results of extensive laboratory and field testing of house siding since 1948 under every type of environment which would lead to the conclusion that no aluminum siding, no matter what its finish, will last for a lifetime. In fact, the evidence submitted, if accepted as true, would establish that the maximum life expectancy of such siding under normal conditions would come closer to twenty years and would

be considerably less under more extreme circumstances. This is based upon experience indicating that even if it does not rust, peel, blister, flake, chip or split, the finish will weather to such an extent as to require repainting within that time.

The Commission made it plain that it has not conducted its own investigation in order to verify the accuracy of this evidence and that the comments set forth in its opinion were based upon the facts as presented and upon the assumption that those facts were correct. On this basis, the Commission advised that it would not be legal for the seller to employ a guarantee to represent that the siding will last for a lifetime or for any other period beyond what can reasonably be expected.

The opinion pointed out that both the trade practice rules for the Residential Aluminum Siding Industry and the Commission's Guides Against Deceptive Advertising of Guarantees contain the principle that a guarantee shall not be used which exaggerates the life expectancy of a product. In such case, the guarantee itself constitutes a misrepresentation of fact even though all required disclosures of material terms and conditions might be made in all advertising of the guarantee. This simply recognizes the principle that a guarantee can be used as a representation of an existing fact as well as a guarantee. Viewed in this light, use of this guarantee would constitute an affirmative representation that the siding will last for the lifetime of the owner when the evidence furnished would indicate this is not true. The gravamen of the offense would be the affirmative misrepresentation of the life expectancy of the product and this could not be corrected by a mere disclosure that what is represented to be a fact is not actually true.

Of equal importance in the Commission's view was the fact that the seller here proposed to couple two basically inconsistent provisions in the same guarantee. One was the use of the lifetime representation and the other was the prorated feature. The Commission stated its opinion to be that it is conceptually impossible to combine the two in the same guarantee when the proration period virtually terminates at the end of twenty years. A guarantee cannot be for a lifetime if it terminated after twenty years. Undoubtedly, many owners will live far beyond that period of time and so the guarantee cannot help but confuse even though a careful reading of its terms might show that it states all relevant facts and even though all advertisements make the required disclosures.

Literally speaking, some benefit may be claimed for the remainder of the owner's life after the expiration of the twenty year period, for the seller will still assume 10% of the cost of materials. But this would appear to be more a matter of form than substance. The owner would be given a mere pittance in order to furnish some color of justification for the claim that the guarantee is for a lifetime. The situation is that the owner must pay more than 90% of all costs in order to receive the benefit of the remaining

10% of the cost of materials, which does not leave him with anything of substantial value to justify the representation of lifetime warranty. In the Commission's view, the purchaser must be afforded something of substantial value for his lifetime in order to support the representation and the Commission did not feel that less than 10% of all costs was of substantial value.

Finally, the Commission noted that the proposed guarantee excludes damages resulting from normal weathering of surfaces. In view of the fact that this appears to be the most prevalent cause for repainting aluminum siding, the Commission also advised that this is a material term or condition which not only should be set forth in the guarantee, for whatever period of time it runs, but also should be clearly and conspicuously set forth in all advertising which mentions the guarantee.

Advisory Opinion Digest No. 101

Statute Involved: Section 2(d), Tripartite Promotional assistance
amended Clayton Act. program—recipe dispensers.
Released: November 11, 1966.

The Commission announced today it had given conditional approval to the use of a tripartite recipe plan promoting the sale of food products.

According to the terms of the proposed plan, the promoter will install a dispensing machine (approximately 18" square) in each retail grocery store containing a sufficient number of recipe cards to meet the demands of its customers. In addition to containing a recipe of the week, the card will also feature the specific brand name of one of the ingredients of the participating food suppliers.

Each participating retailer will be paid \$10.00 per month and furnished with posters and shelf markers publicizing the recipe cards and products of the participating manufacturers. Cost of the plan will be borne by the participating manufacturers. Notification of the plan will be by a printed promotional piece and/or letter to be mailed to all retailers in an area which was not defined with exact precision.

In its opinion the Commission said that Sections 2 (d) and (e) of the Robinson-Patman Act "require a supplier to treat all of his competing customers on a non-discriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The courts have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

The three conditions which must be met before the Commission can give its approval to the plan are as follows:

"First, the plan must be offered to all competing retailers within a given *marketing area*. Under the facts outlined in your letter, there appears to be an indication that the plan, as presently contemplated, may be offered only to those competing retailers within an arbitrarily drawn geographical area." "Second, the plan must be offered to *all* competing retailers within that marketing area. Competing retailers located on the periphery of said market areas are considered by the Commission to be included within the marketing area if in fact they do compete with those therein who are offered participation in the plan." "Third, the plan must be made available to all competing retailers irrespective of their functional classification. It appears that grocery stores will be the principal beneficiaries of the plan. However, if the items involved in the plan are also sold by nongrocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets."

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 102

Statute Involved: Section 12, Federal Trade Commission Act.
Released: November 11, 1966.

Disapproval of proposed weight-reducing claims for garments.

The Federal Trade Commission, basing its action on scientific information available to it and on its knowledge and experience, recently advised a manufacturer of plastic slimming garments that the Commission had reason to believe that proposed advertising and representations to the effect that these garments, through inducing perspiration, would effectively cause weight reduction, or spot weight reduction in pre-selected body areas or reducing generally, would be actionable under Section 12 of the Federal Trade Commission Act.

Advisory Opinion Digest No. 103

Statute Involved: Section 2(d), amended Clayton Act.
Released: November 22, 1966.

Tripartite promotional assistance plan—In-store music.

The Commission recently advised the promoter of the three-party promotional assistance plan outlined below that, subject to the admonitions indicated, the plan would not violate Commission administered law.

The promoter proposes to provide promotional and merchandising assistance to suppliers of products normally sold in grocery and drug stores. In

return for in-store promotion of participating suppliers' products by (1) providing shelf space at least equal to that given competing products selling in the same volume, (2) installing shelf markers or other in-store signs furnished by the promoter advertising the promoted products, (3) maintaining adequate supplies (i.e. what the *retailer* decides he needs to avoid a sellout) of promoted products and (4) periodic (one week in each quarter) off shelf displays (aisle end or other than normal shelf position), the retailer would earn an amount equal to 2% of his net purchases of promoted products, subject to a maximum monthly payment of \$40 per store. Earnings would be computed on a store-by-store basis. The amount earned would be based on purchases of promoted products regardless of whether the retailer purchased directly from the supplier or through a wholesaler.

In addition, retailers could, at their option, buy or rent in-store sound equipment and purchase a background music service from the promoter. The speakers could be used for in-store announcements by the retailers; however, participating suppliers' advertisements would not be broadcast over the network stores. The charges to the retailers for the sound system and music would be applied monthly or quarterly to promotional assistance payments earned for participation in the Plan (i.e., the 2% of purchases). Any excess of earnings over charges would be paid to the retailers in cash.

At the outset and every six months thereafter, the plan would be offered by letter from the promoter to all drug and grocery outlets listed in the yellow pages of the telephone book, which list would be supplemented by participating suppliers' lists of competing customers selling the promoted product.

Participating retailers would agree to allow the promoter's representatives to check on performance and submit reports to suppliers. The reports would contain information regarding the shelf space given the supplier's promoted product, the prices at which it is sold, its shelf position (eye, waist or bottom level) and the like.

With regard to the admonitions, the Commission expressed the view that:

(1) In addition to the letter at the outset and every six months to each competing reseller of promoted products of the supplier, new, competing customers should be offered the plan when the first sale of the promoted product is made to them. The reason is that such new customers are entitled to be offered the assistance promptly.

(2) The reports the promoter submits to suppliers should not contain information which may be used for price fixing purposes.

(3) Prospective participants in the plan should be told:

(1) the fact that the promoter is positioned between the supplier and the supplier's customers—the retailers—does not effect applicability of Sections 2 (d) and (e) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act to the plan; (2) even though the promoter is employed, it is the supplier's

responsibility to make certain that each of his customers who compete with one another in selling the promoted product is offered the opportunity to participate. If opportunity is not offered, or an illegal discrimination results, the supplier, the retailer and the promoter may be acting in violation of Section 2 (d) or (e) of the Robinson-Patman amendment to the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 104

Statute Involved: Section 5, Federal Trade Commission Act.	Approval of descriptions to be used by exclusive seller to U.S. Government.
Released: December 6, 1966.	

The Federal Trade Commission recently advised a manufacturer's representative that in connection with its firm name it might properly describe its office as a "Government Sales and Contract Office," that it might in its promotional literature describe those of its products specifically designed for and sold only to the United States Government as "Model No. . . . G, designed exclusively for and sold only to the United States Government (or thus and so agency)," and that it might properly state on labels affixed to the machinery which it sells that "equipment parts and service are supplied by . . ." (whoever is the supplier).

The advice given was predicated on assurances by the manufacturer's representative that his company sells exclusively to the United States Government, that the company's promotional material is sent only to, and is generally available only to, United States Government agencies, and that the company is the sole source for parts and service for certain of the products which it sells.

Advisory Opinion Digest No. 105

Statute Involved: Section 5, Federal Trade Commission Act.	Foreign origin labeling of imported chemicals.
Released: January 7, 1967.	

The Commission recently issued an Advisory Opinion to the effect that it would be improper to label chemicals composed of 45% imported and 55% domestic product as being of domestic origin, unless an equally clear and conspicuous disclosure was made that 45% of the product was imported.

Advisory Opinion Digest No. 106

Statute Involved: Section 5, Federal Trade Commission Act; Section 2(d) and 2(e), amended Clayton Act.

Tripartite promotional assistance granted on basis of floor space; Lottery merchandising by "lucky" number flashed on screen.

Released: January 7, 1967.

The Commission announced today it could not give its approval to a three-party promotional plan, which involved the placing of a film projector in grocery stores to advertise certain food products, because it contained two provisions which would probably be in violation of the law.

According to the terms of the proposed plan which were submitted by a third-party promoter, the entire cost of the plan will be borne by participating food suppliers. Each retailer who participates in the plan will be paid on a sliding scale for the space occupied by the film projector, depending upon the amount of floor space in the entire store. The reason advanced for the basing of payments upon floor space is that, overall, larger stores will attract more customers and hence more viewers of the projected ads.

In order to induce customers to look at the projected ads, each person entering the store will be given a card containing a number which, if it turns out to be the lucky number, entitles the holder to a prize regardless of whether the holder makes a purchase in the store. However, if the holder of the lucky number has in his shopping cart one or more of the products advertised on the film projector, he will receive a "bonus prize on occasion" in addition to the regular prize.

In its opinion the Commission said that Sections 2 (d) and (e) of the Robinson-Patman Act "require a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The courts have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

Commenting upon specific features of the plan, the Commission said that it contained two features which would probably violate the law.

"First, the Commission is of the opinion that the standard of payment to retailers, which you contemplate basing upon floor space, does not meet the statutory standard of 'proportionally equal terms' as required by Section 2 (d) and (e) of the Robinson-Patman Act. The proposed standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. Moreover, the proposed standard could result in a situation in which retailers who have a small volume with the participating suppliers would

receive more than competing retailers with a much larger volume solely because of larger floor space.

“Second, the Commission is of the opinion that the feature of the plan which induces customers to view the projected ads constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to public policy and the provisions of Sec. 5 of the FTC Act.”

The Commission’s opinion also pointed out that, if the plan is revised so as to eliminate the two foregoing objections, it would still be necessary for the following four conditions to be met:

First, all competing retailers must be notified of their right to participate in the plan on a nondiscriminatory basis.

Second, it must be made available to all competing retailers within a given marketing area and to those who, geographically, are on the periphery of that area if they in fact compete with the favored retailers.

Third, it must be made available to all retailers who compete in the resale of the supplier’s product, irrespective of their functional classification. Therefore, if the items involved in the plan are also sold by non-grocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets.

Fourth, an alternative plan on proportionally equal terms must be offered to those retailers who, for practical business reasons, find the film projector not to be usable and suitable.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 107

Statute Involved: Section 5, Federal Trade Commission Act.

Labeling of product composed of leather fibres.

Released: January 13, 1967.

The Commission was requested to furnish an advisory opinion with respect to the use of the terms “Reconstituted leather” and “Man-made leather” to describe a material composed of 70% leather fibre with bonding agents added and a vinyl backing resembling leather.

In its opinion, the Commission advised that neither term would be considered as a satisfactory description of the material. The word “leather” has long been held to constitute a representation of top grain leather, unless properly qualified to show otherwise. In this connection, the terms “reconstituted” and “man-made,” which at best create inferences of leather which has been in some manner reprocessed, were not considered by the Commission as adequate qualifications when the material in question is nothing more than ground leather or leather fibres held together by bonding agents.

The Commission advised that if the seller wished to show the leather fibre content of this material, it would be necessary to use such terms as "shredded leather" or "pulverized leather," together with a disclosure of the vinyl backing, in order to give the consumer a truthful description of the true nature of the material.

Further, if the seller decided not to disclose the ground leather or leather fibre composition of the material, the Commission stated that it would be necessary to disclose that the material was "Not leather" or "Imitation leather" or "Simulated leather," the reason being that the consumer is entitled to a disclosure that the material before him which has the appearance of leather is not actually what it appears to be.

Advisory Opinion Digest No. 108

Statute Involved: Section 2(f), Holding company ownership of
amended Clayton Act. both auto parts warehouse dis-
tributor and auto parts jobber.
Released: January 13, 1967.

The Commission recently advised a requesting party that his proposed reorganization of properties which he owns or controls would not appear to violate the Clayton Act, as amended by the Robinson-Patman Act.

The requesting party proposes to establish a holding company which would control two operating companies, one an automotive parts warehouse distributor, the other an automotive parts jobber. Two officers of the operating companies will initially hold a minority interest in these companies, an interest which might become a majority interest at some future date. The warehouse distributor will equitably sell to all jobbers who wish to buy from it, except that this distributor will not sell to the jobber with which it has common ownership except on a limited emergency basis.

Advisory Opinion Digest No. 109

Statute Involved: Section 5, Fed- Use of manufacturers' list prices to
eral Trade Commission Act. denote value.
Released: January 24, 1967.

A concern engaged in the distribution of premiums for sellers who make premium offers on the labels of their merchandise recently requested an advisory opinion concerning the legality of using manufacturers' list prices as the value of the items so offered.

After advising that it is impossible to give a categorical answer to such a question since the answer is wholly dependent upon facts which are unknown to the Commission, the Commission advised that in no case could the company or its accounts rely completely upon manufacturers' list prices as an absolute indication of the value of the products offered as premiums.

Instead, since these prices will be described as the value of the premiums on labels and in advertising, they must meet the test of Guide II of the Commission's Guides Against Deceptive Pricing, which provides that whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area.

The Commission advised that if the sales history of any particular product can meet this test then the list price can be used as the value of the product on labeling and in advertising. If it does not meet this test, then the list price cannot be used. The important point to remember here is that the mere fact that a manufacturer has asserted that a given amount is his list price does not constitute a license to others to use that price as a representation of value. The concept of value is not abstract, but must instead be based upon concrete selling prices. Certainly, the Commission stated, if the list price for any particular product can meet the test of substantial sales in the seller's trade area, it can be used as a representation of value even though substantial sales are also made at less than that price by other dealers in the same area.

Additionally, the opinion pointed out that since the company was handling what was described as self-liquidating premiums, there was also the possibility that some of the list prices being employed were old in point of time and did not represent current values. In such a situation, it would not be permissible to use the list price as a basis for a representation of current value.

Finally, the Commission noted that the company was not itself engaged in advertising these prices, but was instead expected to furnish values for the products to the accounts which they could use in their own advertising and labeling. The responsibility for the truthfulness of the price representations made under these circumstances was held to be twofold, being shared by the sellers which actually use the prices in their advertising and labeling and by the distribution company as well under the principle that one who places in the hands of others the means and instrumentality of deception is himself guilty of deceit. Thus it was stated to be important for both to make certain that the prices used to represent the values of these premiums comply with the criteria of the Guides.

Advisory Opinion Digest No. 110

Statute Involved: Section 5, Federal Trade Commission Act.

Agreement among retailers for uniform store hours.

Released: January 24, 1967.

The Commission was requested to furnish an advisory opinion with respect to a proposal by a retail trade association to conduct an informal

survey of a number of grocery operators in the area to determine their individual preferences as to hours of doing business. Upon completion of the survey, the association plans to announce the results thereof. Although a majority of store operators may elect thereafter to operate on uniform hours, as determined by the survey, no sanctions are planned nor will there be any attempt to enforce or insure uniformity of closing hours. There are a number of stores which will not subscribe to such a suggestion and will remain open at other times.

The Commission stressed its understanding that while a majority may voluntarily elect to subscribe to uniform hours of doing business as a result of the survey of individual preferences, those who do not wish to do so will not be subject to any form of coercion or compulsory process, and indeed, it was expected that many will not so subscribe for business reasons of their own. On the basis of this understanding and assuming that the agreement or plan will relate to nothing other than hours of doing business, the Commission advised that it did not believe the plan would violate any laws it administers.

Advisory Opinion Digest No. 111

Statute Involved: Section 2(a), Functional discounts,
amended Clayton Act.
Released: February 2, 1967.

The Commission recently issued an Advisory Opinion to the effect that the 14% discount which would be offered under the plan outlined below probably would result in violation of Commission administered law.

At present, the manufacturer sells his product to manufacturers of a complementary product exclusively. The purchasing manufacturers resell the product to independent-distributors and to ultimate consumers.

The selling-manufacturer proposes to sell independent-distributors direct, charging them approximately 14% more than the purchasing-manufacturers would be charged on shipments to the warehouses of the latter. On drop-shipments to purchasers buying through the purchasing-manufacturers, the manufacturers would be charged the independent-distributors' price. On drop-shipments to consumers of the product, the independent-distributor price would be charged. Drop-shipments could be ordered by any customer and would be openly available to all on the same terms.

There would be no agreement between purchasing-manufacturers or distributors and the manufacturers as to prices the former would charge; however, the manufacturer does now suggest and would continue to suggest prices to be charged consumers. No other form of control over resale of the product is now or would be exercised by the manufacturer.

The Commission pointed out that the price difference which would result from the proposed discount is within the purview of Section 2(a) of the Robinson-Patman amendment to the Clayton Act. Section 2(a) provides, in essence, that it is unlawful for a seller in commerce to discriminate between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to tend to create a monopoly.

The Commission added that the 14% discount to be offered to purchasing-manufacturers is a functional discount and that such discounts are not prohibited by the applicable law or judicial interpretations thereof unless the discounts result in the adverse competitive effects the law proscribes. The Commission was of the view that such adverse effects were likely to result due to the fact that purchasing-manufacturers would compete against distributors in selling to ultimate consumers and the manufacturers would enjoy a 14% price advantage on such sales. The Commission pointed out that unless the 14% only made due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the tile cement would be sold or delivered to the manufacturers, substantial anticompetitive effects probably would result from implementation of the plan. Such a result would be violative of Section 2(a) of the Robinson-Patman amendment to the Clayton Act.

Advisory Opinion Digest No. 112

Statute Involved: Section 5, Federal Trade Commission Act.
Released: February 2, 1967.

Foreign origin disclosure not required on outside of packaged badminton sets.

In response to a question involving the sale of badminton sets which will be sold in an opened display case with the foreign country of origin marked on each imported component readily visible to prospective purchasers, the Commission ruled that it would not be necessary to disclose the foreign origin of each imported component on the outside of the package.

The company which requested the advisory opinion intends to merchandise badminton sets to various department stores throughout the United States. The package, instructions for use and the steel poles will be manufactured here in the United States. The remaining three items in the sets will be imported from three different foreign countries and each will be marked as to its specific country of origin. For example, the rackets will be imported from Japan, the shuttlecocks from England, and the net from Pakistan. The badminton sets will be sold in an opened display case with the country of origin marked on each imported component readily visible to prospective purchasers.

Advisory Opinion Digest No. 113

Statute Involved: Section 7, Pre-merger clearance—Failing company—amended Clayton Act.
Released: February 14, 1967.

The following is a digest of an advisory opinion issued by the Federal Trade Commission regarding a pre-merger clearance matter.

A small manufacturer of a product used in the paper industry applied for clearance of the sale of 67% of its stock to another small company in the same line of business. There was strong competition in the line of business, a few companies dominated the market, and the selling company had net losses for a number of years.

The Commission advised the applicant proceedings would not be initiated if the acquisition was made.

Advisory Opinion Digest No. 114

Statute Involved: Section 5, Federal Trade Commission Act. Retail discount selling organizations.
Released: March 1, 1967.

The Commission recently advised the promoter of a membership organization of retailers which would grant discounts on purchases and services except where prohibited by law that the plan was unobjectionable.

More specifically, the plan provided—

The promoter would set up a discount program for independent retailers such as auto dealers, appliance, furniture and clothing stores. Chain stores and other discount houses would not be admitted to membership.

For \$5.00 per week for 26 weeks or six months, the retailer would become a member of the organization. There would be no fee for consumer-members to join. The promoter would guarantee retailers 30,000 discount member/customers. The retailers would be listed in a book showing the discount each had decided to give on purchases and services except on "fair traded" items or where prohibited by law. There would be no coordination or combination on prices by participating retailers. A free book with customers' membership card as the cover would be mailed to all residents in the area in which the plan is tried.

Although all competing retailers would be offered the opportunity, only one retailer, the first participant in an area, in each category of business would be allowed to join in each of the various areas in which the plan is tried. Participating retailers would "cooperate" only in the sense that all give discounts to member/customers; however, if a group of retailers wished to purchase an item several sold, the promoter would order the item direct

from manufacturers, distributors or importers with whom the promoter has business connections.

The Commission advised the applicant that the plan itself is unobjectionable. The Commission added however that:

a. The participating retailers should grant the discount off the manufacturer's suggested price, where there is one and where a number of the principal retail outlets in the area are regularly engaged in making sales at that price; or off the usual trade area price so that the consumer will in fact receive a discount.

b. The booklet listing participating retailers should note that some listing does not imply that other businesses in the community do not offer similar or even greater discounts and that the listing of the retailer is done for a fee.

c. If participation in the plan results in agreement as to prices, discounts, terms of sale and the like, such agreement or agreements would be violative of Commission administered law.

d. If the literature you use in seeking to persuade retailers or consumer-members to participate actually does or has the capacity to mislead or deceive, it would be actionable under Commission administered law.

e. If implementation of the plan results in discriminatory acts which may substantially affect competition, same would violate the Robinson-Patman Amendment to the Clayton Act.

Advisory Opinion Digest No. 115

Statute Involved: Section 5, Federal Trade Commission Act.
Released: March 8, 1967.

Trade association code of ethics governing pricing and selling practices.

The Commission recently rendered an advisory opinion to a trade association of jobbers advising that while some of the submitted Code provisions appear innocuous, the Code as a whole is shot through with anticompetitive implications.

The Commission pointed out, by way of examples, that the question of establishing fair and adequate profit levels is not an appropriate trade association exercise; the use of price as an economic weapon is integral to the competitive process and becomes anticompetitive only when used destructively; urging the frequent checking of competitive prices suggests an attempt of achieving price uniformity; complaining to a competitor about his prices could be construed as an unfair method of competition depending upon the practice involved for if the "practices" were low prices, the complaint could be construed as an appeal for price maintenance.

In disapproving the Code of Ethics as submitted the Commission advised

that because the effect of issuance of such a Code would be coercive upon the members, the cumulative effect of its provisions could well operate to reduce or eliminate price competition and impair the right of each member to price and promote his products as he sees fit.

Advisory Opinion Digest No. 116

Statute Involved: Section 5, Federal Trade Commission Act.

Advertising claim: "America's most warranted . . ."

Released: March 8, 1967.

The Commission recently advised a manufacturer who wished to use the advertising claim "America's most warranted . . ." that it would be inappropriate and impracticable for it to give the desired advisory opinion.

Citing Rule 1.51 of its Rules of Practice, the Commission stated that the proposed claim was such that an informed decision thereon could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

If the statement in question is true, the Commission added, then of course there is nothing in the statutes which it administers to prohibit its use. The question, however, is enormously complicated and to answer it would require both quantitative and qualitative determinations which could only be made after extensive investigation. While the Commission must of necessity investigate the use of extravagant claims, such investigation should not be initiated in support of an advisory opinion.

Moreover, because of the nature of the proposed claim, Commission approval could be construed and exploited as government endorsement.

Advisory Opinion Digest No. 117

Statute Involved: Section 5, Federal Trade Commission Act.

Misrepresentation of hand cream.

Released: March 21, 1967.

The Federal Trade Commission recently advised a marketer of hand cream that it would be improper and a violation of Commission administered law to represent, contrary to fact, that the product had been "medically prescribed."

There are many precedents for the proposition that it is an unfair trade practice to misrepresent approval or endorsement of products by medical associations, doctors, dentists and related professional groups.

Advisory Opinion Digest No. 118

Statute Involved: Section 5, Federal Trade Commission Act.

Reduced prices on shopper's guide advertising for radio advertisers.

Released: March 28, 1967.

The Federal Trade Commission recently advised a radio station that it might properly give reduced advertising rates in a printed shopper's guide which it plans to publish to those advertisers buying radio time at regular station rates.

The Commission was informed that radio advertisers would not be required to buy shopper's guide space, and that shopper's guide space could be purchased at regular shopper's guide rates by those not buying radio time.

Three other radio stations and two newspapers are available to advertisers within the market area in question.

Advisory Opinion Digest No. 119

Statute Involved: Section 5, Federal Trade Commission Act.

Trade association code of ethics.

Released: April 6, 1967.

The Commission recently advised a trade association that the objectives sought by its proposed Code of Ethics appeared to be unobjectionable and that adherence to the Code should not operate to effect an unreasonable restraint of trade. Accordingly it is the Commission's view that the mere act of becoming a member of the association and joining in its activities for the purposes outlined will not in itself violate any statute administered by the Commission.

The association was advised, however, that if enforcement of the Code operated so as to effect an unreasonable restraint of trade, serious questions would be raised as to the plan's validity. The general test, the Commission stated, is whether concerted action by competitors unreasonably affects a businessman's ability to compete. Thus, if association membership is an important competitive factor, arbitrary or discriminatory refusal of membership to a qualified applicant because of alleged failure to abide by the Code would raise serious questions under Commission-administered law, as would arbitrary or discriminatory expulsion of association members.

In conclusion, the Commission noted that it confined itself in its answer to so much of the question as falls within Commission jurisdiction. The extent, if any, to which another government agency may be concerned with the association's activity is a matter to be determined by reference to that agency.

Advisory Opinion Digest No. 120

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 15, 1967.

Permissible period of time during which new product may be described as "new".

The Commission was recently requested to render an advisory opinion as to the permissible period of time during which an advertiser could continue to describe a new product as being "new."

The Commission pointed out that the word "new" may be properly used only when the product so described is either entirely new or has been changed in a functionally significant and substantial respect. A product may not be called "new" when only the package has been altered or some other change made which is functionally insignificant or insubstantial.

Assuming that a particular product could truthfully be described as "new" in the first instance, the opinion noted that there is little precedent for determining how long an advertiser may truthfully continue to describe it as "new." The Commission stated it was aware, of course, that the word has been frequently abused and that it is in the interest of all advertisers to have established ground rules for its use. However, the time period during which a particular product may be called "new" will depend upon the circumstances and is not subject to precise limitations; any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature. Further, any such attempt would not only fence in all advertisers without regard to the circumstances, but would fence in the Commission as well, and deprive it of all flexibility in dealing with individual situations.

Instead, the Commission felt it would be preferable, considering the absence of precedents, to establish a tentative outer limit for use of the claim, while leaving itself free to take into consideration unusual situations which may arise. Thus, the Commission's position was that until such a time as later developments may show the need for a different rule, it would be inclined to question use of any claim that a product is "new" for a period of time longer than six months. This general rule would apply unless exceptional circumstances warranting a period either shorter or longer than six months were shown to exist.

Advisory Opinion Digest No. 121

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 22, 1967.

Resale price maintenance of books held on consignment.

The Commission was recently requested to render an advisory opinion concerning the legality of an agreement between a university press and a

scholarly association that the press would not sell the annual publication of the association, which it held on consignment, at less than the minimum resale price stipulated by the association. The book normally sells by mail order for the same amount as is charged by the association for annual dues. Members of the association are entitled to receive a copy of the book at no extra charge. The association wishes to include a provision in the contract prohibiting the press from selling to educational institutions, mainly libraries, at any discount below the usual retail price, its purpose being to prevent such buyers from obtaining the book at a lower price than they could by joining the association. This would mean that the press could not give libraries the normal trade discount.

In addition, the Commission was assured that the relationship between the press and the association was strictly one of agency. The press does not print the books for the association, which subcontracts the printing and simply wishes to use the selling facilities of the press to handle sales to non-members. Legal title to the books remain in the association, which owns the copyrights, and the books are being handled by the press on a consignment basis.

The Commission advised that it could see no objection to the inclusion of this provision under the precise factual situation presented. In arriving at this conclusion, the Commission stated that it was mindful of the fact that consignment agreements can, under certain circumstances, be used as a device for illegal resale price maintenance, even where patented or copyrighted articles are involved. However, it was of the opinion that this proposal would not fall within that category in view of the fact that the contemplated consignment agreement containing the clause in question will be with only one consignee and there will be no other outlets competing in the distribution of these books. This view of the law was limited solely to the factual situation involved. Hence, generalizations from this opinion or its extension to other factual situations would not be warranted.

Advisory Opinion Digest No. 122

Statue Involved: Section 2(a), Propriety of publishing marketing
amended Clayton Act. area price lists.

Released: April 22, 1967.

The Federal Trade Commission recently advised a manufacturer who had requested an advisory opinion that there is nothing inherently illegal about area price lists which make only due allowance for differences in the cost of shipment and delivery.

The Commission advised the manufacturer further that price discriminations in sales to customers located in different areas who in fact compete with each other could amount to conduct in violation of Section 2(a) of the

Clayton Act, unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

The Commission also pointed out that it could be unlawful if area price lists permitted sales producing monopoly profits in one area to subsidize sales at much lower prices in another area or to a particular customer or group of customers to the competitive injury of a competitor of the seller.

Advisory Opinion Digest No. 123

Statute Involved: Section 5, Federal Trade Commission.
Released: May 5, 1967.

Selling merchandise by lottery method condemned by Commission.

The Federal Trade Commission announced today it had issued an advisory opinion in which it ruled that a proposed plan calling for the sale of merchandise by means of a lottery would be contrary to the provisions of Sec. 5 of the FTC Act.

"Moreover," the Commission said, "the fact that the purchaser receives something of value for his consideration does not negate the existence of a lottery."

Under the terms of the proposed plan which was the subject of the advisory opinion, the promotion would consist of a store display carton containing 36 \$1.00 plastic scale model kits, with a different number to be marked on the end of each kit box. The display header would announce to prospective purchasers they could win a \$2.00 chrome plated model if the number on the end of the box corresponds with the number to be posted by the store manager in 4 weeks.

Advisory Opinion Digest No. 124

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 5, 1967.

Agricultural cooperatives may market their products through a common sales agent.

In an advisory opinion made public today, the Federal Trade Commission stated that agricultural cooperatives formed under pertinent provisions of the Capper-Volstead Act may establish and market their members' products through a common sales agent.

Counsel for the requesting parties described his clients as cooperative associations of milk producers representing some 361 farmers and dairymen who produce about 2 million pounds of milk per month in excess of that consumed in their trading area. Counsel said that formation of the sales agency by his clients will enable them to dispose of this excess through bidding on Government contracts to supply milk to military bases in competi-

tion with milk now imported from other milk marketing areas for that purpose.

The Capper-Volstead Act (7 U.S.C. 291, 292) permits persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations formed thereunder may make contracts or agreements as will effect such purpose, and they may have marketing agents in common. The Act has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of cooperative associations are concerned. This immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

In approving the formation of a common sales agency by cooperative associations of milk producers to market the products of their members the Commission advised Counsel for the requesting parties that its action "is not to be construed as approval for any practice which may be predatory in nature, may result in unlawful monopolization, may restrain commerce to the extent that milk prices are unduly enhanced thereby, nor to conspiracies or combinations between your" clients "and persons or entities not in this category."

Advisory Opinion Digest No. 125

Statute Involved: Section 5, Federal Trade Commission Act.

Agreement among retailers as to uniform store hours.

Released: May 16, 1967.

The Commission was asked to render an advisory opinion as to whether it would be lawful for a trade association, after making a survey of retailer preferences as to store hours, to recommend that all stores observe the same hours, but that no sanctions would be imposed upon nonconforming retailers. The request was prompted by Advisory Opinion Digest No. 110, which the Association interpreted as having stated that the Commission found nothing unlawful in an agreement among retailers to observe uniform hours of business.

The Commission pointed out that its previous opinion advised merely that there would be nothing unlawful in a retail trade association conducting an informal survey intended to determine its members' individual preferences as to hours of business, followed by an announcement by the association of the results of the survey. The Commission emphasized that its opinion was based on the premise that any number of individual retailers may elect unilaterally to adopt common hours of business. The Commission did not intend to suggest that an agreement among competing retailers with respect to uniform hours of business would be lawful. On the contrary, it was the Commission's opinion that such an agreement among competitors, while perhaps not illegal *per se*, would be fraught with grave risks of illegality.

Conceivably, there might be some rare and most unusual circumstances in which such an agreement among competing sellers could be justified as a reasonable restraint of trade, but this seems unlikely. The fact that no sanctions or coercion are imposed upon noncomplying retailers cannot legitimize an otherwise unlawful agreement in restraint of trade.

In sum, it was the Commission's opinion that the conduct of a survey as to its members' business hours and an announcement of the results of that survey by a trade association, would not be unlawful so long as no agreement among competing sellers was involved.

Advisory Opinion Digest No. 126

Statute Involved: Section 12, Federal Trade Commission Act.

Proposed advertising for portable oxygen administrator.

Released: May 26, 1967.

The Commission was recently requested to render an advisory opinion as to the legality of certain proposed advertising for a portable oxygen administrator designed for individual use.

The advertising would represent that there are many emergencies that call for an immediate supply of oxygen, such as sudden heart attacks, coronary occlusions, respiratory defections, gas and smoke poisoning, drowning, electric shock, asthmatic seizures, and more. Providing oxygen the instant it is needed can, according to the advertising, make the difference between prolonging life and losing it or between complete and partial recovery. When needed, oxygen must be supplied within 5 to 8 minutes to prevent brain damage. Until recently, if an emergency oxygen deficiency occurred, one had to wait for professional medical assistance and there was no way of knowing how long that would take. Now one can have a low cost portable administrator so simple to operate that anyone can administer it, even to themselves. While the literature would caution in some places that all heart and respiratory conditions are not alike and thus the need for oxygen may vary widely in its application so that your doctor will have to be your guide, it would also add that the advertiser knows of no emergency situation where oxygen can do harm and it may save a life under many circumstances.

The opinion pointed out that the matter presented a difficult problem to treat under the advisory opinion procedure, for the Commission has not conducted its own tests of this particular unit and hence is not in a position to comment upon every question raised by the advertising. Hence, its opinion has to be based upon such general medical knowledge as is available and be directed at the main themes of this advertising rather than at specific details.

Based upon what is known of the capabilities of similar devices, the Commission advised that it could not place its stamp of approval upon advertising which holds this device out to the general public as suitable for use and capable of saving lives under all conditions specified without its having been recommended for use by a doctor familiar with the patient and without the individual for whom it has been prescribed, or his family, having been given instructions for its use. This is particularly true when it is considered that in some cases of asthma and emphysema there is a danger in the administration of oxygen without a doctor's prescription and instruction because an over supply in these conditions can actually cause the patient to stop breathing.

The opinion further added that aside from the question of danger in this specific situation of use and the general fire hazard when oxygen is improperly used or stored, the scientific evidence available indicates that without a positive-pressure apparatus, this device will accomplish little more than will mouth-to-mouth resuscitation in situations where emergency oxygen is indicated. In fact, the emergency resuscitator attachment appears to require mouth-to-mouth techniques in conjunction with the device and the evidence indicates this would only increase the oxygen a patient would receive by an insignificant amount. Positive pressure, which can only be administered by trained personnel without grave danger to the patient, is indicated for use when a patient is not breathing. If the patient is breathing he will usually inhale sufficient oxygen from the air by himself until medical help can be obtained.

The fault of this advertising, as the Commission views it, is that while beneficial results can be achieved by the skilled administration of the proper amounts of oxygen when that treatment is indicated, it is deceptive to hold out to the unskilled person that he can by himself properly diagnose the patient's condition and administer oxygen in the required amounts and in the proper manner through use of this device so as to achieve the results claimed in the advertising.

Advisory Opinion Digest No. 127

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 26, 1967.

Description of raised printing as embossed.

The Commission was recently requested to render an advisory opinion concerning the use of the terms "embossing" and "embossed" to describe raised printing or printing by the verkotype process.

The process used would consist of printing the copy with a printing or lithographic press, placing it on a conveyor to send it through a verkotype machine that sprinkles powdered rosin on the wet ink and carries the copy

under gas heaters which would fuse the rosin and ink, thereby creating a raised surface.

The Commission advised that since embossing is generally understood to involve the distension of paper with the use of a die, the description of raised printing, including products of the verkotype printing process, as embossing would be inappropriate.

Advisory Opinion Digest No. 128

Statute Involved: Section 5, Federal Trade Commission Act. Trade association code of ethics.
Released: May 23, 1967.

A group of producers of products sold by door-to-door salesmen employed by independent sales agencies has requested a Commission opinion with respect to the legality of a proposed code of ethics to govern the practices of the agencies and the salesmen. The opinion was rendered following the second submittal of the code, which had been substantially modified as a result of conferences with the Commission's staff pursuant to Commission direction.

The modified code provides for the appointment of an Administrator who will be empowered to impose fines against any of the agencies if he finds that they have authorized, condoned or in any way supported deceptive practices by their sales and collection representatives. The maximum amount of fines has been limited to an amount which in the Commission's judgment will not operate anticompetitively or in a confiscatory manner but sufficient to constitute a deterrent.

Further, in the modified code the agreement between signatory agencies not to employ a person found to be a willful violator by the Administrator in a sales capacity for a period not to exceed one year was eliminated. In its place it is now provided that the Administrator, upon finding that a person has willfully violated the code, shall recommend that he not be employed in a sales capacity for a period not to exceed one year. However, it is further provided that an agency shall use its own discretion in deciding whether to follow such recommendation of the Administrator.

In order for a person to be found to be a willful violator it must be determined that on three separate occasions he violated the code with knowledge that his representations were in violation of the code. Moreover, if an agency repeatedly condones or authorizes violations of the code, it may be subject to expulsion from participation in the code.

Finally, in order to insure greater participation in the administration of the code by the agencies than was the case in connection with the original submittal, the code now provides that the Administrator will be responsible to a Board of Directors composed of six agencies and one producer. Of the six agencies, at least two must not be affiliated with any producer. Also, the

one producer must not be affiliated with any agency. Appeals from actions of the Administrator may be taken as a matter of right to a committee composed of representatives of at least three participating agencies, at least one of which is not to be affiliated with a producer. A new committee is to be appointed each month and its members are to be rotated from among signatory agencies.

The Commission advised that it had given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the industry in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission was unable to give its approval to those sections of code which apply to the salesmen as those sections are now written. While the code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator.

However, the Commission advised that it did not believe that this would call for outright rejection of the code, since it believed the code could be amended so as to achieve the legitimate objectives of the industry without running afoul of the antitrust laws. Thus the Commission stated it was prepared to advise the industry that it could see no objection to the maintaining by the Administrator of a public record of the names and circumstances respecting a finding of a willful violation. If this modification was agreeable to the industry, so that a provision to that effect could be inserted in the code in place of the present section applying to salesmen, the Commission would have no further objection on that score.

The Commission was further of the opinion, now that greater participation of the agencies had been assured, that it was possible to apply the code as now written to the producers and agencies in such a manner as not to do violence to the antitrust laws, particularly if the element of coercion could be truly eliminated insofar as the agencies were concerned when they were arriving at their decision as to whether to join or whether to remain under the code after having joined. The Commission made it clear, however, that this conclusion was a tentative one since there was little recorded experience upon which to predicate such a judgment. Therefore, the opinion was based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined.

The industry was also advised that the Commission approval extended in the opinion was given for a three year period, following which the industry should resubmit its request, and, in the meantime, the Administrator must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken. Further, the opinion was rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan had been put into effect to determine and report to the Commission as to how it is actually working.

Commissioner ELMAN, dissenting:

With the best of intentions, a trade association has proposed, and the Commission now approves, the establishment of a Code which provides for the exercise of the powers of government by a private group.

It is one thing to encourage businessmen to promote voluntary compliance with the law. It is something else to approve a private scheme of law enforcement, where investigations are conducted by private "policemen" and where violations of privately-decreed "laws" are punished by fines and penalties imposed by private "judges" after privately-conducted "trials".

The Code's Administrator and his staff will apparently function like a small version of the Federal Trade Commission. But there is a big difference between such an administrator and the Commission, which is a public agency of government, with powers and duties that are defined and circumscribed by specific statutory provisions enacted by Congress. The decisions and orders of the Commission are subject to judicial review. Commission proceedings are public and must be conducted in conformity with the requirements of due process, the Administrative Procedure Act, and other applicable provisions of law. Findings of fact must be supported by substantial evidence on the record. In short, all our actions are subject, substantively and procedurally, to the basic safeguards and restraints established by law.

It is fundamental that the regulatory powers of government are too awesome to be turned over to private policemen, prosecutors, and judges—no matter how well-intentioned. Regulation of business—at least when it involves the imposition of fines and penalties for violations of prescribed standards of conduct—is the job of government agencies and officials bound by the limitations of due process and the rule of law. It runs against the basic grain of American society to permit private "vigilantes" to act as policemen and to allow private judges to hold "kangaroo courts" where punishment are imposed. The fundamental safeguards and restraints which protect the public against arbitrary or lawless official action are absent when the powers of government are sought to be exercised by private individuals or groups.

I think the Commission is taking a long step backward in approving the

usurpation by a trade association of the law-enforcement powers and duties of an agency of government.*

Advisory Opinion Digest No. 129

Statute Involved: Section 5, Federal Trade Commission Act. "Solid" and "Karat" used together in describing articles composed of gold.
Released: June 13, 1967.

The Commission recently advised an association that the word "solid" could be used in conjunction with the karat indication of gold of 10 or more karats in fineness. For example, it would be proper to use the expression "14 karat solid gold" or "solid 14 karat gold" to describe an article which was both in fact solid and in fact made of gold 14 karat in fineness. The use of such descriptions, or appropriate abbreviations therefor, provided both factors in the description were given adequate prominence, would be unobjectionable.

*Cf. "The Precious Ounce of Prevention", an address by Honorable Paul Rand Dixon, before the Advertising Association of the West, Spokane, Washington, June 28, 1966, pp. 11-12:

"The question then arises as to whether an industry is privileged to crack the whip on the illegal few within it. What kind of discipline is acceptable? Who is to be the judge and jury? What assurance is there that the assessment of the facts will be impartial? And will the accused have a fair chance to defend himself? These are serious questions. We are no longer living in the days of the Old West when punishment was dealt out with more speed than accuracy. We are living instead, thank Heaven, under a government of law for which many generations of free men have fought. Although legal process sometimes may be frustratingly slow, it is the safeguard of our liberty. Thus, should any industry interpret self policing as conveying the privilege to mete out justice to offenders without due process of law, far more would be lost than gained. That is why I say that self policing must be reinforced by governmental authority. For the advertising industry to set up high ethical standards, as you already have done, is all to the good, and to adhere to the standards is even better. Indeed, such self restraint serves to focus attention on those few who are out of step. They may even become so uncomfortable conspicuous that they will mend their ways. But if they don't, and persuasion fails, it is not your privilege to discipline them. Such is the sole responsibility of governmental authority—local, state or national."

Cf. also Donald F. Turner, "Cooperation Among Competitors", Northwestern Univ. L. Rev. 865, 870-71 (1967).

"In discussing collaboration among competitors which regulates or limits their competition in particular ways, I have been considering only *voluntary* adherence by the competitors themselves to agreements of one sort or another. I have not been discussing the question of sanctions that might be imposed within the group for failure to comply with the agreement; the more so, I have not been discussing sanctions effected through pressure on outside parties with whom the group deals. For good reasons, the law has always been suspicious of the potential abuse in private government of economic activity enforced by sanctions. Therefore, the use of sanctions within and without the group raises quite separate questions . . . In short, the imposition of sanctions is indeed an assumption of legislative power by a private group which is likely to be intolerable under all but the most extreme circumstances".

Advisory Opinion Digest No. 130

Statute Involved: Section 5, Federal Trade Commission Act.
Released: June 13, 1967.

Use of words "National" and "Association" in name of proposed trade association.

The Commission was recently requested to render an advisory opinion concerning the legality of the use of the words "National" and "Association" in the name of an association in the process of formation.

The Commission was advised that a group of members of the industry had cooperated in the founding of the association, an unincorporated group. These members were active in several different states. They are now soliciting memberships from every industry member known in the United States, which exceed twenty-five hundred in number. The purpose of the association will be to foster the well-being and growth of the industry, as is common with trade associations. Within a short time, the group expects to achieve substantial and widespread representation.

The opinion advised that the Commission had considered the facts presented and the steps which the group planned to take and that it had no objection to the use of either word in the name of the proposed association.

Advisory Opinion Digest No. 131

Statute Involved: Sections 2(a) and 2(f), amended Clayton Act.
Released: June 27, 1967.

Acceptance of free merchandise by grocery retailer.

The Commission was recently requested to render an advisory opinion with respect to the legality of the acceptance by a grocery retailer of offers of free merchandise from some of its suppliers. Basically, the retailer was interested in the legality of accepting an offer, in connection with the purchase of merchandise, of one case of free goods for every location the purchaser operates. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

Under well-settle principles, the Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, the retailer having advised that no such performance was expected, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice of making such offers would be governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be

unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present.

As the buyer, the Commission advised that the retailer was governed by the provisions of Section 2(f) of the Act, which would make it unlawful knowingly to induce or receive a discrimination in price which is prohibited by Section 2(a). Thus the suppliers could give and the retailer could accept free merchandise under these circumstances to the same extent and in the same amounts as lower prices would be lawful.

Considering the nature of the statute involved, the Commission stated that it was difficult to rule categorically with respect to any particular proposal such as presented in the context of an advisory opinion. This is especially true when it comes to measuring the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these unknown factors, the Commission felt it could offer certain comments of a cautionary nature which might be helpful to the retailer in determining whether or not to accept such offers.

Under the formula which the suppliers proposed to use for determining the amount of free goods to be given each customer, namely, one free case for every location the purchaser operates, the Commission felt it was very unlikely that any of the defenses made available by the Act could be established. The only ones which seemed to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the suppliers obviously would not be reacting to any competitive situation but would instead be motivated solely by their own marketing purposes.

Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of outlets which the purchaser operates, without regard to quantities ordered or differences in the cost of manufacture, sale or delivery.

If the offer is made to obtain new customers, the Commission felt price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of

anticompetitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Commission is unable to give its approval to this plan.

Advisory Opinion Digest No. 132

Statute Involved: Section 2(a), Giving of free merchandise by sup-
amended Clayton Act. pliers to obtain new customers.
Released: June 27, 1967.

The Commission was recently requested to render an advisory opinion with respect to the legality of a proposal by a seller to give free merchandise in order to obtain new customers among retail food outlets not presently selling the products of the seller. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

Under the proposal, for each such outlet which has from one to six check-outs, both inclusive, the seller will give one free case of each product which is purchased by or for sale through such outlet. The requisite purchase must be in case lots. For each such outlet which has seven or more check-outs, the seller will give two free cases of each product which is purchased by or for sale through such outlet and the requisite purchase again must be in case lots. For the purpose of this offer, the term "check-outs" means cash registers or other places in the outlet at which customers regularly pay for food purchases made in said outlet.

The Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice would be governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition and where none of the defenses afforded by the Act are present. Thus the seller was advised that it could give free merchandise under these circumstances to the same extent and in the same amounts as it could grant lower prices to the recipients thereof.

Considering the nature of the statute involved, the Commission went on to advise that it was difficult to rule categorically with respect to any particular proposal in the context of an advisory opinion. This is especially true

when it comes to measuring in a prospective manner the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these unknown factors, the Commission did feel that it could offer certain comments of a cautionary nature which might prove helpful to the seller in determining whether or not to embark upon this program.

Under the formula which the seller proposed to use for determining the amount of free goods to be given each customer, namely, one free case for each outlet with up to six checkouts and two free cases for each outlet with more than six, it appeared unlikely to the Commission that any of the defenses made available by the Act could be established. The only ones which would seem to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the seller obviously would not be reacting to any competitive situation but would instead be motivated solely by its own marketing purposes.

Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of checkouts per outlet which the purchasers operate, without regard to quantities ordered or differences in the cost of manufacture, sale or delivery.

If the offer is made to obtain new customers, the Commission felt that price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of anti-competitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Commission is unable to give its approval to this plan.

Advisory Opinion Digest No. 133

Statute Involved: Section 5, Federal Trade Commission Act.

Released: July 13, 1967.

Agreement among members of a trade association to comply with government ruling.

A trade association recently requested an advisory opinion as to its proposal to hold joint discussions among its members as to the proper descrip-

tion of the industry's product looking toward a possible agreement among all concerned to comply with ruling of a government agency as to how the product should be labeled. The Association assured the Commission that the discussion would be for this limited purpose only and that there would be no price fixing, monopoly or other antitrust question involved.

The Commission advised that there could be no objection to a discussion among the members looking toward a limited agreement to comply with this ruling on a voluntary basis. The members were further advised, however, that nothing in this opinion was to be construed as approval of any steps which might be taken by the members, acting in their private capacity, to enforce this ruling themselves as to any members who might not be inclined to agree. Such approval as was given was limited to the simple agreement in principle to comply with the ruling, with enforcement being left to the properly constituted government authorities.

Advisory Opinion Digest No. 134

Statute Involved: Section 5, Federal Trade Commission Act.

Proposed lease of patented industrial machine designed to produce non-patented end products.

Released: July 13, 1967.

A manufacturer of a patented industrial machine designed to produce a non-patented end product has requested an advisory opinion as to the legality of its proposed form of lease.

The manufacturer posed two specific questions pertaining to the lease and requested an opinion as to any other phase which the Commission might feel should be covered. The first question related to the lease term and royalty provisions, which provide that the lease shall continue in effect for three years with the lessee having the right to terminate upon 90 days notice during the second and third years and that the rental shall be 2.2% of the gross sales of products produced on the machine by the lessee. The Commission stated that it viewed the patent grant as conveying to the patentee the right to charge whatever royalty was satisfactory to the parties, measured by whatever patented or unpatented royalty base he desired for as long a period of time as he elects, so long as there is no attempt thereby to extend the patent monopoly beyond its intended scope. Therefore, it could see no objection to three provisions as written.

The second question related to the paragraph providing that the lessor will not make any sales of the equipment and will not enter into a lease agreement for such equipment with anyone else whose place of business is located within the lessee's trading area as defined in the lease. The Commission noted that this provision did not grant the licensee an exclusive territory, although it had been advised that the nature of the end product would make it difficult for anyone else to compete within that area because of the freight factor. Be that as it may, the Commission was of the opinion

that the owner or holder of exclusive patent rights to make, use and sell may carve out of his grant a limited monopoly for a licensee and, therefore, it could see no objection to this provision.

The Commission further noted that following discussions with the staff the manufacturer authorized deletion of one sentence in the lease for editorial purposes and that in the paragraph dealing with alterations, the manufacturer requested deletion of the sentence requiring that any alterations, improvements, or changes, which are or may be patentable, shall, upon request, be assigned to the lessor. Thus the manufacturer did not request an opinion as to the required grantback of improved patents incorporated in the original submittal.

While the Commission did not purport to pass upon the purely contractual aspects of the lease, it did state that it had reviewed the other provisions of the lease and expressed no objections thereto from the standpoint of the laws it administers, particularly in view of the fact that it had been advised that there were other competitive machines which the lessees are free to rent or purchase and in view of the fact that there were no tie-ins requiring the purchase of auxiliary or other equipment or supplies from the lessor.

Advisory Opinion Digest No. 135

Statute Involved: Sections 2(d)
and 2(e), amended Clayton Act.
Released: July 19, 1967.

Tripartite promotional assistance
plan featuring brand name pro-
motion through contest books.

The Commission was recently requested to render an advisory opinion concerning the legality of a tripartite promotional program featuring the sale by a promoter to grocery retailers of books in which customers can paste labels from suppliers' products and receive a cash reward depending upon the number of labels collected.

Under the plan, manufacturers will be solicited for permission to show reproductions of their labels, box tops, etc., within the pages of the books at no charge. The promoter will then offer the books for sale to all retailers within the boundaries of the initial test area. The retailers can then distribute the books in any manner they choose, either by mail, house-to-house, or at their stores. They may offer them as a bonus for a certain purchase or for purchases of a specified amount.

Consumers will be invited to buy and try the products shown and to paste or otherwise fasten the actual label or other product identification over the designated space in the book. The books are redeemable for cash at the issuing retailer's store and the value depends upon either the total number of product identifications returned in one type of book or whether all product identifications are returned in the other type of book. The retailer advances the cash reward to consumers redeeming books issued by him. The promoter

will then reimburse the retailer the full amount advanced and in addition pay him a checking and handling fee, which will vary depending upon whether it is a completely filled or partially filled book. The promoter will then invoice suppliers based on the number of product identifications returned. This invoice will include an amount sufficient to cover the cash reward to the consumer, and fee to be paid the retailer and a payment to the promoter for his costs plus his profit.

Retailers stocking all the items shown on the inside pages, or willing to do so, will be offered a choice of the two types of books. First, a book offering a cash reward based on the number of product identifications returned. The consumer can fasten one or more of the product identifications in the book and return it to the retailer for a cash reward. Second, a book offering a flat cash reward for completely filling the book with all identifications shown. Retailers stocking one or more of the items shown, but not all of them, will be offered the book where redemption value is based on the number of identifications returned. The consumer can make purchases anywhere and fill as many spaces as desired, regardless of limit to items stocked by the issuing retailer.

Retailers using either type of book can choose from individualized covers or preprinted stock covers and will have a choice of using a name coined by the promoter or a name of their own choosing. The cost to the retailer will vary according to the type and quantity of books purchased. The promoter has advised that the differences in costs of both the standard and individualized covers is solely attributable to differences in the cost of printing and distributing different quantities and that the books are to be sold to retailers at cost.

The promoter will mail an "Offer to Retailers" to all grocery stores, supermarkets, headquarters of each local, regional and national chain, wholesalers and the area headquarters or warehouses of each cooperative or association within the geographic area, as their names can be found in trade and telephone directories, route lists, etc. Realizing that some stores might be missing from these lists and also that other types of retailers might be offering at least some of the products shown, the promoter will run an advertisement in every daily newspaper within the area outlining the features of the books and offering to furnish a copy of the notice to any interested retailer. In any county where there is no daily newspaper, the notice of advertisement will be run in a weekly newspaper of general circulation.

The Commission advised that while it believed the promoter had done a commendable job of devising a plan which contained alternatives which should prove to be usable in one form or another by every customer of the participating suppliers, there was still lacking the element of proportionally equal treatment of those customers as required by Sections 2 (d) and (e) of the Clayton Act, as amended. In brief, these sections require that when-

ever a seller makes payments and furnishes services for the benefit of one customer, he must make those payments or services available on proportionally equal terms to all competing customers. If a situation such as this, where a number of suppliers will be making payments to the promoter which will inure to the benefit of their customers, the responsibility rests on the promoter and the suppliers to see that the promotional assistance thereby rendered is made available on proportionally equal terms to each competing customer of each participating supplier.

The Commission's concern with this proposal stemmed first from the fact that the retailers will be charged different prices for these books depending upon the quantities ordered. In one sense, this could be viewed simply as a sale from the promoter to the retailers and thus subject to the cost justification defense which the statute makes available to one charged with a discrimination in price. However, the Commission found it conceptually impossible to lift this transaction out of the whole and view it as a separate price discrimination problem. The proposal involves one essentially promotional program in which the parts cannot be separated from the whole. While it is true that the promoter will sell the books to the retailers, he will do so at cost and this would not be possible were it not for the fact that he will derive his profit from payments made by the suppliers. Thus the Commission ruled that the entire plan was keyed to payments which emanate from the suppliers and this being so all parts must be judged according to the standards set forth in Sections 2 (d) and (e) of the act.

This brought the Commission into confrontation with the fact that the defense of cost justification is not available to one charged with a violation of these Sections. It followed, in the Commission's view, that there was no way to escape the conclusion that the smaller dealers were not being afforded proportionally equal treatment when they had to pay more for the books than did their larger competitors. The opinion acknowledged it to be true that these prices are equally available to all in that all will be charged the same price for the same quantities. But it is equally true that all will not be able to buy in the same quantities. Since the retailers' profits from this plan will equal the amount by which their payments for redeeming books exceed their cost of purchasing such books, the Commission could not view the plan as being available on proportionally equal terms so long as there is a disparity in the prices they must pay in order to participate.

In this connection, the Commission made it clear that it was only concerned with the prices charged for the books with standard covers since those were the real base of the plan. The purchase of books with individualized covers appeared to be purely optional with the retailer if he cared to spend more in order to more closely identify the plan with his own store.

A second respect in which this proposal was held to be deficient under the law stemmed from the fact that the large retailers were apparently to be

offered both the fully completed and the partially completed book plans, while the smaller retailers were to be offered only the latter. In the Commission's view, both plans must be affirmatively offered to and made available to all retailers before the overall plan could be said to be available to all competing customers on proportionally equal terms.

The opinion singled out two additional factors of the proposal which should be borne in mind if it is to be conducted within the law. The first concerned the fact that grocery retailers will be notified by mail and all other customers of the participating suppliers will be notified by advertisement. While the statute prescribes no particular method by which the availability of allowances or services is to be communicated to a seller's customers, it is clear that the duty rests upon such seller to see that all competing customers are informed. A plan can only be said to be available to a customer if he knows about its existence. If the method of notification chosen actually reaches all competing customers, there could be no objection to the plan on that score. However, the promoter was cautioned to keep in mind that the suppliers could incur liability if it subsequently developed that some did not as a matter of fact receive notice because of the method chosen.

The second factor stemmed from the fact that it was proposed initially to test the program in nine contiguous counties. Even though this is a test area the promoter was advised to be careful here not to discriminate against customers located on the fringes but outside the area selected since they may be actually competing with those who are participating. In such situation, the existence of competition prevails, not geographic or political subdivisions, and the fringe area customers, if any there be, who in fact compete must be afforded an equal opportunity to participate.

NOTE.—Modified by Commission action of July 11, 1968. See Appendix.

Advisory Opinion Digest No. 136

Statute Involved: Section 5, Federal Trade Commission Act.

Selective leasing of shopping center space.

Released: July 19, 1967.

The Federal Trade Commission was recently asked its views as to the legality of the following proposed course of conduct:

A real estate developer plans to develop a new city composed of some 5,000 families. In connection therewith space is to be made available for business and service facilities. Prospective lessees of this space will be accepted, or rejected, in light of a statistical study purporting to show an optimum occupancy mix.

The Commission advised the requesting party that, in the absence of any purpose or intent to create a monopoly, prospective lessees could be accepted or rejected at will provided the action taken was taken independently and as the result of the lessor's individual judgment.

The Commission noted, however, that it expressed no views as to the propriety, under the trade regulation laws, of any agreement between lessor and lessee as to others to whom space might be leased.

Advisory Opinion Digest No. 137

Statute Involved: Section 5, Federal Trade Commission Act.
Released: August 24, 1967.

Proposed trade association discussions seeking firm price guarantees from suppliers.

The Commission was recently requested to render an advisory opinion with respect to the legality of a user's trade association discussing and seeking a "guarantee that a quoted price will remain firm for a definite number of days" from individual suppliers or from their national association.

It was represented that the product constitutes about 30% of the cost of doing business and that while some users buy direct, others purchase from intermediate suppliers. Regardless of the supply source, product suppliers change prices without notice and will not guarantee firm prices unless the purchase contract calls for a large quantity of the product. As users' customers demand firm price quotations on their needs and because of the normal time lapse between a quotation and actual product purchase, an interim price increase by producers results in a lessening of the users' profit. The Association added that there is no agreement not to do business with those producers who decline to guarantee firm prices, but that individual users will continue to bargain for concessions as they do at present.

The Commission advised that it could neither approve nor sanction the proposed industry discussions. Though such discussion might be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even if the discussions were accompanied by disclaimers, there is implicit therein too grave a danger that it would serve as advice whereby the concerted power of members of the local association, and even of the national association, might be brought to bear to coerce the producers, or their association, to conform pricing policies to the standard desired, or at the very least as an invitation to enter into agreements among themselves to do so.

Advisory Opinion Digest No. 138

Statute Involved: Textile Fiber Products Identification Act.
Released: August 24, 1967.

Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

The Commission was recently requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

The requesting party proposed using a label which would bear the depiction a fur-bearing animal commercially used in fur products, a trade name and trademark having a fur-bearing animal connotation, and the required fiber content disclosures.

The Commission pointed out that the Rules and Regulations promulgated under authority of the Textile Fiber Products Identification Act provide, in Rule 9, that the label of a textile fiber product shall not contain a name, word, depiction, descriptive matter, or other symbol which connotes or signifies a fur-bearing animal, unless such product is a fur product within the meaning of the Fur Products Labeling Act. Subject to this proviso, a textile fiber product may not be described on the label with the name or part of a name of a fur-bearing animal, whether as a single or combination word similar to a fur-bearing animal name, for example, "Broadtail."

The Rules permit the nondeceptive use on textile fiber products of fur-bearing animal names but only where the animal fur is not commonly or commercially used in fur products, as for example, "Bear." Further, the Rules do not prevent nor prohibit the nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless "the textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product."

The Commission advised that it would not be proper, in the labeling of textile fiber products, to use a label bearing the depiction of a fur-bearing animal nor a trademark and trade name having fur-bearing animal connotations. Such labeling, with or without the required fiber content disclosures, of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective customers into the mistaken belief that the textile fiber product to which such label is affixed contains the fur of the animal depicted of fur fibers from such animal.

Advisory Opinion Digest No. 139

Statute Involved: Section 5, Federal Trade Commission Act.

Advertising claims for personal deodorant spray.

Released: August 30, 1967.

The Commission announced today it had rendered an advisory opinion in regard to some proposed advertising claims for a personal deodorant spray.

Specifically, the Commission considered the propriety of the following two claims: (1) that the product meets the U.S. Government requirements for safety and effectiveness and (2) that no other medicated personal deodorant spray equals its safety and effectiveness.

In regard to the first claim, the Commission said there were no specific standards or requirements officially recognized by the U.S. Government relating to the safety and effectiveness of personal deodorant sprays. Under these circumstances, therefore, the Commission said it would be improper to claim that such requirements exist and that the product meets those requirements.

With respect to the second claim, the Commission said that opinion evidence indicated there are other medicated deodorant sprays on the market which are equally as safe and effective as the product in question. In view of this opinion evidence, and in the absence of reports of properly controlled studies establishing the validity of the claim, the Commission said that it could not give its approval to the second claim.

Advisory Opinion Digest No. 140

Statute Involved: Section 2(d), Advertising allowances by book
amended Clayton Act. publisher.
Released: August 30, 1967.

The Commission announced today it had rendered an advisory opinion in regard to the legality of a book publisher's promotional plan calling for the payment of advertising allowances. Specifically, the Commission ruled that the proposed plan would be in compliance with Sec. 2(d) of the Clayton Act, as amended.

Under the terms of the proposed plan, the book publisher proposes to offer to retailers, wholesalers and retailers who purchase through wholesalers advertising allowances equal to 75% of the actual cost for newspaper and magazine advertisements at local rates, but not to exceed 10% of the net value of confirmed orders for the advertised titles. Additionally, allowances will be paid for the use of stuffers, circulars and catalogs, but not to exceed 10% of the dealers' net purchases. Regardless of which method of advertising is used, promotional payments will not exceed 10% of the buyers' total net purchases.

Advisory Opinion Digest No. 141

Statute Involved: Section 5, Fed- Proposed advertising for mink oil
eral Trade Commission Act. skin lotion.
Released: September 6, 1967.

The Commission was recently requested to render an advisory opinion with respect to proposed advertising for a skin lotion containing mink oil, which would represent that the product will relieve the scaling, itching and redness of psoriasis and eczema.

The opinion advised the advertiser that while the Commission has no objection to representations that the product will afford temporary relief of itching and scales of psoriasis, any mention of eczema or representations in advertising that the product will relieve redness would appear to have the capacity and tendency to deceive.

Advisory Opinion Digest No. 142

Statute Involved: Textile Fiber Products Identification Act. Information required on label affixed to textile fiber products.
Released: September 6, 1967.

The Commission was recently requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to stimulate a fur or fur product.

The requesting party proposed using two labels on his products. The first would bear his trademark and trade name and would be affixed inside the neck of the garment in the conventional manner. The second, bearing the required fiber content disclosures, would be a separate tag hung elsewhere on the garment.

The Commission pointed out that the Rules and Regulations promulgated under authority of the Textile Fiber Products Identification Act define "required information" as that which must appear on labels, and "label" as the means of identification required to be affixed on textile fiber products and on which the "required information" is to appear (Rule 1, paragraphs (e) and (f)). The "required information" includes "the generic names and percentages by weight of the constituent fibers present" which shall be "conspicuously and separately set out on the same side of the label in a manner as to be clearly legible and readily accessible" to such a prospective purchaser (Rule 16). The name to be used on such labels "shall be the name under which the person is doing business" or his word trademark if registered (Rule 19).

The opinion pointed out that Rule 16(b) provides that the required name or registered identification number may be conspicuously set out on a separate label which is prominently displayed in close proximity to the label containing the other required information. However, in this instance, the Commission believed that it would not be proper, in the labeling of a textile product, to identify the product with one label bearing a trademark and trade name including fur terminology and to make the fiber content disclosure on another label or tag hung elsewhere on the product. It was the Commission's opinion that the proposed labeling of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective purchasers into the mistaken belief that such product was a fur or fur product.

Advisory Opinion Digest No. 143

Statute Involved: Section 2(d), Promotional allowances by fabric
 amended Clayton Act. supplier to finished product re-
 Released: September 12, 1967. sellers.

In an advisory opinion the Commission ruled that a fabric supplier who makes advertising allowances available to one or more resellers of a finished product, irrespective of the fact that an intermediary performs work on the raw material which transforms it into the finished product, thereby adopts those resellers of the finished product as his customers and must comply with Sec. 2(d) of the Robinson-Patman Act.

Commenting further upon the customer relationship, the Commission said:

"We think Congress clearly intended to ban discriminations in the form of advertising allowances, regardless of the fact that intermediaries might be interposed, where the grantor deliberately contacts hundreds of retailers directly with the purpose of expending thousands of dollars for advertising purposes. Thus where a supplier initiates such a promotional program with retailers and has primary, if not the sole, responsibility over the control and administration of the plan, we think the customer relationship has been established and the plan must be tested in the light of the requirements of Sec. 2(d) of the Act."

Under the terms of the proposed plan, the fabric supplier would pay 50% of retailers' advertising costs if the retailer sells and advertises wearing apparel manufactured from a certain line of fabric, up to a total cost of 1,200 lines published in Advertising Checking Bureau (ACB) newspapers. Retailers who use non-ACB rated newspapers, radio, television, handbills or mail stuffers will be paid an equivalent measurable cost. The plan will be made available to all retailers located in selected trading areas of all wearing apparel manufacturers who purchase and produce the finished product from the fabric in question. Only dealers who purchase apparel at regular wholesale prices will be eligible to participate.

In its opinion, the Commission concluded that the plan complies with Sec. 2(d) of the Robinson-Patman Act with two reservations. In commenting upon the first reservation, the Commission said:

"The statute requires one who gives advertising allowances to make those payments available to all competing customers. Availability means that the grantor of the allowance must notify all competing customers of their right to participate in the plan. Thus the provision of the plan which requires a retailer located just outside one of the selected areas to show that he competes with one or more of the favored retailers in order to have the offer made available to him would appear to shift the responsibility of notification required under the statute. For this reason, the Commission cannot approve this particular provision of the plan

should it result in discrimination against retailers located on the periphery of the selected trading areas.”

With respect to its second reservation, the Commission said that its opinion should not be construed as implying approval of the phrase “at regular wholesale prices” if the practical effect of that language is to procure resale price maintenance.

Advisory Opinion Digest No. 144

Statute Involved: Section 5, Federal Trade Commission Act.

Proposed license agreement for process patent.

Released: September 29, 1967.

The Commission recently rendered an advisory opinion in which it informed the owner of patented process for preparing food that it could see no objection to the form of a proposed licensing agreement with the food processing industry.

The proposed agreement, which was the only form of agreement to be used, was described as nonexclusive in nature and provided for the licensees to use the process and machinery at one uniform rental rate regardless of the physical location of the licensee. Although the process patent contemplates the use of the machinery and the agreement contemplates use by the licensees of that machinery, there is no absolute requirement that the licensees use any particular machinery in connection with the process.

The hourly rental to be charged all licensees was to be measured by a meter attached to the machine and the licensor reserved the right to cancel the license if the annual rental due from operation of the machinery fell below a stated minimum amount, unless the licensee paid the difference between the actual rental due and the required minimum. The duration of the agreement was to be for a period of five years.

The Commission advised that while it did not purport to pass upon the purely contractual aspects of the agreement, it could see no objection to the form of the agreement from the standpoint of the laws it administered, as distinguished from matter pertaining to the implementation thereof.

Advisory Opinion Digest No. 145

Statute Involved: Section 2(a), amended Clayton Act.

Aggregating purchases of multi-unit organization for discount purposes.

Released: October 17, 1967.

The Commission rendered an advisory opinion in which it concluded that it would not be permissible under Sec. 2(a) of the amended Clayton Act to aggregate the purchases of three centrally owned retail grocery stores for the purpose of cost justifying a lower price to those stores.

“The reason for this,” the Commission said, “is that discounts to multi-

unit purchasers must be cost justified on a store-to-store basis where, as here, each store orders separately, receives separate delivery and is invoiced separately."

Concluding its opinion, the Commission said:

"Since independent and singly owned retail stores are served in identically the same manner, it would confer an advantage on the multi-unit store, not by virtue of any savings in cost to the store but solely by reason of its membership in the centrally owned organization. Combining or *aggregating purchases*, therefore, for the purpose of determining costs of a multi-unit organization is not related to the realities of the market since the independent or singly owned store competes with the individual stores of the chain organization."

The particular facts in the advisory opinion involved three centrally owned retail grocery stores. Each store placed separate orders with the wholesaler, had its goods delivered separately and was invoiced separately. In addition, some single owned stores bought in larger volume than the smallest store which belonged to the centrally owned organization.

Advisory Opinion Digest No. 146

Statute Involved: Section 5, Federal Trade Commission Act.	Request for revision of Advisory Opinion No. 120 pertaining to use of the word "new".
Released: October 24, 1967.	

The Commission was recently requested to reconsider and revise its advisory opinion as to the permissible period of time during which an advertiser may continue to describe a new product as being "new." The opinion in question was announced in Advisory Opinion Digest No. 120 and took the position that until such time as later developments may show the need for a different rule, the Commission would be inclined to question use of any claim that a product was new for a longer period of time than six months.

The request was that the Commission revise this opinion to omit specifying any time limit or, in the alternative, to specify a period of at least one year, with the same proviso as was written into the present opinion that exceptional circumstances may warrant a longer or shorter period. In response to this request, the Commission stated its basic conclusion that the general rule announced in the opinion, which was announced as the rule which would be followed until later developments might show the need for a different rule, has not been in existence long enough for the accumulation of any additional experience which would indicate the need for a change at this time.

However, the Commission did take note of the argument that six months is not adequate time for test marketing new products, which are usually

tested in areas representing between 1% and 15% of the population and run for an average of six months to two years. In this regard, the Commission advised that the six months rule announced in its previous opinion does not apply to the bona fide test marketing of a new product. So long as the test marketing program does not cover more than 15% of the population, so long as the test period does not exceed six months in duration and so long as it is being conducted in good faith for test purposes only, the Commission stated that it did not intend to apply the six months rule until the test period had ended and the product had been introduced to the general market.

The requesting party had further contended that the time selected was not long enough to cover the average life of packaging materials and advertising literature and thus would necessitate scrapping such materials after the time had expired. With respect to this point, the Commission stated that while it was always anxious to minimize such losses to advertisers whenever it could do so consistently with its duty to protect the public from deception it would seem that here the advertiser is peculiarly in control of the situation and able to protect himself against being caught with a large inventory of such materials on hand.

When an advertiser introduces a new product to the market he is at that time on notice that the claim "new" can remain valid for only a temporary period of time and he is at that time charged with the responsibility of preparing only so much material containing the word as can be used within the period of time during which the product can accurately be described as new. Even granting that one cannot predict with mathematical accuracy how fast the inventory will be consumed, still one experienced in such matters should be able to predict with reasonable accuracy how much will be needed for six months use and be prepared to discontinue use of such material at the end of that time without the loss of significant amounts.

Finally, the Commission stated that it had announced in its first advisory opinion on this subject (Advisory Opinion No. 120) that shorter or longer periods of time would be considered for particular products upon a showing that such different period was more appropriate for the product in question. No such showing had been made on this application warranting the Commission to make any change in its announced time period.

Advisory Opinion Digest No. 147

Statute Involved: Section 2(a), amended Clayton Act.	Granting of "back-haul" allowances to customers picking up their own orders.
Released: October 24, 1967.	

The Commission recently rendered an advisory opinion advising a manufacturer of food products that it would probably be illegal to grant so-called

"back-haul" allowances to customers who pick up their own purchases at the manufacturer's warehouses.

The manufacturer in question presently sells its products on a delivered price basis with bracket pricing and does not permit customers to pick up products at warehouses or plants. Customers with trucks returning empty to their warehouses along routes near the manufacturer's warehouses and plants are now demanding the opportunity to pick up products and to earn an allowance by so doing. Consequently, the manufacturer proposed to institute a program whereunder customers would be permitted to pick up products and be paid an allowance equal to the amount the manufacturer would otherwise have to pay a common carrier to deliver to the customer.

The Commission advised that the proposal was governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present. Considered in the light of this statute, the Commission concluded that, assuming the presence of all the other elements necessary to a determination of a violation of the statute, the implementation of this proposal would probably result in a violation of the law. This result seemed to the Commission necessarily to flow from the use of a delivered pricing system, for in such a case the freight factor included within the price is not the actual freight to any given point, but an average of the freight costs for all customers within the zone wherein the delivered price is quoted, or, at least, a figure determined by some formula apart from actual costs. If one customer is then given a "back-haul" allowance for the actual freight saved, the opinion advised serious possibility of discrimination would exist in any delivered pricing system and it is highly doubtful that the defense of cost justification, at least, would be available.

While this conclusion may seem unreasonable from one point of view, since the allowance would be for no more than the actual freight saved, it seemed to the Commission to be a necessary result of using a delivered pricing system. Whenever such a seller departs from his delivered prices for the benefit of one customer, he leaves himself open to a charge of discriminating against his other competing customers who order in the same quantities and hence fall within the same pricing bracket because he failed to make allowances for the individual cost factors present in their situations. The law does not require that a seller pass on his cost savings to his customers, the Commission stated, but where he elects to do so in one instance it does require that he not discriminate between his purchasers where such discrimination has the proscribed adverse effect on competition.

Advisory Opinion Digest No. 148

Statute Involved: Flammable Fabrics Act.

Wood fiber chip corsage as wearing apparel under Act.

Released: November 7, 1967.

The Commission was recently requested to render an advisory opinion as to whether a corsage made of wood fiber chips is considered to be wearing apparel under the Flammable Fabrics Act.

The Commission has advised the requesting party that in its opinion a corsage made of wood fiber chips is an article of wearing apparel as the term "article of wearing apparel" is defined in the Flammable Fabrics Act, and is subject to the Act.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 149

Statute Involved: Section 5, Federal Trade Commission Act.

Payment for recruiting new students.

Released: November 21, 1967.

The Commission recently advised a school that it might properly offer and pay a stated sum of money to present students under the following circumstances:

At, or near, the conclusion of a course of instruction students would be supplied with cards recommending the school for distribution to their friends. When and if a recipient of one of the distributed cards contracted for, and paid the fee for, a course of study offered by the school, the student who had distributed that card would be, at his option, paid a stated sum or would have an equal sum credited against the cost of his further studies.

Commissioner JONES dissents:

In her view this particular type of paid testimonial (where students are to receive \$10.00 credit on tuition for every new enrollee recruited by them) without disclosing the fact of such payment is inherently deceptive.

Advisory Opinion Digest No. 150

Statute Involved: Section 5, Federal Trade Commission Act.

Trade association publication of advertisements for use by members featuring range of prices to be charged consumers.

Released: November 21, 1967.

The Commission recently advised a trade association in the home improvement field that it would probably not be illegal for the association

to furnish its members with advertising featuring a range of prices to be charged consumers.

The advertisements in question were to be included in a booklet to be sent to all members and would be suitable for mailing to the members' customers. The advertisements would depict typical home improvement projects, list the specifications for the project and state a range of prices in terms of dollar amounts per month for a specified number of years. The prices would be qualified by stating that they will vary according to labor and material costs in various areas. One page of the booklet would include a schedule of financing charges for one, two, three years, etc. The advertisements would be marked "Proof" and members purchasing the booklets to send to their customers would have the option of changing any of the suggested project prices if they desire.

The opinion stated that, in general, there could be no objection to the proposal if implemented exactly as outlined above. In this connection, however, the Commission added that all involved should be aware of the dangers of suppressing or eliminating or restraining price competition among individual builders or contractors because of the fact that prices are to be included in the advertisements. Thus, this plan would be rendered unlawful if in practice the suggested prices were used as subterfuge or pretext for horizontal price agreements, or otherwise restraining competition, between contractors or builders in particular market areas. Special care must therefore be taken to insure that the legality of the plan is not impaired by the manner in which it is implemented. This advisory opinion is expressly predicated on the assumption that the proposal will be implemented in strict conformity with the representations made to the Commission.

Advisory Opinion Digest No. 151

Statute Involved: Section 2(a), amended Clayton Act.	Commission cannot approve substantial additional annual volume discount pricing program.
Released: December 8, 1967.	

The Commission advised a manufacturer it cannot approve a pricing proposal to provide customers an additional 10% discount on all purchases above \$15,000 in volume within the calendar year. The additional discount would be granted as soon as the \$15,000 volume is reached in the year. The proposal was scheduled to go into operation in 1968. The same rules would apply for each succeeding calendar year. Also, the program would provide a further discount on purchases above \$25,000 in annual volume. The present pricing program is not under examination.

The manufacturer sells his products solely to nonexclusive distributors who resell them, and similar commodities produced by other suppliers, to end users.

The Commission told the manufacturer it cannot approve the proposal because there is a strong likelihood that price discriminations in violation of Section 2(a) of the Clayton Act may result if the proposal is put into operation. The Commission pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate Section 2(a) of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

Advisory Opinion Digest No. 152

Statute Involved: Section 5, Federal Trade Commission Act.

Trade association product certification program.

Released: December 13, 1967.

The Commission announced today it had rendered an advisory opinion involving a trade association's proposed use of a certification mark which is designed to upgrade the safety and quality of a particular product.

Specifically, the Commission was requested to rule upon the following two questions:

1. Can the association require non-members to join the association as a condition precedent to using the association's patented certification mark?
2. If not, can the association charge non-members a higher fee than members for use of the mark?

In response to the first question, the Commission said that it should not grant approval to a program where the "trade association requires non-members to join the association as a condition to using the association's patented certification mark because there is at this time insufficient information to evaluate the impact on competition of such a restriction." Commencing further on the first question, the Commission sent the requesting party a copy of Advisory Opinion Digest No. 96, dealing with a closely related situation where the Commission did give its approval to a similar program on condition that all competitors be given unrestricted and non-discriminatory access to its certification program whether they were members of the association or not.

In response to the second question, the Commission reached the following conclusion:

"... non-members of the association may be charged a higher fee than members provided it represents no more than a reasonable differential to insure that members and non-members of the association alike pay an equal share of the costs necessary to support the program. In short, if members of the association by payment of dues or other assessments have borne some of the cost of the program not reflected in the certification fees charged them then the payment of that portion of

the costs may be reflected in the fees charged to non-members. This advisory opinion of course can not give you more than general guidance on this matter and the question of what is a reasonable differential would have to be decided on the facts of each case."

Commissioner JONES, dissenting:

I have no quarrel with the substance of the Commission's response to the applicant Association's request for an advisory opinion on two questions relating to the availability to non-members of the Association of the certification mark to be adopted by the Association relative to a particular type of safety device and to the right of the mark by non-members. However, I am dissenting from this opinion because in my view the Commission should not have responded to what are obviously peripheral aspects of the Association's certification program without full knowledge of the substantive features of the program.

The members of the applicant trade association manufacture the safety device involved. They describe their products as "high performance" ones which are used in particular fields. The certification program which gave rise to the advisory opinion request is said to have been adopted in order to upgrade the quality of the safety device involved and to insure that no one requiring such a product places too great a reliance on an inadequate product. We do not know whether the certification mark represents minimum or maximum safety standards, nor do we know whether the product test standards being used were designed for the particular uses for which this product might be purchased. It is highly possible that a product failing to qualify under the mark may be entirely adequate for some uses though not for others. It is equally possible that a product meeting the standards might be quite inadequate for other purposes. Thus, some manufacturers who make adequate products for certain purposes might nevertheless be excluded from obtaining the mark. We also have no information on the procedures used in formulating the standards on which the mark will be based. Finally, we are not informed as to how the mark might be advertised and what the impact of the name of the standards institute which formulated the standard might have on the public's attitude towards the Association's mark.

In short, we are asked to give an opinion on a peripheral aspect of this program when the program itself, either in its conception or in its administration, might be in violation of the laws administered by this Commission. I do not believe that we should give advisory opinions under such circumstances.

Commissioner REILLY concurs with the dissenting statement.

Advisory Opinion Digest No. 153

Statute Involved: Section 2(a), Proposal to grant discounts for in-
amended Clayton Act. creased annual purchases.

Released: December 19, 1967.

The Commission recently rendered an advisory opinion in which an applicant was informed a proposal to grant discounts to a certain class of customers—jobbers who bought his products for resale—to be given at the end of a sales year based on increased amounts of purchases over purchases in the preceding sales year cannot be approved because it appears on its face the proposal would violate Section 2(a) of the Clayton Act if it were put into operation. The proposal was based on the following scale:

- (a) 2% discount on a 20% to 29% inclusive increase;
- (b) 3% discount on a 30% to 39% inclusive increase;
- (c) 4% discount on a 40% to 49% inclusive increase; and
- (d) 5% discount on a 50% or more increase.

The Commission further pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate Section 2(a) of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

Advisory Opinion Digest No. 154

Statute Involved: Section 5, Fed- Legality under antitrust laws of
eral Trade Commission Act. complying with State milk mar-
Released: December 22, 1967. keting order fixing minimum
resale prices.

The Commission recently rendered an advisory opinion that a distributor who complied with a state's milk marketing order fixing the minimum resale prices of dairy products would not be subject to a charge of violating the antitrust laws.

The distributor in question did not have a warehouse in the state in question, but shipped dairy products into the state from its warehouses located in neighboring states. In most cases, the price increases required by the order issued pursuant to the state's dairy products marketing act would be significant and the distributor sells the same products at substantially lower prices to stores located in the neighboring states because competitive pressures dictate lower prices except where the higher prices are required by law.

The distributor expressed concern that by agreeing to comply with the orders of the state, it would subject itself to possible action under the Sherman Act, the Federal Trade Commission Act, or possibly even the

Clayton Act, as amended by the Robinson-Patman Act, since sales will be made at different prices to purchasers in different states of commodities of like grade and quality. Hence an opinion was requested as to whether the distributor will be in violation of any of the laws administered by the Commission if it complies with the state laws fixing the minimum resale prices of dairy products.

The Commission advised that it was of the opinion that the distributor would not be subject to a charge of violating any of the laws it administers because of its compliance with the lawful orders of the state as to the minimum resale prices of dairy products. In the Commission's view, it is well settled that the antitrust laws have application to the actions of individuals, partnerships and corporations and not to the activities of a state. While a state may not authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful, it may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a state as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the state's orders.

Advisory Opinion Digest No. 155

Statute Involved: Section 5, Federal Trade Commission Act; Section 2(a), amended Clayton Act.
Released: December 29, 1967.

1. Varying discount pricing schedule.
2. Distributor recruitment through grant of override.

The Federal Trade Commission recently advised a manufacturer of household products that his proposed varying discount price schedule and his proposed granting of bonus payments to recruiting distributors on the business of distributors whom they recruit would, under the facts presented, in all probability result in violation of both Section 2(a) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

The manufacturer proposed to appoint as independent distributors such persons as would buy the requisite amount of inventory. Initial sales to such distributors would be at 33⅓% off the manufacturer's suggested prices for his products. Incentive bonuses, computed at from 5% to 60% of the value of their purchases, increasing as the value of purchases increased, would be paid from time to time to the distributors. Distributors would be encouraged to recruit additional distributors who would also make a capital investment in inventory. A recruiting distributor would be given at 10% to 12% override on the dollar volume of purchases of any distributor whom he had recruited.

The Commission noted that because of the nature of the plan it was almost inevitable that very wide differences in prices would be charged customers, some of whom would, by reasonable assumption, be competitive with others. These differences would be so great that the anti-competitive effects made unlawful by the amended Clayton Act would almost certainly follow.

In addition, it is clear from the facts presented that the requesting party contemplates that the so-called independent distributors would be for the most part selling at retail. The marketing plan is not primarily designed as an offer to knowledgeable businessmen, competent to weigh and evaluate commercial risks. It is designed, rather, to appeal to uninformed members of the general public, unaware of and unadvised of, the true nature of the risks run—persons with limited capital who are led to part with that capital by promise and hopes which are seldom, if ever, fulfilled. A particular vice of the plan is that part which provides override bonuses for recruited distributors. Implicit in such an arrangement is the promise, rarely if ever kept, that the recruiting distributor can, without himself working, profit greatly from the work of others.

Advisory Opinion Digest No. 156

Statute involved: Section 5, Federal
Trade Commission Act.
Released: December 29, 1967.

Origin qualification for brand name
indicating French origin.

The Commission rendered an advisory opinion in regard to the legality of using foreign words indicating French origin in the brand name of a toilet preparation, where the product is blended in the United States with domestic alcohol and French oils. Specifically involved in the opinion was the propriety of using foreign words in the brand name of the product immediately followed by the following qualification—"BLENDED WITH FRENCH OILS IN USA".

In its opinion, the Commission said that the question posed is governed by Rule 3(b) of trade practice rules for the Cosmetic and Toilet Preparations Industry. "This rule," the Commission said, "specifically forbids the use of any foreign word or depiction in the brand name of a toilet preparation which may tend to convey the erroneous impression that the product is made wholly in a foreign country, unless a conspicuous disclosure is made in close conjunction therewith of the fact that such product was blended in the United States."

Concluding its opinion, the Commission said:

"... the proposed disclosure, 'BLENDED WITH FRENCH OILS IN USA,' would meet the requirements of Rule 3(b) as an adequate qualification of a French brand name to describe a product blended

in the United States with domestic alcohol and French oils. It is not necessary to disclose the presence of French oils, but this disclosure is permissible so long as the statement is factually true."

Advisory Opinion Digest No. 157

Statute Involved: Section 2(d), Paying advertising allowances to
amended Clayton Act. customers in selected trade area.
Released: January 4, 1968.

The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by Section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

"This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

Concluding its opinion, the Commission said:

"Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission."

Advisory Opinion Digest No. 158

Statute Involved: Section 5, Federal Trade Commission Act. Proposed trade association adoption
of a pricing manual for common
use by electronics servicemen
members.
Released: January 4, 1968.

The Commission was recently requested to render an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects.

Advisory Opinion Digest No. 159

Statute Involved: Sections 5 and 12,
Federal Trade Commission Act.
Released: January 12, 1968.

Advertising offering sale of treat-
ment for athlete's foot.

The Commission recently rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use

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of a product, the efficacy of the product for the use recommended must of course also be considered.

Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so.

Advisory Opinion Digest No. 160

Statute Involved: Sections 5 and 12, Federal Trade Commission Act.	Advertising promoting sale of information and a product.
Released: January 12, 1968.	

The Commission issued an advisory opinion today in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

The initial advertisement offered the sale of information for 20¢ and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

Its opinion concluded with the following statement:

"The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

"This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so."

Advisory Opinion Digest No. 161

Statute Involved: Sections 5 and 12, Federal Trade Commission Act.	Advertising promoting sale of information and a product.
Released: January 18, 1968.	

The Commission today issued its advisory opinion concerning proposed advertising offering for sale for \$1.00 a pamphlet which (1) advises a method for curing athlete's foot and (2) recommends the use of a specific

proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

The Commission stated that use of the proposed advertising would be violative of Sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care." The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's foot are now available which have hitherto been withheld from the public.

Its opinion concluded with the following statement:

"The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

"This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so."

Commissioner ELMAN dissents:

He does not agree that selling advice is in the same category as selling a product. Recognizing that a good deal of foolish and worthless advice is being peddled to the American people, and not merely in the field of medicine or health, Commissioner Elman does not believe that Congress intended that the Federal Trade Commission or any other government agency should set itself up as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories disseminated to the public.

Advisory Opinion Digest No. 162

Statute Involved: Section 5, Federal Trade Commission Act.

Exchanging wage rates among trade association members.

Released: January 27, 1968.

The Commission announced today it had rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used

as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

"Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care."

Advisory Opinion Digest No. 163

Statute Involved: Section 5, Federal Trade Commission Act.

Released: January 31, 1968.

Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.

The Federal Trade Commission recently rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance" or other similar terminology.

The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisfactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers will be made from time to time and those who are not keeping pace will be discontinued.

The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their ability to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not designed to maintain suggested prices, is one which will seriously affect those prices.

The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril.

Advisory Opinion Digest No. 164

Statute Involved: Section 7, Pre-merger clearance: No anti-amended Clayton Act. competitive effects foreseeable.
Released: February 13, 1968.

The Commission issued an advisory opinion on May 14, 1964, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding (1) that competing distributors would not be foreclosed from supplies he distributed and (2) that

preexisted relationships between him and said supplier would not be altered without prior Commission approval.

Advisory Opinion Digest No. 165

Statute Involved: Section 7, Pre-merger clearance: Deteriorating
amended Clayton Act. financial condition.

Released: February 13, 1968.

The Commission issued an advisory opinion on July 30, 1964, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, non-viable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers.

Advisory Opinion Digest No. 166

Statute Involved: Section 7, Pre-merger clearance:
amended Clayton Act. Declining industry.

Released: February 13, 1968.

The Commission issued an advisory opinion July 30, 1964, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing company in a declining industry.

A single-line manufacturer of a byproduct of the cotton industry desiring to be acquired by a multi-product company in the chemical industry sought clearance of its proposed acquisition. The firms were competitors but demand for the product was declining due largely to wide fluctuations in price. There was also increasing production of competitive products made from wood pulp which could be used for the same purposes, and reasonable, but unsuccessful attempts had been made to sell to others.

The Commission, basing its belief on the information then before it, advised that the proposed sale probably would not violate any of the laws it administers.

The Commission added that the opinion should not be construed as in any way affecting any other matter involving the requesting party or the purchaser which the Commission was then or might thereafter investigate.

Advisory Opinion Digest No. 167

Statute Involved: Section 7, Pre-merger clearance:
amended Clayton Act. Deteriorating industry.
Released: February 13, 1968.

The Commission issued an advisory opinion on August 18, 1964, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor.

One of the larger manufacturers of industrial clay products sought clearance to acquire a smaller manufacturer of the same product. The smaller manufacturer did not have as extensive a product line as the larger company. The companies partially competed in a limited geographical area; however the smaller firm had been unable to replace key personnel and the trend in its financial condition was downward. Further, its employees, comprising about 20% of the work force in a small community, faced loss of jobs if the smaller company went out of business. Lastly, the other party was the only available purchaser.

Basing its belief on the information then before it, the Commission advised the proposed sale probably would not violate any of the laws which it administers.

Advisory Opinion Digest No. 168

Statute Involved: Section 7, Pre-merger clearance:
amended Clayton Act. Imminent insolvency.
Released: February 13, 1968.

The Commission issued an advisory opinion on October 27, 1964, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor in financial distress.

A firm in a local service business requested clearance to merge with a competitor, with whom it was aligned in its activities, and to form a new corporation. The service firm had experienced declining earnings for the past eight years and there was strong competition from other service businesses in the area in which both did business. The requesting party had experienced an increase in operating costs and expenses in relation to sales, was in a critical financial condition and apparently could not long continue to operate as a solvent and going concern. A national chain was the only other possible purchaser.

The Commission basing its belief on the information then available to it advised that the transaction would not violate any of the laws which it administers.

Advisory Opinion Digest No. 169

Statute Involved: Section 7,
amended Clayton Act.
Released: February 13, 1968.

Pre-merger clearance:
Financial distress.

The Commission issued an advisory opinion on May 26, 1965, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of an integrated competitor in poor financial condition.

A large diversified manufacturer of closures with less than 3% of its total sales accounted for by a specialty closure product, sought to acquire the second largest integrated manufacturer of such products, in an industry dominated by another fully integrated company. The first four firms in the industry accounted for about 55% of the market. The company to be acquired was in poor financial condition, and it was doubtful whether its credit standing could support the new financing necessary for plant improvement and extension of product lines which were needed to improve its competitive position.

The Commission basing its opinion on the information available to it advised (1) that it would not challenge the acquisition if consummated, but (2) that such advice was given without prejudice to the right to reconsider in the event anticompetitive effects causally connected to the acquisition were manifested in the future.

Advisory Opinion Digest No. 170

Statute Involved: Section 7,
amended Clayton Act.
Released: February 13, 1968.

Pre-merger clearance:
de minimus competitive effect.

The Commission issued an advisory opinion on June 8, 1965, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a competitor's unprofitable operating division.

A large manufacturer of a diverse line of aeronautical supplies sought Commission approval for the disposition of one of its operating divisions which was an unprofitable part of its total business. The proposed purchaser was another diversified corporation also engaged to a small degree in the same line of commerce. It was evident that although these two companies ranked high in market shares, there were many others in the business, and

that restrictive licenses were often used by customers to exercise an effective consumer-control of the survey market. The total dollar value of the business being sold was small and it appeared there would be a liquidation of the assets if the sale was not made.

The applicant was advised that based on the available information a proceeding would not be initiated by the Commission to challenge the acquisition. The Commission added that the advice was being given without prejudice to its right to reconsider the questions involved in the event substantial anticompetitive effects attributable to the acquisition were manifested in the future.

Advisory Opinion Digest No. 171

Statute Involved: Section 7,
amended Clayton Act.
Released: February 13, 1968.

Pre-merger clearance:
Denied, adverse competitive ef-
fects probable.

The Commission issued an advisory opinion on June 10, 1965, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was denied because of the existence of probable adverse competitive effects.

A manufacturer/retailer of consumer leather goods requested clearance for its proposed acquisition of a major regional retailer of products produced by the manufacturer. The horizontal and vertical implications of this proposed merger were similar to those which were declared unlawful in the case of *United States v. Brown Shoe*, 370 U.S. 294 (1962). However, the market shares were smaller and probable adverse competitive effects somewhat less than were present in the *Brown Shoe* case.

The Commission advised there existed a substantial probability that the proposed acquisition would be a violation of the Clayton and Federal Trade Commission Acts. The application for pre-merger clearance was denied.

Thereafter, the acquisition was consummated. A complaint issued and a consent settlement effected whereby the acquiring company agreed to make no further acquisitions of retailers or manufacturers of the product involved for a period of several years without prior Commission approval.

Advisory Opinion Digest No. 172

Statute Involved: Section 7,
amended Clayton Act.
Released: February 13, 1968.

Pre-merger clearance: Adverse
competitive effects not dis-
cernible.

The Commission issued an advisory opinion on July 23, 1965, in which a request for pre-merger clearance from liability under Section 7, amended

Clayton Act, was given limited approval because it did not appear that the acquisition would result in the requisite adverse competitive effects.

A diversified processor, wholesaler and retailer sought clearance for its proposed acquisition of an independent food supplier which sold a major portion of its products to a subsidiary of the acquiring company. The isolated transaction did not appear to have the requisite substantial adverse competitive effects called for by the statute, but in view of pending investigations of additional acquisitions by the acquiring company, an unrestricted clearance could not be approved by the Commission.

The Commission advised that it would take no action solely as to the proposed transaction if it was consummated. The Commission added that it conditioned its advice on assurances that by accepting and acting upon the opinion, the acquiring company would not use the opinion as precedent or argument in the investigation, or in the formal or informal hearings, of any matter involving the acquiring company then pending or which might come before the Commission or any other court or agency.

The Commission added that if at some future date the acquiring company was required to divest the subsidiary which was actually taking over the independent company, the parent company would not object to divestiture of the independent food supplier on terms set by the Commission or other court or agency.

Advisory Opinion Digest No. 173

Statute Involved: Section 7, Pre-merger clearance: Denied, lack
amended Clayton Act. of competitive information.

Released: February 13, 1968.

The Commission issued an advisory opinion on October 29, 1965, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was denied for lack of competitive information concerning competition in the line of commerce involved.

A leading manufacturer of dispensing machines sought approval of its proposed purchase of a smaller, family held manufacturer of dispensing machines which were complementary to the product line of the acquiring company.

The Commission declined to render an opinion because of (1) the paucity of competitive information concerning competition in the line of commerce with which the acquired company's machine was identified, and (2) the short time period available between the date of the request and the closing date agreed upon between the parties. This short time precluded a more complete investigation and analysis.

Advisory Opinion Digest No. 174

Statute Involved: Section 7, Pre-merger clearance denied: Ver-
amended Clayton Act. tical merger would raise ques-
Released: February 13, 1968. tions.

The Commission issued on advisory opinion September 8, 1966, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was denied because the competitive implications of the acquisition would raise economic questions resolvable only by investigation.

A leading construction material producer applied for clearance of its proposed acquisition of a diversified company having a large share of a regional market in the sale of raw materials such as sand, gravel and stone, which were complementary to its principal product line. The requesting party offered to dispose of certain producing plants now operated by the company, and to continue appropriate leases of other such plants as the company owned.

The Commission advised the requesting party that the competitive implications of the integration of construction material distributors with sources of raw materials were such that an investigation to assess the economic effects of the acquisition, if it was consummated, would be necessary.

Advisory Opinion Digest No. 175

Statute Involved: Section 7, Interpretation of request for pre-
amended Clayton Act. merger clearance: Declining
Released: February 13, 1968. industry.

The Commission issued an opinion October 8, 1965, in connection with a request for advice by two respondents as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting them from, among other matters, uniting facilities so as to eliminate competition.

One respondent, a small company in the coin operated machine business, desiring to be acquired by the other, a larger company in the same industry, applied for clearance of the proposed acquisition under Commission established procedures. It was reported that the smaller respondent was in financial difficulties to the point where it was approaching failure. Further reasons advanced to support the proposed merger were that demand for the product was on the decline, the industry easy to enter, and reasonable efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission advised that if the smaller respondent sold its business to any company, the Commission did not intend to initiate proceedings with regard to such sale.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 176

Statute Involved: Section 7, Pre-merger clearance: *de minimus*
amended Clayton Act. competitive effects.

Released: February 13, 1968.

The Commission issued an advisory opinion on November 29, 1966, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company in financial distress.

A dairy products processing company in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The companies competed to a limited extent; however, the applicant had losses for a number of years, could not obtain long term financing and had made numerous unsuccessful attempts to sell to others.

The requesting party was advised that, relying on his representations as to the hopeless financial condition and unsuccessful efforts to sell, the Commission would not challenge the proposed acquisition if it were consummated.

Advisory Opinion Digest No. 177

Statute Involved: Section 7, Compliance with interpretation of
amended Clayton Act. request for pre-merger clear-

Released: February 13, 1968. ance: Imminent insolvency.

The Commission issued an opinion February 14, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small company manufacturing food products applied for clearance of its acquisition by a larger producer engaged in operations in the same product line. The larger producer was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both producers competed in the same general trading area. It was presented that the smaller company was in imminent danger of insolvency and that it had exhausted every possibility of locating another purchaser without success.

On the basis of available information, but primarily because of the equities affecting the smaller company's position in the industry, the Commission give its approval to the proposed acquisition.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 178

Statute Involved: Section 7, Compliance interpretation of re-
amended Clayton Act. quest for pre-merger clearance:
Released: February 13, 1968. Denied, other purchasers avail-
able.

The Commission issued an opinion April 2, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large company in the food products field applied for clearance if its proposed acquisition of a smaller company engaged in operations in the same product line. The larger company was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both companies were in substantial competition in the same general trading area. It was determined that other prospective purchasers were available and that the smaller company was of considerable size when compared with other regional producers.

The Commission advised that the proposed merger could not be approved under the circumstances.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 179

Statute Involved: Section 7, Compliance interpretation of re-
amended Clayton Act. quest for pre-merger clearance:
Released: February 13, 1968. Imminent bankruptcy.

The Commission issued an opinion October 28, 1964, in connection with a request for advice from a small company as to whether its proposal to merge with any other company in the same field would, if consummated, be in violation of Section 7, amended Clayton Act.

A small food products manufacturer applied for advice from the Commission regarding the possibility of selling out to any other company operating in the same field, particularly to a large processor in the same products line. The larger producer was subject to a Commission order prohibiting such acquisitions for a designated period of time without prior Commission approval.

It was presented that the requesting company had made reasonable but unsuccessful attempts to locate a purchaser other than the larger company, moreover was on the verge of bankruptcy.

On the basis of available information, but primarily because of the equities affecting the requesting company's position in the industry, the Commission advised that an acquisition by another producer in the same field would not be in violation of Section 7, amended Clayton Act, and in the event a sale is made to a company which is under Commission order requiring approval of such acquisition, said approval would be granted.

In clearing the proposed sale the Commission pointed out that the approval might be reconsidered, revoked or rescinded if it subsequently appeared the facts submitted were inaccurate, incomplete or that they had changed at the time a sale was made.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 180

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clearance:
Released: February 13, 1968.	Imminent insolvency.

The Commission issued an opinion September 24, 1965, in connection with a request for advice as to whether a proposed merger, if consumated, would be in violation of an outstanding Commission order prohibiting the acquiring company from making certain acquisitions for a designated period of time without prior Commission approval.

A small food products manufacturer applied for clearance of its proposed acquisition by larger company under Commission order and which was much more extensively engaged in the same product line. The requesting company was experiencing a decline in annual profits to the point of insolvency. It was reported that refinancing was not available and the smaller company was not, for a number of reasons, a viable concern in the context of the particular market. Exhaustive efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission gave its approval to the proposed acquisition.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 181

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quests for pre-merger clearance:
Released: February 13, 1968.	<i>de minimus</i> competitive effects—
	one request denied.

The Commission issued opinions on February 9, 1966 and January 26, 1967, in connection with requests for advice as to whether several proposed

mergers, if consummated, would be in violation of an outstanding Commission order prohibiting future acquisitions by respondent for a designated period of time without prior Commission approval.

A large automatic machine company under Commission order sought approval for the proposed acquisition of two smaller, local companies engaged in the same line of business. In one metropolitan area respondent and the first smaller company were in competition, and in the other trading area respondent and the second smaller company did not compete to any significant degree. In the first area there were a substantial number of local and national competitors involved, and in the other area a substantial number of local competitors and one national competitor were involved.

In these two instances the Commission approved the proposed acquisitions.

In a third request for advice involving a different trading area, the respondent sought clearance for the proposed acquisition of a smaller, local company engaged in the same line of business in direct competition with the larger company. There was a concentration in the line of commerce involved. The Commission denied the request for clearance because it was incompatible with the objectives of the order prohibiting such acquisitions.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 182

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clearance:
Released: February 13, 1968.	Liquidation probable.

The Commission issued an opinion May 24, 1966, in connection with a request for advice as to whether a proposed acquisition, if consummated, would be in violation of an outstanding order prohibiting respondent from making certain acquisitions for a designated period of time without prior Commission approval.

A large manufacturer of food products sought clearance of its proposal to acquire a smaller manufacturer engaged in the same general line of commerce. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval. The two manufacturers were not in competition in the same geographical trading area, but to a very limited extent the requesting manufacturer was a supplier to the smaller company.

The smaller manufacturer had made reasonable but unsuccessful attempts to sell to others in the industry and in the circumstances liquidation apparently was the only alternative to the proposed sale.

The Commission advised that, in reliance on the information submitted by the parties, if the proposed acquisition was made, the Commission would not proceed against the acquiring company.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 183

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clear-
Released: February 13, 1968.	ance: Denied, competitive
	considerations.

The Commission issued an opinion July 20, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large manufacturer of industrial products sought clearance for its proposed acquisition of a smaller company in the same as well as in a complementary product line. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were competitors and the smaller was quite capable of growing and developing in the industry. Further, no efforts had been made to locate other possible purchasers.

The Commission advised that approval for the proposed acquisition would not be in the public interest because it would entail the acquisition of a competitor and further increase concentration in the industry.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 184

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clearance:
Released: February 13, 1968.	Bankruptcy imminent.

The Commission issued an opinion September 1, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small processor of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger processor was, and is now, subject to a Commission

order prohibiting, among other matters, the making of certain acquisitions for a designated period of time without prior Commission approval.

The requesting processor was on the verge of bankruptcy and had made reasonable but unsuccessful attempts to locate another purchaser within the industry.

The Commission advised that, in reliance on the information and data supplied, it would approve the request for clearance of the proposed acquisition.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 185

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clearance:
Released: February 13, 1968.	<i>de minimus</i> competitive effect.

The Commission issued opinions September 29, 1966 and January 26, 1967, in connection with requests for advice from a small company as to whether a proposal to merge, if consummated, would violate an outstanding order prohibiting either purchasing company from making certain acquisitions.

A small processor of food products which was tightly held, having declining profits, increasing expenses, a loss of key personnel, a plant too small to compete efficiently, and an owner-manager who was determined to sell, applied for clearance for its proposed acquisition by either of two larger processors in the same general line of commerce. Both of the larger processors were subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

On the basis of supplied information, the Commission cleared the request for acquisition by either of the two larger processors. Subsequently, however, partial acquisition by a third processor was approved, as was a partial acquisition by one of the larger concerns.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 186

Statute Involved: Section 7,	Compliance interpretation of re-
amended Clayton Act.	quest for pre-merger clearance:
Released: February 13, 1968.	<i>de minimus</i> competitive effect.

The Commission issued an opinion December 23, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would violate an outstanding order prohibiting the purchasing company from making certain acquisitions.

The estate of a very small retailer of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval. The retailer, a negligible factor in the industry and in the relevant geographical market, was not capable of development in the estate status.

The Commission cleared the proposed acquisition.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 187

Statute Involved:	Section 7,	Compliance interpretation of re-
	amended Clayton Act.	quest for pre-merger clearance:
Released:	February 13, 1968.	Imminent insolvency.

The Commission issued an opinion September 25, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the purchasing company from making certain acquisitions.

A large integrated company manufacturing commercial products applied for clearance to acquire a smaller company engaged in operations in the same product line in the Western states. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were in direct competition in the geographical trading area. However, each held a relatively small share of the market involved. It was represented that the small concern had exhausted all other possibilities of selling to another purchaser, save to one or more of the other integrated manufacturers in the industry. The seller, who was suffering personal hardships because of illness in his family, had to leave the business and the area which it served.

On the basis of the information and data supplied, the Commission cleared the request for clearance of the proposed acquisition.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 188

Statute Involved:	Section 7,	Pre-merger clearance denied:
	amended Clayton Act.	Merger of firms in same industry
Released:	February 13, 1968.	would raise questions.

The Commission issued advisory opinions on September 27, 1962, March 28, 1963 and September 12, 1963, in which commutual requests for pre-

merger clearance from liability under Section 7, amended Clayton Act, by a small dairy in financial difficulty were denied as to acquisition by a larger company in the same industry, but were finally approved permitting acquisition by a diversified corporation in another industry.

A small dairy in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The larger company, an integrated processor and distributor of dairy products, was the respondent in a complaint in litigation with the Commission.

The applicant was advised the proposed acquisition would raise questions similar to those involved in the proceeding and that the pendency of the proceedings made it inappropriate to express any further views. Reconsideration was requested. In response, the Commission informed the applicant of the decision in the *Foremost Dairies* case, Docket 6495 and again advised that the acquisition would raise serious questions under Section 7 of the Clayton Act. Further, the Commission pointed out that it recognized the problems of small dairies and suggested further efforts to sell to a local or regional purchaser.

Later, the small dairy requested consideration of its proposed acquisition by a large, diversified corporation in the food industry. The Commission advised it would contemplate no action if the transaction was consummated. The Commission added its advice should not be construed as affecting any position it had previously taken against the acquiring corporation nor as in any way prejudicing any pending or future action it might take against the acquiring corporation regarding other acquisitions.

Advisory Opinion Digest No. 189

Statute Involved: Section 7, Pre-merger clearance: Precarious
amended Clayton Act. financial condition.

Released: February 13, 1968.

The Commission issued an advisory opinion on March 20, 1963, in which a request for pre-merger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company on the verge of insolvency.

A manufacturer of consumer goods desiring to be acquired by a larger producer in the same field requested clearance of the proposed acquisition. His company had suffered declining sales for a number of years and was in a precarious financial condition to the point of being on the verge of insolvency. Further, reasonable attempts to sell to others had been made but there was no other purchaser which could preserve the competitive force possessed by the requesting manufacturer.

The requesting party was advised that if the sale were consummated, the Commission would contemplate no action based on this transaction alone.

The Commission added that its decision was based on representations that the smaller firm was in such dire financial straits that it faced impending bankruptcy. Further, the Commission stated it was expressing no opinion regarding prior acquisitions or on restrictive practices, if any, by the purchaser or any other company which may have contributed to the requesting party's failing condition.

Advisory Opinion Digest No. 190

Statute Involved: Section 5, Federal Trade Commission Act.

Random distribution of "Bonus Certificates" with purchase.

Released: February 16, 1968.

The requesting party was advised that if the sale were consummated, the random inclusion of "bonus certificates" in egg cartons would be violative of Section 5 of the Federal Trade Commission Act.

The seller proposed to include "bonus certificates" in cartons of eggs offered for sale. The certificates were described as being worth "so many eggs or \$5.00 in cash." They would be randomly distributed so that some cartons would contain eggs plus a bonus certificate of value, while others would contain eggs only, or eggs plus a certificate of little or no value.

The Commission was of the view that this would be merchandising by lottery, a practice which the Commission has long held to be unfair within the meaning of Section 5 of the Federal Trade Commission Act.

Advisory Opinion Digest No. 191

Statute Involved: Section 5, Federal Trade Commission Act.

Advertisements which appear in news format.

Released: February 16, 1968.

The Commission announced today it had rendered an advisory opinion involving the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.

The factual situation presented to the Commission involved the publication of a column in a newspaper which advertised the cuisine facilities of several restaurants. Written in narrative form, the write-up about each restaurant usually identified the chef and/or head waiter, gave a brief description of how a certain meal is prepared, and contained other factual information concerning the hours during which meals are served, whether dancing is permitted, whether cocktails are served, and some general indication of the price range of the meal.

In its opinion, the Commission concluded:

"... the column uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant. Since the column in fact consists of a series of commercial messages which are paid for by the advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement, as outlined in the aforementioned press release. This conclusion would not be altered even though the column carried the exact cost of each meal being advertised, or if it listed the price range of the various meals."

Advisory Opinion Digest No. 192

Statute Involved: Section 7, amended Clayton Act.	Pre-merger clearance denied: Merger of competing milk companies would increase market concentration.
Released: February 20, 1968.	

The Commission recently rendered an advisory opinion in which clearance was denied to an applicant to sell its milk processing and dairy products distribution assets to a large, integrated food producing, processing, wholesaling and retailing concern. The proposed purchaser has a dairy products subsidiary in actual or potential competition with the applicant in the same market.

The Commission noted that the proposed merger would combine the firm now appearing to rank fourth in sales in the market with the eighth to result in a firm in second or third position. It also appears that the present top four firms have about forty percent of the sales in the market and therefore the proposed merger would further increase the market concentration.

Because the proposed merger raises such serious questions of possible violations of Section 7 of the amended Clayton Act, the Commission advised the applicant that pre-merger clearance cannot be granted. The Commission further stated that, if the merger occurs, the Commission may take the action it deems necessary to protect the public interest and prevent anti-competitive effects.

Advisory Opinion Digest No. 193

Statute Involved: Section 5, Federal Trade Commission Act.	Substitution of merchandise unlawful even though equivalent in grade, quality and appearance to that ordered by customers.
Released: February 20, 1968.	

The Commission was recently requested to render an advisory opinion with

respect to the legality of substituting, on customer orders for a particular fabric, a fabric produced by another manufacturer without notifying customers of the intended substitution.

It was represented that customers had long been supplied with a specific fabric and that sample display cards had been distributed to them advertising the availability of this fabric. The supplier recently discontinued production of the fabric and another supplier was located who will furnish a similar product said to be identical in pattern and of better quality. It was proposed to supply customers with the new product without resampling their display cards or otherwise advising them of the substitution, the cost of which, it was asserted, would be prohibitive.

The Commission advised that it could not give its approval to this proposed business practice. A foreseeable result of substituting the product of one manufacturer for that of another would be to mislead customers into purchasing an article which they might not wish or intend to purchase, and which they might or might not purchase if they were informed as to its origin. Nor would the prejudice thus engendered be confined to customers; other distributors and manufacturers of a competing product would be injured when orders that would normally have come to them if the fabric were rightly named are diverted to the offending firm.

Advisory Opinion Digest No. 194

Statute Involved: Section 2(a),	Use of uniform delivered pricing system effected by deducting freight
amended Clayton Act.	allowances from F.O.B. price.
Released: February 24, 1968.	

The Commission recently advised a West Coast manufacturer of industrial parts that it would not be illegal to use either a conventional uniform delivered pricing system based on average cost factors or a uniform delivered pricing system which will be effected by granting so-called freight allowances to be deducted from the manufacturer's f.o.b. factory price.

The facts with respect to the second alternative were that the manufacturer proposed to establish and f.o.b. factory price of, for purposes of illustration, \$99.50. Actual freight to West Coast customers may be .50 and such customers would receive no allowance. Thus they would pay the manufacturer \$99.50 and the carrier .50, making a total of \$100.00. Then, again using hypothetical figures for purposes of illustration, actual freight to a Denver customer may be \$1.00. The manufacturer would grant such a customer a .50 freight allowance to be deducted from the f.o.b. price, thus leaving the customer paying the manufacturer a price of \$99.00 and the carrier \$1.00, making a total of \$100.00. Continuing east, actual freight to a Kansas City customer may be \$1.50. The freight allowance would be \$1.00, leaving the customer paying the manufacturer \$98.50 and the carrier

\$1.50, for a total again of \$100.00. This would continue in graduated steps across the country to where an East Coast customer with actual freight costs of \$3.00 would receive an allowance of \$2.50, leaving him also paying a total of \$100.00. The manufacturer advised that it was considering this alternative for administrative reasons, since it wished to pass title to the customers upon delivery to the carrier and have the customers handle all freight bills.

With respect to the first question, the Commission advised that it was of the view that there could be no question of the manufacturer's right to unilaterally employ a uniform delivered pricing system, since if each buyer pays the same delivered price no question under the Clayton Act, as amended by the Robinson-Patnam Act, would arise. While the factual situation under the second alternative is somewhat more complicated, the Commission was further of the view that it also would not result in a violation of law if implemented exactly as outlined above. In the Commission's view, the difference between the two systems is one of form rather than of substance and that it would make no legal difference whether the manufacturer computes its factory price and adds to it an amount equal to the average freight costs for delivering to all customers, as is done in the usual uniform delivered pricing system, or whether it accomplishes the same result by deducting an amount roughly equal to the same freight factor. In either event, it would seem that the manufacturer would have made freight a part of the price, so that each buyer's out-of-pocket costs would be exactly the same.

The Commission further cautioned, however, that since this opinion deals in a projected manner with hypothetical figures chosen for illustrative purposes, the computations later to be made based upon actual cost factors must in practice achieve the result claimed in that each buyer will pay exactly the same net price including the freight. Any other result, the Commission stated, would be outside the scope of this opinion.

Advisory Opinion Digest No. 195

Statute Involved: Section 2(d), Notice to magazine dealers as to
amended Clayton Act. availability of display allowance.

Released: February 24, 1968.

The Federal Trade Commission recently advised a seller of magazines that it could see no objection to its proposed method of notifying dealers of the availability of a display allowance program on the assurance that all dealers would receive notice by the method selected.

Under the proposal, the display allowance plan would be offered to all retailers on the same basis. Under the method of notification proposed, an advertisement would be published in a trade publication of general circula-

tion among dealers announcing the main details of the proposal. A one inch reminder advertisement would then be published in three subsequent issues. Then the seller proposed to work with the distributor of the publications and the wholesalers to reach every retailer competing in the distribution of the publications.

The Commission advised that while Section 2(d) of the amended Clayton Act does not specifically require that all competing customers be individually notified regarding the particulars of a promotional program, it has repeatedly held that the statute contemplates that all competitors shall be accorded equal opportunity to participate. This construction has been incorporated in the Commission's Guides for Advertising allowances, where sellers are advised that they should take some action to inform all customers competing with any participating customer that the plan is available. This may be done by any means the seller chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. While the Guides do add that if a seller wants to be able to show that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing, the Commission added that it is clear that other methods are permitted if notice to all competing customers is given.

The Commission concluded that it could see no objection to the proposed program of notification based on the assurance that it will reach all competing dealers of the publications. In this connection, however, the Commission further advised that whenever a seller selects any method of notification short of actual notice to each dealer, he bears full responsibility under the law for seeing that the method selected gives each dealer the notice to which he is entitled.

Advisory Opinion Digest No. 196

Statute Involved: Section 5, Federal Trade Commission Act.
Released: February 27, 1968.

Commission holds not objectionable the advertising phrase "It works . . . or we'll fix it free."

The Commission recently rendered an advisory opinion whereby it concluded that a proposed phrase "It works . . . or we'll fix it free." is not objectionable and thus may be used in advertising, and on boxes containing products of a certain manufacturer. The Commission took account of information that the particular manufacturer does, in fact, repair without question and without charge of any kind (e.g., for parts, labor, "handling," or return postage) all of its products sent to it directly by owners or through retailers.

Advisory Opinion Digest No. 197

Statute Involved: Section 5, Federal Trade Commission Act.

Use of term "hand made" to describe boot with a sealed sole.

Released: February 27, 1968.

The Commission recently rendered an advisory opinion to the effect that the unqualified term "Hand Made" could not be used to describe a boot with a sealed sole.

The requesting party is currently selling a completely hand made boot in which all parts are cut by hand and stitched together to form the uppers. It is hand lasted and then the sole is built up and stitched together by hand. The boot is labeled "Hand Made." The seller is now considering putting on a sealed sole to replace the leather sole. Other than that all operations will be identical, including the hand sewing of the heel counter. An opinion was requested as to whether a boot so constructed could still be labeled "Hand Made."

The opinion advised that in the Commission's view the seller could not use the unqualified term "Hand Made" to describe a boot with a sealed sole. He could, however, use the term to describe the part or parts which are sewn by hand in such manner as to make it clear, by use of an appropriate disclosure, that the sealed sole is not hand sewn.

Advisory Opinion Digest No. 198

Statute Involved: Section 2(a), amended Clayton Act.

Truckload discount for quantity purchases.

Released: March 5, 1968.

The Commission announced today that it had rendered an advisory opinion involving a 5% discount that a manufacturer proposed to offer to all customers purchasing in truck-lot quantities. The manufacturer requesting the opinion is subject to a cease and desist order prohibiting price discrimination under Section 2(a) of the amended Clayton Act.

The manufacturer operates a single factory located in the Midwest and ships its products on a uniform delivered price basis to wholesale customers located throughout the continental United States. The manufacturer desires to pass on to its customers cost savings due to lower freight rates for full truckload-lot quantities, by means of a uniform discount applicable to all truckload orders. For a recent six-month period, the manufacturer determined that its average freight saving on such orders was in excess of 5%. It thereupon requested an advisory opinion as to whether the Commission would approve a uniform 5% truckload discount.

The Commission advised the manufacturer that it could not approve the proposed 5% discount for truckload-lot orders because, based on the sub-

mitted data, the proposed discount would not appear to be uniformly cost justified. Accordingly, the use of such a discount could result in violation of the order in question, by producing price discriminations between customers qualifying for the discount and competing customers not able to qualify for it. The Commission noted that the alleged cost savings depend upon averaging the savings in the freight rates for truckload-lot shipments to all of the manufacturer's truckload customers in the United States and that, although the freight saving increase with the distance of customers from the manufacturer's plant, the freight savings on sales to nearby truckload customers is considerably less than 5%.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 199

Statute Involved: Section 5, Federal Trade Commission Act.
Released: March 5, 1968.

Agreement by processors to sell at prices higher than minimum set by State regulation.

The Commission recently rendered an advisory opinion advising a state official that it would be illegal to hold a meeting at which the processors of milk within the state would agree to sell at prices higher than the minimum prices set by the state milk control agency.

The official pointed out that the state milk control agency had performed its function of setting minimum prices pursuant to state law, but that it was felt that it would be difficult for many processors to maintain a profitable operation at these minimums in the outlying areas and towns due to higher delivery costs. The official also advised that this proposed action would not be taken pursuant to state law, but would instead be as a result of voluntary agreement among the processors involved.

The opinion advised that it was the Commission's considered opinion that such an agreement among the processors would be subject to serious question under well-settled principles of antitrust law. The Commission stated the law is clear that a state may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a state as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the state's orders, including orders setting minimum prices for milk.

Here it appeared that the state, speaking through its milk control agency, had already performed its regulatory function and set minimum prices for milk within its borders. While any individual processor may sell at higher prices if he so desires, for them to combine together to agree to sell at higher

prices would, in the Commission's view, present an entirely different question and would be a situation which would enjoy no part of the immunity afforded by state regulation. The prices to be charged within the state may be raised or lowered only by the state itself, the opinion added. They may not be altered by agreement among those subject to the state's regulation without being fully subject to the antitrust laws, under which no principle is more firmly established than that which holds that any agreement among competitors as to the prices at which they will sell is illegal *per se*.

Advisory Opinion Digest No. 200

Statute Involved: Section 5, Federal Trade Commission Act.

Promotion and sponsorship of price catalogs by trade association.

Released: March 11, 1968.

The Commission was recently requested to render an opinion with respect to an outstanding order to cease and desist which, among other things, proscribed agreements to suggest resale prices. The issue involved the legality of a covered Trade Association's sponsorship of catalogs for its member-dealers, which catalogs would contain manufacturers' suggested resale price.

The Commission advised that under an outstanding Commission order covering the Trade Association and its members such sponsorship by the Association may well violate said order.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 201

Statute Involved: Section 5, Federal Trade Commission Act.

Specialized automotive repair association desires to publish flat rate manual for its members.

Released: March 11, 1968.

The Commission recently issued an advisory opinion stating that it cannot approve the publication by a specialized automotive repair association of a flat rate repair manual for use by its members in determining labor charges.

The Commission commented that there is implicit too grave a danger that the association's manual would facilitate price fixing between competing repair shop operators. The Commission pointed out the well-established antitrust principle that price fixing by competitors is illegal *per se*. The public expects to derive benefits from different prices offered by competing service operators.

Advisory Opinion Digest No. 202

Statute Involved: Section 2(a), Jobbers and Wholesalers.
amended Clayton Act.

Released: March 14, 1968.

The Commission recently issued an advisory opinion to an applicant who (1) asked for a definition of the words "jobber" and "wholesaler," and (2) asked the Commission's views as to the propriety of a proposed revision in price lists.

In response the Commission stated:

"As a working rule, one might suppose that, in a three level system, wholesalers are closer to producers and jobbers are closer to retailers in the distribution of a producer's goods. Traditionally, producers sell to wholesalers who sell at a higher price to jobbers who sell at a higher price to retailers.

"The controlling element in your problem, however, as in similar problems arising under the amended Clayton Act, is whether or not resale competition actually exists as between and among these various resellers rather than the names they use to describe themselves. If in fact a so-called wholesaler competes with a so-called jobber in the redistribution of goods, the difference in names is of no consequence; the fact of competition is.

"In *F.T.C. v. Ruberoid*, 343 U.S. 470, (1952) the Supreme Court stressed that actual competition in resale operations is decisive rather than nomenclature and approved the Commission's disregard of 'ambiguous labels, which might be used to cloak discriminatory discounts to favored customers.'

"What you plan, as we understand it, is to sell your middlemen, whether 'wholesalers' or 'jobbers,' at one price, while selling certain selected retailers at a higher price.

"In the circumstances you present, you may properly do this provided the 'wholesalers' and 'jobbers' are functioning at the same distribution level and are not themselves engaged in retail operations competitive with the selected retailers."

Advisory Opinion Digest No. 203

Statute Involved: Section 5, Common selling organization.
Federal Trade Commission Act.

Released: March 14, 1968.

The Commission recently advised a group of geographically scattered, relatively small public warehousemen that it would not object if they were to establish a jointly owned selling agency under the conditions described.

The Commission understands that the identified public warehousemen propose to establish, as a separate corporation, a single service organization,

nationwide in scope. Each participating public warehouseman would periodically provide the service organization with information about the kind of storage space he has available, where such space is available, the times at which such space might be available and the terms and conditions under which such space would be available. The information provided is to be processed by electronic data processing equipment for use by storage space salesmen employed by the service organization. Only generalized information developed by the service organization will be made available to participants jointly.

Each participating public warehouseman is to retain and affirmatively maintain local autonomy in administration, storage, rates, and customers to be serviced. The Commission notes that, under the statutes it administers, each participating public warehouse is required independently to set his own rates and his own terms and conditions of sale. Any use of the service organization to effect concert of action as to rates, terms, or conditions of sale would expose participants to a charged violation of Section 5 of the Federal Trade Commission Act.

The Commission would not object to the establishment of a cooperative enterprise, as above described, operating as above set forth.

The following proviso, however, was added to the opinion:

"Unless the Commission has previously rescinded this approval, you are directed that at the end of three years from the date of this opinion to submit to the Commission a complete report on your membership, terms and conditions under which the cooperative is operating, including a statement for each member on the sales territory of such member, the volume of business and percentage of such members business."

Advisory Opinion Digest No. 204

Statute Involved: Section 5, Federal Trade Commission Act. Guarantees.

Released: April 3, 1968.

In an advisory opinion rendered to a watch manufacturer, the Commission ruled that a guarantee which has conditions and limitations, other than as to time, may not be represented as an "unconditional" guarantee. It also advised the requesting party that a guarantee which lasts for only three years cannot be described as a "lifetime" guarantee. Moreover, the Commission objected to the guarantee being described as "4-Ever."

With respect to the claim "unconditional," the Commission said that it would be proper to claim that a product is "Unconditionally guaranteed for three years" if in fact no other conditions existed. However, where there are conditions other than time, such as were present in the case presented for review, the Commission said that it would be improper under Sec. 5 of the FTC

Act to claim that the guarantee is "unconditional." The reason for this, it was concluded, is that the term "unconditional" means there are no conditions attached, and it is a contradiction in terms rather than an attempt at modification to permit use of the claim "unconditional" provided the conditions are disclosed.

Under the terms of the guarantee which was the subject of the Commission's opinion, the purchaser of the watch had the option to renew the original guarantee which expired at the end of three years by paying a service fee of \$5.00 on an annual basis. By having to pay the \$5.00 service fee, the Commission said, the purchaser no longer has a "lifetime guarantee" but a service or insurance policy which is renewable at his expense on an annual basis.

The Commission also ruled that it is necessary to disclose the life being referred to whenever it is claimed that the duration of the guarantee is for a "lifetime." For example, is it the life of the original purchaser, the original user, or the life of the product, etc? Thus, even if the requesting party resolved the first objection and offered a guarantee for life rather than for three years, it would still be necessary to disclose clearly and conspicuously the life to which reference was being made.

In the opinion the Commission also objected to the term "4-Ever" because, contrary to fact, the product was not guaranteed forever.

Finally, the Commission stated that it was not ruling upon the "waterproof" claim because it currently has under consideration a possible revision of trade practice rules relating to the term "Waterproofing" as applied to watches.

Advisory Opinion Digest No. 205

Statute Involved: Section 5, Federal Trade Commission Act.

Use of a computer system to collect and disseminate marketing data.

Released: April 3, 1968.

The Commission recently issued an advisory opinion concerning the legality of a proposal to employ computer and data processing equipment to collect and disseminate certain information in connection with marketing of icepack broilers. Sellers would feed into the system their asking prices and quantities available, and later report on actual sales, giving the prices and quantities sold. This information would be available to subscribers of the service, whether the subscribers are sellers, buyers, or members of the public. Subscribers would obtain the information by calling in to the central computer. Identity of all parties (sellers and buyers) would be kept secret from each other and from the public.

The Commission advised the applicant that it has no objection to the proposed plan, provided it is not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of poultry, or for some illegal purpose, then the Commission would of course have serious objection to the plan.

The Commission continued:

"Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that a price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

"Unless the Commission has previously rescinded this approval, you are directed, at the end of three years from the date of this opinion, to submit to the Commission a complete report on the actual operation of the program, describing how identity protection was maintained, and to include copies of your printed-out periodic reports and audits."

Advisory Opinion Digest No. 206

Statute Involved: Section 4(b) (4),
Textile Fiber Products Identification Act.

Marking requirements for apparel
assembled abroad of U.S.
components.

Released: April 4, 1968.

The Commission recently advised an apparel manufacturer that Section 4(b) (4) of the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

The fabric of which the apparel will be made is entirely of domestic origin. This fabric will be cut into shapes and forms. The cut fabric, together with buttons, trimmings, threads, labels, in short all findings, also of domestic origin will be shipped abroad to be assembled and sewn into the product. The assembled product will be returned to the United States where it will be finished, pressed, folded, and packaged.

The Commission advised the requesting party that a label or other mark denoting the particulars of foreign origin would be required in the following terms: "Assembled and sewn in [name of foreign country where assembled and sewn] of American-made materials."

Advisory Opinion Digest No. 207

Statute Involved: Section 5, Federal Trade Commission Act. Origin of goods.
Released: April 4, 1968.

The Commission rendered an advisory opinion today in response to a question concerning the origin of a telephone answering machine which was composed of both domestic and foreign made components.

The basic machine is manufactured in a foreign country, but modification to be performed in the U.S., including both labor and parts, will represent approximately 70% of the total cost of the finished product. Numerically, approximately half of the components are domestic and the remaining half are imported.

Concluding that such a product should not be unqualifiedly marked as "Made in U.S.A.," the Commission said:

" . . . a 'Made in U.S.A.' mark would constitute an affirmative representation that the finished product was made in its entirety in the United States. Since the end product would in fact contain foreign made components of a substantial nature, it would be improper to describe the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure of the identity and foreign country of origin of the imported components."

Advisory Opinion Digest No. 208

Statute Involved: Section 5, Federal Trade Commission Act. Disclosure of origin of golf clubs made in this country from imported parts.
Released: April 4, 1968.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of golf clubs made in this country using imported component parts. The cost of materials and labor in this country with respect to the four clubs in question will range from a low of 63% to a high of 92%.

The opinion advised that in the absence of any affirmative representation that the products are made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of any other facts indicating actual deception, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of these golf clubs will not be regarded by the Commission as deceptive. Accordingly, no marking is required on these clubs with references to the country of origin.

Advisory Opinion Digest No. 209

Statute Involved: Section 5, Federal Trade Commission Act.

Disclosure of origin of component used in drawer slide assembly.

Released: April 4, 1968.

The Commission was recently asked to render an advisory opinion as to the labeling requirements applicable to a slide assembly for cabinet and desk drawers which will be made in this country using an imported rail member. The imported component will make up less than half the cost of the completed assembly.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead customers as to the country of origin, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of the product would not be regarded as deceptive.

However, the Commission was also of the opinion that it would not be proper to describe the completed slide assembly as "Made in U.S.A." since that would constitute an affirmative representation that the entire assembly was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the rail member is imported.

Advisory Opinion Digest No. 210

Statute Involved: Section 5, Federal Trade Commission Act.

Origin of imported mechanical pencil action.

Released: April 4, 1968.

Today the Commission announced it had rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of imported mechanical pencil actions which are to be assembled with an American made barrel and clip.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive.

Advisory Opinion Digest No. 211

Statute Involved: Section 5, Federal Trade Commission Act.

Disclosure of origin of imported FM tuners.

Released: April 4, 1968.

The Commission was requested to render an advisory opinion concerning the proper marking of small FM tuners imported from a foreign country.

The tuners are disassembled in this country and a number of domestic components are installed to replace their foreign counterparts to change the tuning frequency and narrow the bandpass.

With regard to the proposal to omit any statement on the label concerning the origin of the product, and instead to include a brochure with each unit that would accurately explain its origin, the Commission believes that such proposal would not violate any of the alws administered by it.

Advisory Opinion Digest No. 212

Statute Involved: Section 5, Federal Trade Commission Act.	No disclosure required of imported shower head components.
Released: April 4, 1968.	

The Commission announced today it had rendered an advisory opinion concerning the proper labeling as to the origin of shower head components to be imported from a foreign country. Under the terms of the proposal the imported components will represent approximately 40% of the total cost of the completed unit, with American labor and material representing the remaining 60%.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported shower head components beyond what is imposed by the Bureau of Customs.

Advisory Opinion Digest No. 213

Statute Involved: Section 5, Federal Trade Commission Act.	Disclosure of origin of bicycles made in this country from imported parts.
Released: April 4, 1968.	

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of bicycles which were to be produced in the Virgin Islands using parts to be imported from a foreign country together with other parts from the United States. The value of the imported parts in relation to the total value of the finished bicycle will be around thirty-five percent.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these bicycles will not be regarded by the Commission as deceptive.

Advisory Opinion Digest No. 214

Statute Involved: Section 5, Federal Trade Commission Act.

Origin of lamps containing an imported wooden base.

Released: April 4, 1968.

The Commission announced today it had rendered an advisory opinion concerning the proper labeling as to the origin of lamps containing a wooden base imported from Japan, which represents approximately 20% of the total cost of the completed unit. The remaining components will be of American origin and the lamps will be assembled here in the United States.

Two questions were ruled upon by the Commission in the advisory opinion. First, would it be proper to label the lamps as "Made in U.S.A."? Second, if not, must the wooden base be labeled as "Made in Japan"?

In response to the first question, the Commission said that the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire lamp was of domestic origin. Since a substantial portion of the lamp would be of foreign origin, the Commission ruled it would be improper to label the lamps as "Made in U.S.A." without a clear and conspicuous disclosure in the label that the wooden base is made in Japan.

In regard to the second question the Commission said that, if the lamps are not labeled as "Made in U.S.A." and no other representation is used which might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, under the facts as presented the failure to mark the origin of the goods will not be regarded by the Commission as deceptive. Accordingly, the Commission said that no marking is required on the imported wooden base with reference to the country of origin.

Advisory Opinion Digest No. 215

Statute Involved: Section 5, Federal Trade Commission Act.

Misrepresenting goods as "Made in U.S.A."

Released: April 4, 1968.

The Commission rendered an advisory opinion today in response to a question involving the origin of a hoist which is to be made in part of both domestic and foreign made components.

Specifically presented to the Commission was the question of the percentage of domestic material which must be in the finished product in order for it to be properly described as "Made in U.S.A."

In response to the foregoing question, the Commission said:

"... a 'Made in U.S.A.' mark would constitute an affirmative representation that the product was made in its entirety in the United

States. If the product was made of foreign components and assembled in the United States, it would be improper to describe the finished product as 'Made in U.S.A.' although a legend 'Assembled in U.S.A. [name of country] components' would be proper."

Advisory Opinion Digest No. 216

Statute Involved: Section 5, Federal Trade Commission Act. Misrepresentation as to origin.

Released: April 4, 1968.

The Commission rendered an advisory opinion today in regard to the proper labeling of the origin of photographic accessories which are imported in whole or in part from a foreign country.

In the opinion the Commission ruled upon the following three questions which were presented to it. First, what percentage of foreign made components can a product contain and still be properly labeled as "Made in U.S.A."? Second, in the absence of a "Made in U.S.A." claim, when is it necessary to disclose the foreign country of origin of an imported product? Third, does the Commission have any specific regulations as to size, material and location whenever it is necessary to disclose the origin of an imported product?

In response to the first question, the Commission said:

"... the 'Made in the U.S.A.' mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product did in fact contain foreign made components of a substantial nature, it would be improper to label the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure indicating the identity of the imported components and the foreign country of origin thereof."

With respect to the second question, the Commission stated that it is somewhat hypothetical in that it does not involve a specific proposed course of action, and therefore it is not the proper subject for an advisory opinion.

In regard to the third and final question, the Commission stated that it had no specific regulations as to the exact size, etc., of the disclosure. The Commission said that it would have to state the rule in general terms because the facts of each case may be different. The basic requirement, the Commission said, is that the disclosure must be of such conspicuousness as to be likely observed by prospective purchasers making casual inspection of merchandise and of such degree of permanency so as to remain thereon until consummation of the consumer sale thereof.

Advisory Opinion Digest No. 217

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 4, 1968.

Manufacturer may not mark "Made in U.S.A." on imported blades of cutlery finished and assembled in the United States.

The Commission recently issued another advisory opinion in a series concerning commodities of partial or total foreign origin.

The Commission advised a manufacturer in this country, the applicant for an advisory opinion, that he may not mark "MADE IN U.S.A." on imported blades of cutlery to be finished and assembled in the United States. The Commission noted that a blade is a significant component of cutlery. The Commission called attention to the danger that the contemplated marking might violate Section 5 of the Federal Trade Commission Act.

Advisory Opinion Digest No. 218

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 4, 1968.

Origin of goods.

The Commission announced today it had rendered an advisory opinion in regard to representations concerning the origin of goods which are produced domestically but which contain imported components.

Specifically, the Commission ruled that food machinery may not be represented affirmatively as being of domestic origin unless it is made in its entirety in the United States.

Under the factual situation presented to the Commission, the requesting party proposes to produce a food machine here in the United States which will contain some components imported from a foreign country. Specifically, the requesting party wanted to know what percentage of the machine must be made in the United States before it can be affirmatively represented as an American-made product.

Although the Commission ruled that such a machine could not be affirmatively represented as being of domestic origin, it further stated the ruling does not prevent the vendor from making a factual disclosure of the percentage of American-made parts as contrasted with the percentage imported, should the vendor desire to make such a representation.

Advisory Opinion Digest No. 219

Statute Involved: Section 5, Federal Trade Commission Act. Disclosure of foreign origin.

Released: April 4, 1968.

The Commission recently issued an advisory opinion dealing with the failure to disclose the foreign origin of imported switch plates. The packages containing the switch plates was labeled with a company name suggesting that the product was of domestic origin.

Under these circumstances, the Commission required that the foreign origin of the product be disclosed in conjunction with the company name.

Advisory Opinion Digest No. 220

Statute Involved: Section 5, Federal Trade Commission Act. Disclosure of origin of imported tools.

Released: April 4, 1968.

The Commission announced today it had rendered an advisory opinion in regard to the proper labeling of the country of origin of certain imported tools.

Specifically, the requesting party wanted to know whether it would be necessary to disclose the country of origin on the tools and in advertising.

In the advisory opinion which was issued, the Commission concluded that it would be necessary to disclose the foreign country of origin of the tools in a clear and conspicuous manner at the point of sale. It also ruled that it would not be necessary to disclose the origin of the tools in advertising.

Advisory Opinion Digest No. 221

Statute Involved: Section 5, Federal Trade Commission Act. Disclosure of origin of imported metal spring clamps.

Released: April 4, 1968.

The Commission announced today it had rendered an advisory opinion in regard to the proper marking of metal spring clamps imported from a foreign country. The clamps are to be imported in bulk, packaged and resold in the United States. They will be used to hold glass to the backing of frames, on cardboards and other accessories, in temporary bookbindings, office ledgers, etc.

The Commission advised the person requesting the advisory opinion that it would be necessary to mark the imported clamps with the foreign country of origin in a clear and conspicuous manner.

Advisory Opinion Digest No. 222

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 4, 1968.

Disclosure of origin of component part of ice cream spade made in this country.

The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of the imported metal portion of an ice cream spade manufactured in this country.

The opinion advised that in the Commission's view the country of origin of the imported metal portion of the ice cream spade should be disclosed wherever the name of the company appears and that it should be disclosed in a clear and conspicuous manner on the package or the ice cream spade itself.

Advisory Opinion Digest No. 223

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 4, 1968.

Necessity for disclosing country of origin of imported gloves.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported gloves which will be packaged in this country.

The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of the gloves in a clear and conspicuous manner at the point of sale.

Advisory Opinion Digest No. 224

Statute Involved: Section 5, Federal Trade Commission Act.
Released: April 4, 1968.

Domestic origin marking for product with foreign components.

The Commission recently issued an advisory opinion dealing with the propriety of using the marking "MADE IN U.S.A" on a product, a significant component of which is in fact manufactured or produced in a foreign country.

The Commission was of the opinion that the proposed marking would constitute an affirmative claim that the product was entirely of domestic origin and such claim would be manifestly incorrect and actionable.

An article assembled or processed in the United States as above described, however, might properly be marked "MADE IN U.S.A." if the marking is accompanied by appropriate qualifying words (e.g. "of 'X' country compo-

nents" or "of 'X' country materials") provided this additional disclosure is made as conspicuously as the claim "MADE IN U.S.A." and in close proximity thereto.

Advisory Opinion Digest No. 225

Statute Involved: Section 5, Federal Trade Commission Act.

Labeling of material composed of leather fibers.

Released: April 4, 1968.

The Commission rendered an advisory opinion in regard to the legality of the following five terms to label material composed of pulverized leather:

1. Pulverized Leather
2. Reconstituted Leather
3. Imported Bonded Leather-Fibers
4. Bonded Leather-Fibers
5. 100% Leather-Fibers

Imported from Europe, the material will be sold to manufacturers of luggage, handbags and various other leather goods. The pulverized leather will be bonded with an adhesive and coated either with some type of lacquer or vinyl coating.

In its opinion, the Commission ruled that it had no objection to labels which describe the material as "Pulverized Leather" or "Bonded Leather-Fibres." It rejected, however, the term "Reconstituted Leather" since the word "Reconstituted" creates the impression that the material is leather which has been reprocessed in some manner, when in fact it is nothing more than pulverized leather held together by an adhesive.

With respect to the third proposed label, the Commission expressed the opinion that it would be deceptive to use the word "imported" without disclosing the specific country of origin of the material. Even though the word "imported" is not used, the Commission said that it would still be necessary to disclose the origin of the material since it is entirely imported.

According to its opinion, the Commission also ruled that it would be improper to represent that the material consists of "100%" leather fibers, since it contains a substantial amount of adhesive as well as being coated either with a lacquer or vinyl coating. The requesting party was further advised, however, that there would be no objection to using a percentage figure which factually portrays the amount of pulverized leather present in the material.

With further reference to the fifth and final proposed label, the Commission stated that the words "Leather-Fibres" either standing alone, or when coupled with the leather appearance of the appearance of the material, could create the impression that the material is wholly the hide of an animal or at least something more than pulverized leather. To dispel this erroneous impression, the Commission said it would be necessary to use qualifying

language, such as "Bonded Leather-Fibres." "Leather fibers and an adhesive," etc., in connection with the words "Leather-Fibres."

Finally, if the seller decided not to reveal the composition of the material, the Commission pointed out that it would be necessary to disclose that it is not leather by such language as "Not Leather," "Imitation Leather," or "Simulated Leather." The reason for this, the Commission said, is that the material has the appearance of leather, and in order to remove the potential deception inherent through its appearance it is necessary to disclose the fact that it is not leather.

Advisory Opinion Digest No. 226

Statute Involved: Section 5, Federal Trade Commission Act.	Necessity for disclosing country of origin of imported honing stones.
Released: April 4, 1968.	

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported honing stones which will be affixed to plastic handles in this country. The name of the applicant, an American company, would appear on the handle.

The opinion advised that in the Commission's view the country of origin of the honing stone must be disclosed in a clear and conspicuous manner on the product itself.

Advisory Opinion Digest No. 227

Statute Involved: Section 5, Federal Trade Commission Act.	Necessity for disclosing country of origin of imported nails.
Released: April 4, 1968.	

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported nails, which will be imported in bulk and repackaged in this country.

The opinion advised that in the Commission's view the country of origin of these nails must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly or indirectly could the importer imply that the nails are made in the United States.

Advisory Opinion Digest No. 228

Statute Involved: Section 5, Federal Trade Commission Act.	Disclosure of origin of imported switchplates.
Released: April 4, 1968.	

The Commission was requested to render an advisory opinion in regard to the proper marking of the origin of imported switchplates, which are to

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be packaged in a plastic bubble and sealed to a display card for resale to the general public.

In the opinion the Commission advised the requesting party that it would be necessary to clearly and conspicuously disclose the foreign country of origin of the imported switchplates on the front of the display card.

Advisory Opinion Digest No. 229

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 4, 1968.

Disclosure of origin of imported braids used in production of braided rugs.

The Commission was requested to render an advisory opinion with respect to the necessity of disclosing the country of origin of imported braids which are stitched together in the United States to produce a braided rug.

The opinion advised that in the Commission's view there should be a clear and conspicuous disclosure that the rugs were assembled and sewn in the United States of imported materials.

Advisory Opinion Digest No. 230

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 4, 1968.

Disclosure of origin of imported eyelashes.

The Commission was requested to render an advisory opinion concerning the proper labeling as to the foreign country of origin of imported false eyelashes. All of the other components, such as the mounting card, directions for use, plastic box, adhesive, etc., will be made and printed in the United States.

In its opinion the Commission concluded that it would be necessary to disclose the foreign country of origin of the imported eyelashes. The Commission also said that it would be acceptable for the disclosure to be made on the back of the mounting card, provided the disclosure is prominent and conspicuous.

Advisory Opinion Digest No. 231

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 4, 1968.

Disclosure of foreign origin on container.

It was announced today by the Federal Trade Commission that an advisory opinion was rendered in regard to the question of whether it is neces-

sary to disclose the foreign country of origin on containers of imported chemicals which are packaged in the U.S.

In the opinion, the Commission advised the requesting party that it would be necessary to disclose the foreign country of origin of the imported chemicals on the repackaged containers in a clear and conspicuous manner.

Advisory Opinion Digest No. 232

Statute Involved: Section 5, Disclosure of origin of imported
Federal Trade Commission Act. knife blades.
Released: April 4, 1968.

Today the Commission announced it had rendered an advisory opinion concerning the proper marking of the origin of knife blades imported from a foreign country. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades.

Advisory Opinion Digest No. 233

Statute Involved: Section 5, Disclosure of origin of imported
Federal Trade Commission Act. radios.
Released: April 4, 1968.

The Commission announced today it had rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign country of origin on the container of an imported two-way radio. The equipment itself will be stamped or labeled to denote the foreign country of origin.

Citing the general rule in matters of this nature, the Commission stated that a clear and conspicuous disclosure of the foreign origin of the product must be made at the point of sale. This means, the Commission added, that it may be necessary to make the disclosure on each individual container, if the prospective purchaser does not have the opportunity to inspect the merchandise prior to the purchase thereof in order to be apprised of its origin.

Advisory Opinion Digest No. 234

Statute Involved: Section 5, Labeling partially imported product
Federal Trade Commission Act. as "Made in U.S.A."
Released: April 4, 1968.

The Commission rendered an advisory opinion in regard to the question of whether it would be permissible to label the container of a polishing cloth

as "Made in U.S.A." if approximately 38% of the cost of the finished product is imported from a foreign country, the remainder being of domestic origin.

The polishing cloth is composed of two separate cloths sewn together, one which is impregnated and is used for polishing and the other is untreated flannel which is used as a finishing-off cloth. It is the impregnated cloth which will be imported, and the untreated flannel will be obtained from a domestic source. Because the greater portion of the cost of the finished product is of domestic origin, the requesting party seeking the opinion wanted to know whether it would be proper to label the container as "Made in U.S.A."

In its advisory opinion, the Commission said:

"... the claim, 'Made in U.S.A.', would constitute an affirmative representation that the entire polishing cloth was of domestic origin. Since a substantial portion of the finished product is of foreign manufacture, it would be improper to label the container as 'Made in U.S.A.'. However, if you wish to do so, you may make the following claim: 'Made in U.S.A. of impregnated cloth imported from _____'."

Advisory Opinion Digest No. 235

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 4, 1968.

American manufacturer may not place labels "Made IN U.S.A." on garments manufactured in this country from imported cloth.

The Commission has issued another advisory opinion among several recently dealing with products of foreign origin or containing significant components originating in foreign countries.

In reply to a request, the Commission advised an American manufacturer that he may not place labels "Made in U.S.A." on garments manufactured in this country from cloth produced in a foreign country. The Commission noted that the cloth is a significant component of the finished garment. The Commission stated that "Made in U.S.A." means made in the United States of America completely and accordingly cannot be applied where a significant component originated in a foreign country. The Commission suggested that such labels on the proposed garments might violate Section 5 of the Federal Trade Commission Act.

Advisory Opinion Digest No. 236

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 4, 1968.

Disclosure of origin of imported picture components.

The Commission announced today it had rendered an advisory opinion

concerning the proper marking of the origin of various imported picture components. The opinion involved two specific factual situations.

In the first situation, the frame is imported from one foreign country, the picture is from another and the glass, mat and other finishing of the product is of U.S. origin. Second, all of the components are of domestic origin, except the picture motif which is imported.

In the absence of any affirmative representation that the finished product is made in the United States, or any representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of the imported components in either of the two factual situations would not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported components beyond what is imposed by the Bureau of Customs.

Advisory Opinion Digest No. 237

Statute Involved: Section 5, Federal Trade Commission Act.

Disclosure of origin on containers of imported toy components.

Released: April 30, 1968

The Commission announced today it had rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign origin on the container of various imported toys packaged therein.

Under the factual situation presented to it, the requesting party imports plastic articles in bulk which are, whenever possible, marked as to their foreign origin. Moreover, the imported articles are repackaged in the United States for resale, and sometimes domestically made components are added, and at other times components from another foreign country are also added. The imported components come principally from two foreign countries. There is no fixed percentage of imported components in each kit and the amount may vary as much as 1%–75%, and only a few of the toy kits contain wholly imported components. The toys are sealed in the container and prospectively purchasers cannot examine the goods prior to the purchase thereof in order to be apprised of the foreign origin markings thereon.

Based upon its understanding of the facts and because of the special circumstances presented by the product and the packaging thereof, the Commission expressed the opinion that it would be appropriate to mark the container in substance as follows: "Some items or components of items are made in _____ and _____."

(Name of foreign country)

(Name of foreign country)

Advisory Opinion Digest No. 238

Statute Involved: Section 7, Commission denies clearance for
amended Clayton Act. proposed merger of substantial
Released: April 30, 1968. local independent producer of a
food product and a leading
national processor and distrib-
utor of the same product.

In an advisory opinion released recently, the Federal Trade Commission denied clearance to a substantial local independent producer of a particular food product to sell its assets or capital stock to a leading national processor and distributor of the same product.

The Commission noted that, while the two companies do not sell their product in each other's markets, they appear to be potential competitors of each other. The national company appears to rank as fourth largest distributor nationally of the product involved, and first in several cities with very substantial shares of the markets. The local company ranks second among all sellers of this food product in one principal metropolitan market, first there among the independents, and has enjoyed a substantial share of the market for many years. The merger would be a (geographic) market extension for the national company, eliminating each as a potential competitor of the other and removing the local independent from competition. The proposed merger would appear to violate Section 7 of the Clayton Act and consequently the Commission must refuse to grant the premerger clearance requested.

Advisory Opinion Digest No. 239

Statute Involved: Section 5, Fed- Labeling of Mesquite Chips.
eral Trade Commission Act; Sec-
tion 4, Fair Packaging and
Labeling Act.
Released: April 30, 1968.

The Commission announced today it had rendered an advisory opinion to a manufacturer of mesquite chips, a product designed to flavor food cooked with charcoal.

In the advisory opinion, the Commission dealt with two questions. The first question involved Sec. 5 of the FTC Act and the propriety of such claims in labeling as whether the product will impart "real western barbeque" flavor to food and whether it may properly be labeled as mesquite chips. Second, under Sec. 4 of the Fair Packaging and Labeling Act, is it proper to state the net weight as "32 OZ. (2 LBS.)" if the weight may vary as much as 2 ounces either way after it is shipped into interstate commerce,

depending upon the presence or absences of humidity, and the package in fact contains 32 ounces when it is packed?

Passing upon the first question, the Commission said that it had no objection to the proposed claims in the labeling insofar as Sec. 5 of the FTC Act is concerned.

With respect to the second question, the Commission ruled that the proposed declaration of net weight complies with Sec. 4 of the Fair Packaging and Labeling Act and comes within the variations in stated weight permitted under Sec. 500.22(b) of its regulations. This section permits:

“Variations from the stated weight . . . when caused by customary and ordinary exposure, after the commodity is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.”

In arriving at this conclusion, the Commission said that it has assumed that good distribution practices will be followed in the marketing of the product which unavoidably result in the change of weight in a relatively small percentage of cases, and that an overage is a likely to occur as often as a loss in weight.

The Commission's opinion also advised the requesting party of certain technical requirements of its regulations, such as the location of the declaration of net weight, the exact size of the declaration in relation to the area of the principal display panel, and other information relating to the identity and location of the manufacturer of the product.

Advisory Opinion Digest No. 240

Statute Involved: Section 5, Federal Trade Commission Act.

Released: April 30, 1968.

Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

The Commission was recently requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

The requesting party proposed to use a word closely resembling the name of a fur-bearing animal, the fur of which is commonly used in the manufacture of garments, in association with a pile fabric simulating that fur.

In the Commission's view, the use of the proposed term to describe such a fabric would be violative of that part of Section 5 of the Federal Trade Commission Act which makes deceptive acts or practices in commerce unlawful.

Advisory Opinion Digest No. 241

Statute Involved: Section, 5, Federal Trade Commission Act.
Released: May 7, 1968.

Proposed sales promotion plan rejected as violative of Section 5, FTC Act.

The Commission recently advised a requesting party that violation of Section 5 of the Federal Trade Commission Act would result from the adoption of a proposed sales promotion plan described in essence as follows:

A certain sum of money would be reserved from the proceeds of a sale to a first customer. That customer, if he wished to participate in the sales promotion program, would be paid up to one quarter of the reserved sum as commission on sales to ten additional customers. The first customer would also be paid up to one quarter of the reserved sum on sales made by his customers to yet another generation of customers and so through a fourth generation.

The tabulation distributed to potential purchasers of the requesting party's merchandise showed that the original participant, in theory, might benefit from the efforts of 11,100 sales persons.

This in the Commission's judgment was beyond the realm of possibility. The return to any given participant would unquestionably be a great deal less than the theoretically achievable amount set forth; more often than not it would be negligible. The initial purchaser would not surely benefit beyond that amount, if any, which he can gain through his own efforts. Any further amount which he might receive would accrue to him sheerly through chance.

Advisory Opinion Digest No. 242

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 7, 1968.

Necessity for disclosing the country of origin of imported ink.

The Commission was recently requested to render an advisory opinion with regard to the necessity for disclosing the foreign origin of ink which is imported from Germany. The ink is imported in 50 liter drums and resold to the consumer in $\frac{3}{4}$ and 2 ounce bottles.

The opinion advised that in the Commission's view the country of origin of this ink must be disclosed in a clear and conspicuous manner on the bottles in which it is sold and, if the ink is packaged in separate boxes, on the boxes themselves in such a manner as to be readily seen by prospective purchasers. The opinion added that neither directly nor indirectly could it be implied that the ink is manufactured in the United States.

Advisory Opinion Digest No. 243

Statute Involved: Section 2(c),
amended Clayton Act.

Released: May 7, 1968.

Receipt of discount in lieu of broker-
age by respondent wholesale food
distributor.

A wholesale food distributor under order for having violated Section 2(c) of the amended Clayton Act has been advised by the Federal Trade Commission that if he received or accepted a discount offered by one of his suppliers for rendering certain "special services," he would be in violation of order entered against him.

The Commission noted that the 5% discount offered to the distributor was equal to commissions normally paid by the supplier to brokers; the services to be rendered by the distributor were services normally performed by brokers in connection with sales to other distributors; other circumstances and statements clearly indicated that both parties to the transaction considered the discount as compensation for elimination of brokerage expense, and the discount therefore amounted to an allowance in lieu of brokerage.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 244

Statute Involved: Section 5, Fed-
eral Trade Commission Act.

Released: May 15, 1968.

Disclosure of foreign origin of nasal
cannula required.

The Commission recently advised a requesting party that a medical device manufactured in a foreign country from domestic designs and made on domestic machinery furnished by the U.S. seller should be marked clearly and conspicuously with the name of the foreign country. The marking could be on the device itself or on the package but in any event the disclosure must be made or attached with such permanence to remain on the product or container until bought by the ultimate purchaser.

Advisory Opinion Digest No. 245

Statute Involved: Section 5,
amended Clayton Act.

Released: May 15, 1968.

Commission denies approval of pro-
posed joint venture corporation
composed of five competing man-
ufacturers to bid on prime con-
tract to furnish products of uni-
form specifications.

The Commission recently issued an advisory opinion denying approval of a proposed joint venture corporation to be composed of five manufacturers to

bid on a large contract that would require more extensive facilities than possessed by any one of them. The actual work on the contract would be performed by the five participating companies and by others on a subcontract basis. The five are now actual or potential competitors.

In the opinion of the Commission, the proposed joint venture corporation composed of competing companies would appear to be illegal under federal antitrust laws as a combination to fix prices in contract bids.

Advisory Opinion Digest No. 246

Statute Involved: Section 5, Federal Trade Commission Act.

Released: May 15, 1968.

Publication by trade association of recommendation to manufacturers of procedure for prepaying freight.

The Commission recently rendered an advisory opinion informing a trade association of wholesalers that it could not give its approval to a proposal to conduct a study of various policies for prepaying freight being used by manufacturers and to publish the results as a recommended procedure for prepaying freight.

The Association advised that a certain number of manufacturers who sell to its members have a "paid freight" policy whereby they will pay the freight, on one of a number of bases, on orders above a certain quantity which are shipped to the members. Many manufacturers do not have such a policy. Among those that do, there are fifteen to twenty different procedures for handling payment, most of which involve a lapse of time of from sixty days to six months before the wholesaler can collect the allowance. The Association is interested in conducting a study of these practices with the ultimate view of reducing the fifteen or twenty procedures now in effect to perhaps two or three and also to reduce the time period for the recovery of the funds to no more than sixty days, thus eliminating the long period in which capital of the members is tied up in what is supposedly prepaid freight.

The Association stated that these efforts are not in any way intended to coerce manufacturers into giving freight allowances they do not care to give, but are solely to reduce the complexity and cost of doing business. It definitely plans to publish the results as a "recommended procedure for prepaying freight," but does not plan any efforts to enforce this recommendation or to put any pressure on the manufacturers to adopt the recommendation beyond the simple publication of the results of the study and the recommended procedure.

The Commission advised that even though the study and published recommendation may be motivated by a purpose to remove evils affecting the in-

dustry, it appears to go further than is reasonably necessary to accomplish such result. Even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth in the recommendation, there is implicit in such recommendation by the wholesalers too grave a danger that it will serve as a device whereby the concerted power of the members of the Association is brought to bear to coerce the manufacturers to conform their pricing policies to the restrictive standards of the recommendation, or at the very least as an invitation to enter into agreements among themselves to do so. The Commission would, however, have no objection to the preparation by the Association of an objective study of these practices for the members of the Association provided the study did not contain any recommendations.

Advisory Opinion Digest No. 247

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 15, 1968.

Disclosure of origin of crib mattresses, etc., made in this country using imported outside covers.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of crib mattresses, play pen pads and bumpers which will be manufactured in this country using imported outside covers. The manufacturer advised that the relative manufacturing cost of the imported part to the American parts will be from 1/5 to 1/7 and that a comparison of the cost of the imported sheeting to the selling price will run about 1/7 to 1/12.

The opinion advised that in the absence of any affirmative representation that these products are made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive.

Advisory Opinion Digest No. 248

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 15, 1968.

Validation of guarantee—Time requirement.

The Commission recently interpreted for a requesting party one aspect of the Commission's Guides Against Deceptive Advertising of Guarantees. These Guides, in general, provide that any guarantee used in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee; (b) the manner in which the guarantor will perform; and (c) the identity of the guarantor.

The language proposed for the guarantee of a product sold by mail was: "If for any reason you are not satisfied with your purchase, return it to us at once" In the Commission's view the expression "at once" was too vague and accordingly the proposed guarantee did not conform to the Guides.

The Commission approved the proposed guarantee when it was modified to read: "If for any reason you are not satisfied with your purchase, return it to us within x days," "x" being a number of days certain.

Advisory Opinion Digest No. 249

Statute Involved: Section 5, Federal Trade Commission Act.

Released: May 21, 1968.

Trade association code providing that members will not advertise sales below cost.

The Commission recently rendered an advisory opinion informing a trade association that there could be no objection to its proposed "Guide to Ethical Advertising Practices," with the exception of one provision relating to advertising of sales below cost.

The Guide set forth a number of prohibitions of various advertising practices which the Commission deemed to be in accord with applicable law and the Commission also noted that the association did not contemplate any efforts of its own to enforce the Guide, but instead planned to publish it solely for the education and guidance of the members. The one provision questioned by the Commission provided that since below cost pricing is predicated on additional sales, members shall not advertise merchandise or services or a combination of both below their total cost.

The opinion advised that while the mere adoption and dissemination of this Guide by the association may not be considered the equivalent of an agreement not to advertise below cost prices, still if it had the effect of persuading substantial numbers of the members of the association to refrain from so advertising, it would, the opinion stated, raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Since sales below cost can be a legitimate method of competition, depending upon the circumstances, any agreement among competitors to refrain from such advertising to that extent restricts competition. Hence, it was stated that any provisions which would have a tendency to bring about that result could not meet with Commission approval.

The Commission further advised that this conclusion would not in any way be altered by the existence of the many state laws on the subject. These laws vary greatly in their coverage and application and, in any event, would not provide a legal basis for an agreement among the members of an industry to refrain from the practice in question.

Advisory Opinion Digest No. 250

Statute Involved: Section 5, Federal Trade Commission Act.

Released: May 21, 1968.

Formation of local trade associations by state-wide trade association.

In a recently issued advisory opinion disapproving a proposal by a state trade association desiring to establish a state-wide network of local clubs or trade associations in the same industry the Commission advised that, on the basis of presented facts, it was unable to determine with any degree of accuracy their precise purpose and objectives.

The advisory opinion pointed out that the Commission does not generally disapprove the proposed formation of industry groups or trade associations for purposes which are not anticompetitive. If the purpose for such formation is the dissemination of information on local or state legislation, the improvement of individual businesses, or the establishment of sound accounting principles and bookkeeping practices or similar activity, the Commission would voice no objection.

If, however, the purpose or effect of such groups and their policies is the unlawful suppression of competition, the promotion of unlawful price stability or so-called orderly marketing practices, their formation could not be approved under any circumstances.

Since these latter effects would not be inconsistent with the general statement of purpose submitted with the factual presentation, the Commission disapproved the proposal in its present form.

Advisory Opinion Digest No. 251

Statute Involved: Section 5, Federal Trade Commission Act.

Released: May 21, 1968.

Disclosure of country of origin of imported fasteners.

The Commission was recently requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of metal fasteners which will be imported from Japan. The fasteners will either be imported in bulk and repackaged in small cardboard cartons in this country or will be packaged in individual cartons in Japan.

The opinion advised that in the Commission's view the country of origin of these fasteners must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that they were made in the United States.

Advisory Opinion Digest No. 252

Statute Involved: Section 5, Federal Trade Commission Act.

Location of foreign origin disclosure.

Released: May 21, 1968.

Responding to a request for an advisory opinion, the Commission said today that the disclosure of the foreign country of origin of imported fishing reels must be made in a location where it would be readily observed by prospective purchasers.

Under the factual situation presented to it in the advisory opinion, the imported fishing reels are plainly marked as to their specific foreign country of origin. It is anticipated, however, that the reels will be packaged for resale in the United States in a vinyl zipper case and then placed inside a cardboard carton. Information as to the exact manner in which the reels will be displayed at the point of sale was not available.

The question presented to the Commission was whether it would be necessary to make the foreign origin disclosure of the reels on the case or the outside of the cardboard carton, or on both.

After pointing out that it could not give a specific answer as to the exact location of the foreign origin disclosure because it had not been advised of the exact manner in which the reels would be displayed at the point of sale, the Commission stated:

"Whenever an affirmative disclosure of origin is required in order to prevent deception, the general rule is that the marking must be legible and must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, and not after, the purchase thereof. This means, of course, that if the reels are displayed at the point of sale in a cardboard carton, a conspicuous disclosure would have to be made on the outside of the carton. A similar disclosure would be required on the vinyl case, if the reels are displayed only in the case. On the other hand it follows that the disclosure on the reels would be sufficient, provided that the reels are displayed at the point of sale in such a manner that prospective purchasers could readily observe the disclosure thereon prior to the purchase of the merchandise."

Advisory Opinion Digest No. 253

Statute Involved: Section 2(a) and 2(d), amended Clayton Act.

Extended credit terms for newly established stores in impoverished urban areas approved.

Released: May 25, 1968.

The Commission recently advised an apparel manufacturer that under the circumstances described his proposed plan would not likely contravene laws administered by the Commission.

The manufacturer proposes to give extended credit terms to one class of his customers, excluding other classes. Those to whom extended credit is to be given are described as follows:

- (1) the business is a newly established business located within an urban, inner core, ghetto-type area,
- (2) the proprietor or principal owner of the business is a resident of the urban, inner core, ghetto-type area within which the business is located,
- (3) in light of its ownership, management, and location the business stands a reasonable chance of survival.

To such customers the following extended credit terms will be offered:

- (1) one year's credit on orders placed during the first month of operation.
- (2) six months credit on all orders placed thereafter.

The extended credit given is to be limited to the first five years of a new store's operations. It was also proposed that such new firms be given on an introductory basis certain in-store and point-of-sale advertising materials, not to exceed in total value (i.e., cost to the requesting party), the sum of \$500.

The Commission felt that there would be little, if any substantial competition between the favored and disfavored customers.

The Commission announced that it would not, currently at least, challenge the requesting party's proposal.

The Commission noted further that if changed circumstances required a change in the Commission's present views, the requesting party would be given ample opportunity, as provided by the Commission's Rules of Practice, to modify or abandon, without penalty, the presently approved proposal.

One year subsequent to the initiation of this program the requesting party was requested to submit to the Commission a report describing the details of the implementation of the plan together with any objections it may have received.

Advisory Opinion Digest No. 254

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 30, 1968.

Operating of exclusive check-cashing concession in retail stores.

The Commission recently rendered an advisory opinion to the effect that it would not be illegal for a company to operate a proposed check-cashing program pursuant to which it would function as the check-cashing concessionaire within subscribing retail establishments.

Under the plan as presented, the company would charge check-cashing customers a ten cent fee for all checks drawn for sums greater than the

amount of the purchase and would pay to the subscribing retailers a portion of that fee as consideration for the grant of concession rights. The company would assume the entire burden of bad-check risks and collection efforts.

The subscribing retailers and their employees would act as agents of the company by performing the actual check-cashing function, following procedures required by the company utilizing the company's information system. Money used in cashing checks for sums greater than the amount of the purchase would be the retailers' money and the retailers would deposit all checks and fees collected by them in their own banks. Out of the fees so collected and deposited, the subscribers would remit to the company seven cents per check cashed, including checks drawn in the amount of the purchase, although no fee would be charged the customer for such checks. The company would pay the subscriber the full amount of all bad checks and would assume the function and risks of attempting to collect on such checks.

The subscribing retailers would retain the difference between the amount paid the company and the aggregate fees collected as their basic consideration for granting the concession rights and could realize additional consideration from a reserve to be maintained by the company. The company would run its own credit check of all applicants for and holders of check-cashing courtesy cards, issue cards inscribed with the retailer's name, keep the credit information up to date and operate, using moneys and employees of the subscriber and at locations within subscriber's outlets, check-cashing concessions which would be furnished with on-line telephone reports of information contained in the company's records.

The agreements to be executed with the subscribers would give the company the exclusive check-cashing concession rights within the stores for a period of twenty-four months, subject to an initial right of cancellation by the subscriber at the end of the first five months. The only cost to the subscriber in exercising this latter privilege would be the loss of the initial set-up charge paid upon installation of the concession in the store. After the expiration of the twenty-four months period, the agreements would be renewable for one year periods at the option of the parties. The company also advised that to its knowledge no one else is presently engaged in operating such check-cashing concessions.

The company expressed primary concern with two legal issues created by this proposed plan. The first had to do with whether the company's separate agreements with subscribers, each providing for the collection of a ten cent fee, would be deemed a horizontal price-fixing conspiracy. Second, the company inquired as to whether the exclusive aspect of the agreements makes them objectionable under Section 5 of the Federal Trade Commission Act.

With respect to the first question, the opinion advised that in the Commission's view, based upon the facts presented, the only price involved is the

company's own price for the service rendered and hence no question of a price fixing agreement should arise. With regard to the second question, the Commission was of the opinion that the time periods involved in these exclusive agreements should not result in unreasonable restraints of trade considering the fact that this is a small company seeking to establish itself in a new field of endeavor where there are no existing competitors and where a substantial outlay of capital and the assumption of considerable risk will be required. Hence, the Commission was influenced by the fact that subscribers have the opportunity to terminate the arrangement at the end of the first five months and again at the expiration of the twenty-four months period and that renewals will be for one year periods only.

The Commission also cautioned that this opinion was being rendered in the light of the competitive situation which now exists and that in that light it could see no objection to the form of the agreements and the proposed manner of implementing the program. The Commission could not, of course, foresee in all particulars the impact of this program upon future competitive conditions which might conceivably require a different view of the exclusive provisions contained therein.

Advisory Opinion Digest No. 255

Statute Involved: Section 5, Federal Trade Commission Act.
Released: May 30, 1968.

Misrepresentation as to origin of flatware imported in substantial part.

The Commission rendered an advisory opinion today in regard to the proper marking of the origin of flatware which is imported in substantial part. Specifically, the following three questions were ruled upon by the Commission.

First, can flatware which is gold plated in the United States be marketed without disclosing the foreign origin of the imported stainless steel blanks, if it is sold under a trade name consisting of a company name suggesting domestic origin hyphenated with the word "American"? (The gold plating will cost from 30%-50% of the total cost of the finished product.)

Second, if the trade name referred to above in the first question is not used, will it then be necessary to disclose the foreign origin of the imported stainless steel blanks?

Third, if a disclosure is required, must it be stamped on the flatware itself or can it be placed on a string tag attached to the flatware or on the container?

In response to the first question, the Commission said that the use of the proposed trade name would constitute an affirmative representation, contrary to fact, that the entire product was made in the United States. Since a substantial portion originates in a foreign country, it will then be necessary to

clearly disclose the country of origin of the imported stainless steel blanks in immediate connection with the trade name wherever it is used, both in advertising and labeling.

In response to the second and third questions, the Commission said that disclosure of the origin of the imported components would be required even though the company elected not to market the flatware under the proposed trade name. The Commission also stated that the disclosure may be made on the flatware itself, or on a string attached thereto, or on the container, provided the disclosure is of that degree of conspicuity and permanency as will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof.

Advisory Opinion Digest No. 256

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: June 11, 1968.

Use of unqualified word "Diamond"
to describe abrasive discs contain-
ing other materials.

The Commission was recently requested to render an advisory opinion concerning the legality of describing abrasive discs or laps containing diamond and other abrasives as "Diamond Discs."

The manufacturer presently produces diamond coating laps which are a single layer of diamond held in a plated nickel bond and uses only diamond as the abrasive. It now plans to produce a companion product line and add another abrasive particle as a filler. For example, it would mix aluminum oxide with the diamond, with the ratio of diamond to aluminum oxide being as low as one to ten and, in any event, the filler would be more than 50%.

The opinion advised that in the Commission's view such an abrasive disc or lap could not truthfully be described as simply a "Diamond Disc." The opinion further advised that nothing in the law would prevent use of the word "Diamond" as part of a truthful description of the product, but that if the manufacturer did elect to use it, considering the low percentages of diamond which were contemplated, it should only be used as a part of a full disclosure of all the abrasive materials used, including the percentages of each.

Advisory Opinion Digest No. 257

Statute Involved: Section 5, Fed-
eral Trade Commission Act.
Released: June 11, 1968.

Legality of trade association sug-
gesting rental rate for containers
in which industry products are
sold.

The Commission was recently requested to render an advisory opinion concerning the legality of a trade association suggesting a rental rate for

the containers in which the product of the industry is sold if such rate is lower than the standard charge now being made.

The members of the association are engaged in the sale of a product in returnable containers many times the value of the product itself. The practice in the industry today is to charge a daily or monthly rental for the time during which the containers are held beyond thirty days. Some of the members would now like to go to a straight rental and feel the best way to do this would be through the association.

The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law without regard to the ultimate rental set, whether higher or lower than the existing rate. Even though couched in the form of a suggestion, the natural and probable result of such an action would, the opinion stated, be to persuade substantial numbers of the members to charge the rate suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a common rate. Such an agreement would be a clear restraint of trade under existing law, the Commission added.

It was the Commission's opinion that the rental rates to be charged by the members should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise.

Advisory Opinion Digest No. 258

Statute Involved: Section 2(d), amended Clayton Act.	Promotional assistance plan limited in value to percentage of purchases.
Released: June 11, 1968.	

The Commission recently approved, with modifications, a proposed promotional assistance plan.

The requesting party will be offering cooperative advertising allowances under the program in question for a limited period of time. The dollar value of the allowance offered is to be measured at 12% of the dollar value of a particular account's purchases for the calendar year 1967. Certain new accounts will also be able to participate, if they will. The 12% limitation for new accounts will be based on an estimate of the annual dollar volume of business reasonably to be expected from such new accounts.

The offer specifically provides for an allowance of 60 cents per unit purchased.

The requesting party will require the following performance from those accepting its offer:

1. The product must be promoted with an advertised price that is below normal shelf price.

2. The ad must be at least 3 column inches.
3. The advertisement must run in all paid circulation newspapers normally used by the Account, and in no event may those newspapers cover less than 75% of the Account's marketing area.
4. Eligible advertising must be an integral part of the Account's omnibus advertisement and not set apart from the regular advertisement.
5. Advertisement must run before a specified date.
6. Advertising placed under this agreement will not be accepted as performance under any other cooperative advertising program for the same period.
7. If the account is unable to utilize newspaper advertising, a representative should be contacted to arrange for an alternative proportionately equal method of performance.

Proof of performance under the offer will be required from participants.

Notwithstanding the statement of the requesting party that the offer will be made to "certain" new accounts, the Commission understands that the offer will in fact be made to all entitled customers. Furthermore all customers who in fact compete on the same functional level will be afforded an opportunity to participate whether they buy direct from the requesting party or through an intermediary.

The plan as above outlined was acceptable to the Commission provided promotional funds are not disbursed in excess of the actual cost of the advertising. Without such a limitation larger participants in the promotion, buying in larger quantity, might enjoy a cash overage not available to smaller competitors thereby occasioning possible violation of Sections 2 (a) and (d) of the amended Clayton Act.

Advisory Opinion Digest No. 259

Statute Involved: Section 7,
amended Clayton Act.
Released: June 25, 1968.

Commission has no objection to
proposed merger to two non-
competing quarry and building
materials companies.

The Commission recently issued an advisory opinion telling applicants it has no objection to their proposed merger.

According to the information submitted in connection with the application for an advisory opinion, the two companies do not sell to the same customers nor do they sell in the same geographic markets in their distribution of certain building materials. Both companies are of modest size.

Advisory Opinion Digest No. 260

Statute Involved: Section 5, Term "X Grown Emeralds" as descriptive of synthetic stones improper.
Federal Trade Commission Act.
Released: June 25, 1968.

Responding to a request for an advisory opinion, the Commission announced today it had taken the position that it would be improper to use the term "X Grown Emeralds" as descriptive of synthetic stones.

In expressing the opinion that the proposed phrase would not constitute a proper disclosure of the nature of the product and the fact that it is not a natural stone, the Commission said:

"This conclusion is based upon the belief that most consumers would probably ascribe to the word 'grown' its more commonly accepted meaning, namely, one of natural growth, and thus conclude, contrary to fact, that the product is a cultured stone. Under these circumstances, therefore, the Commission is of the opinion that use of the proposed term would not be in compliance with Sec. 5 of the FTC Act because the stones are synthetic, not cultured."

Advisory Opinion Digest No. 261

Statute Involved: Section 2(d), Promotional assistance available to all customers.
Amended Clayton Act.
Released: July 2, 1968.

The Commission was requested to render an advisory opinion with respect to the legality of a supplier's proposed promotional program under an outstanding Commission order which, in pertinent part, prohibits the supplier from making promotional payments to its customers in a discriminatory manner. According to information provided by the supplier, all its sales are made to retailer customers—distributors or other intermediaries are not utilized in the distribution of the supplier's products.

Under the proposed program as set forth and explained by the supplier, promotional allowances would be made available to all customers of the supplier and could be applied by the customers to the costs incurred by them in three categories of advertising and promotional activity: Point-of-sale materials, cooperative advertising in daily and Sunday newspaper listed in Standard Rate and Data; and so-called other store promotions, including advertising in newspapers not listed in Standard Rate and Data, catalog and local radio and T.V. advertising, envelope stuffers, and sales incentive programs and contests.

Further, the amounts of such allowances would be determined at the rate of 7% of each participating customer's net purchases from the supplier in a

six-month period, although this figure could be adjusted within any given trading area (defined by Management Survey of Metropolitan County Areas) as operating experience requires. In the case of Standard Rate and Data newspapers, the allowances could be applied to two-thirds the cost of such advertising, and for all other forms of eligible advertising and promotional activity, allowances could be applied to the full cost of the activity. In all cases, and whether any customer chooses to participate in any or all of said categories of advertising and promotional activity, the supplier's total contribution to the customer's cost would be subject to the 7% of purchases limit. Allowances earned but not used by any customer in a six-month period could not be carried forward to the following such period.

Regarding the point-of-sale materials, the supplier would mail or deliver quantities of these materials to all customers, and each customer would be advised in advance that such point-of-sale materials would be charged against his available promotional and advertising allowances, unless returned to the supplier within 10 (ten) days of receipt, by mail or delivery to the supplier's salesman.

The supplier was advised that the proposed promotional program, if implemented in a non-discriminatory manner, would not be in violation of the Commission's order or Section 2(d) of the Clayton Act.

The Commission cautioned that its opinion was predicated upon the supplier's assurance that all provisions of the proposed program, particularly that concerning the availability of cooperative advertising allowances for advertising in non-Standard Rate and Data newspapers, providing only that such newspapers have verifiable costs and circulation, and that concerning the return privilege regarding point-of-sale materials which would be mailed or delivered to the supplier's customers, would be effectively communicated to all customers of the supplier.

The Commission further cautioned that a customer who is located on the periphery of a particular trading area and who competes in fact with a customer located within such trading area, should be offered the particular promotional plan available to the customer within the trading area so as to preclude discrimination between customers competing in the resale of the supplier's products.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of practice (1967).

Advisory Opinion Digest No. 262

Statute Involved: Section 5, Federal Trade Commission Act.

Use of suggested list prices accompanied by disclaimer.

Released: July 2, 1968.

The Commission was recently requested to render an advisory opinion as to the propriety of an advertisement referring to a product as "\$1.09 size,

for 69¢" accompanied by a statement that "All regular prices are the manufacturers' suggested retail prices and are furnished here to help you identify the size being offered for sale."

The opinion advised that the answer to this question depended wholly upon whether or not the prices used as the basis for comparison complied with Guide III of the Guides Against Deceptive Pricing, since, in the Commission's view, the use of the phrase "\$1.09 size" in the body of the advertisement and the reference to "manufacturers' suggested retail prices" in the statement place the representation in the category of a trade area price comparison. Therefore, the opinion added, unless the higher prices used do in fact represent the prices at which substantial sales are made by the principal retail outlets in the area, their use would be deceptive.

The Commission further stated that it was of the opinion that the capacity of such advertisements to deceive would not be relieved or removed by the statement or disclaimer proposed in situations where the prices used do not meet the test of the Guides. At best, such a statement would simply render the advertisement ambiguous and leave it subject to two interpretations, one of which is false. It would still leave substantial numbers of consumers under the impression that the higher prices used were in fact the actual trade area prices within the meaning of the Guides.

Advisory Opinion Digest No. 263

Statute Involved: Section 2(a), Amended Clayton Act.	Price difference between competing "stocking" and "non-stocking" dealers.
Released: July 9, 1968.	

The Commission rendered an advisory opinion today in which it said that it could not give its approval to a plan whereby manufacturers would give a lower price to "stocking" dealers who compete with "non-stocking" dealers. The opinion was given to a trade association which represents manufacturers of a household product.

As justification for the variance in the proposed pricing schedules, the association pointed out that "stocking" dealers experience a higher cost of doing business and therefore must sell at higher prices than their competing "non-stocking" dealers. It was also contended that such a price differential would stimulate the purchase of the product in question for inventory.

Expressing the view that it could not give its approval to such two price schedules if the "stocking" and "non-stocking" dealers compete and if the pricing differentials are of sufficient magnitude to adversely affect competition, the Commission concluded that the proposed plan could result in illegal price discrimination under Sec. 2(a) of the Clayton Act, as amended. In its opinion, the Commission went on to point out that such price differ-

ences would be illegal unless they could be justified on the basis of one of the specific defenses provided in Sections 2 (a) and (b) of the statute.

"For example," the Commission said, "the law permits price differences which can be justified by provable cost differences in the manufacture, sale or delivery of such products resulting from the differing methods or quantities in which the products are sold or delivered. Accordingly, Section 2(a) does not preclude prices reflecting less costly and, therefore, more efficient methods of distribution provided that the standards inherent in the statute's cost justification proviso are met."

Although the party seeking the advisory opinion did not raise the question, the Commission's opinion touched upon another point of interest in this type of a situation. Specifically, the Commission said:

"... it is conceivable that certain members may wish to compensate their customers for services which the customers may render for them in connection with the handling or resale of products manufactured by such members. The law provides a means by which this may be done, but if it is done, the manufacturer must comply with the requirements of Section 2(d) of the Act. This requirement is simply that compensation for such services, if made by a manufacturer to one customer, must be made available on proportionally equal terms to other customers of that manufacturer who compete with the favored customer in the sale of the manufacturer's products. This means, among other things, that any plan or program, under which the payments are made must, if necessary, provide for alternative services or facilities which, as a practical matter, can be provided by all competing customers."

Concluding its opinion, the Commission cautioned as follows:

"It should be noted, however, that payments by manufacturers to their customers 'to stimulate the purchase of their goods for inventory,' are not payments of the type contemplated by Section 2(d). Such a payment would merely be a reduction in price to induce the purchase of the manufacturer's goods and, if given to some but not all of the manufacturer's customers, might be unlawful price discrimination within the meaning of Section 2(a)."

Commissioner ELMAN, dissenting:

What is proposed here is that manufacturer members of a trade association will furnish compensation, in the form of a lower price, to those dealers who perform "stocking" services. A supplier may lawfully compensate his customers for services which promote more efficient distribution, so long as he satisfies the requirement of Section 2(d) of the Clayton Act that such compensation be available on a nondiscriminatory basis to other competing customers. The Commission's Guides for Compliance with Sections 2 (d) and

(e) (adopted May 19, 1960) indicate that the "services or facilities" covered by the statute are not limited to advertising and similar promotional activities but also include the furnishing of warehouse, showroom and "stocking" services and facilities. It is also clear that compensation lawfully paid a customer under Section 2(d) may, to simplify bookkeeping, be expressed in the form of a discount from invoice price. In such a case, if we look at substance rather than form, there is neither a price discrimination nor probable injury to competition, the two essential elements of a Section 2(a) violation.

If the lower price to dealers performing "stocking" services is *bona fide* compensation for the performance of distribution services desired by the manufacturer, and is available to all competing customers on a nondiscriminatory basis, it is lawful under Section 2(a) as well as 2(d) of the Clayton Act. In my view, the statute was not intended to prevent a manufacturer from obtaining distribution through as many functionally distinct channels as his business needs require. A *bona fide* functional discount or allowance to customers, offered and paid on a proportionally equal basis as compensation for warehousing and similar services rendered to the manufacturer, may increase efficiency, decrease costs, expand service to the consumer, and reduce prices. Such non-discriminatory distribution methods promote competition, encourage innovation, benefit the consuming public, and thus advance the basic goals of the antitrust laws. To require identity of treatment of customers trading on different functional levels or rendering different distribution services is to foster economic discrimination—the very antithesis of "the central purpose of § 2(d) and the economic realities with which its framers were concerned". (*Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).)

The Commission here imposes an unreasonable and impossible burden on suppliers in meeting the requirement of "availability". It declares that compensation may be given only for services or facilities which all competing customers can provide. In other words, if some of a supplier's customers cannot—for any reason, including their own inefficiency—provide services or facilities which a supplier needs to promote more economical distribution, he is barred from compensating other customers who are ready, willing, and able to furnish such services or facilities. By thus reading into the statute something which is not there, the Commission turns it topsy-turvy. The Commission says, in effect, that a manufacturer may not grant functional compensation to customers who earn it by rendering services he needs, unless he also gives the same compensation to other customers who do not earn it and render no services at all. Here again, neither Congress nor the courts can be blamed if, through administrative interpretation, the Robinson-Patman Act is converted into an anti-competition, anti-efficiency, anti-consumer statute.

I agree with Commissioner Nicholson that the time has come for the majority of the Commission to reexamine its position.

Commissioner NICHOLSON, dissenting:

I would not issue an advisory opinion in this matter since the Commission does not have sufficient facts to determine whether the applicant's proposed compensation of dealers, who provide stocking services, is inimical to the purposes of the Robinson-Patman Act.

The majority follows on a long line of Commission interpretations under which eligibility for functional discounts was solely related to the functional level of the buyer.¹ In all of these cases it could be said that a seller's reimbursement of a buyer for services also benefited him in the resale of the seller's product. However, whatever competitive disadvantage may be experienced by another buyer's failure to receive such compensation may be due not to a subterfuge by the seller to avoid the purposes of the Robinson-Patman Act but merely to the unpaid buyer's reluctance to innovate, to attempt marketing efficiencies, to engage in business risks, or to move with the times.

In none of these cases did the Commission carefully consider that its failure to permit compensation of the buyer for particular functions as a purchaser might hamper competition and efficiency in marketing, nor did it consider *the possibility* that its sole concern with the resale functional level of the buyer "compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration."² In none of these matters did the Commission fully recognize that while, at one time, distinctions between the various distribution levels in American marketing had been clear-cut and the duties assigned to each level were rigidly defined, modern-day consumer needs and business response to such needs have resulted in a "proliferation of modern marketing units [which] defies neat nomenclature and descriptive labels."³

The majority assumes that the proposed discount will amount to a violation of law. Commissioner Elman is certain that it will not. I will not make either assumption. We lack the facts necessary to make the analysis suggested above—an analysis so necessary to the proper application of a statute not meant to "penalize, shackle, or discourage efficiency, or to reward inefficiency."⁴

¹ See e.g., *Agricultural Laboratories, Inc.*, 26 F.T.C. 296 (1933); *Albert L. Whiting*, 26 F.T.C. 312 (1938); *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co. v. F.T.C.*, 323 F. 2d 44 (7th Cir. 1963); *National Parts Warehouse v. F.T.C.*, 346 F. 2d 311 (7th Cir. 1965); *Monroe Auto Equipment v. F.T.C.*, 347 F. 2d 401 (7th Cir. 1965); *Purolator Products, Inc. v. F.T.C.*, 352 F. 2d 874 (7th Cir. 1965).

² Report of the Attorney General's National Committee to Study the Antitrust Laws, 207 (1955).

³ *Id.*, at 204.

⁴ H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

Advisory Opinion Digest No. 264

Statute Involved: Section 2(a), Special discount grant for stocking,
Amended Clayton Act. quantity orders and cumulative
Released: July 9, 1968. purchases.

The Commission announced today it had rendered an advisory opinion to a manufacturer of food serving equipment which involved a proposal to use stocking, quantity and cumulative price discounts.

Under the first category, a discount of 50% and 15% would be given to stocking dealers who continually order in large quantities and maintain a regular stock of the product in question for local delivery to restaurants, hospitals, etc.

The second category involves the following quantity discount schedule to dealers based upon each order:

<i>Amount purchased:</i>	<i>Discount, percent</i>
1-11 dozen -----	50
11-24 dozen -----	50 and 5
25 and more dozen -----	50 and 10

Each dealer will receive the following additional cumulative volume discount at the end of each year based upon the total dollar volume of purchases for that year:

<i>Amount purchased:</i>	<i>Discount, percent</i>
\$1-\$3,499 -----	0
\$3,500-\$5,999 -----	1
\$6,000-\$8,499 -----	2
\$8,500-\$10,499 -----	3
\$11,000-\$14,999 -----	4
\$15,000-Up -----	5

Stocking dealers will be in competition with nonstocking dealers and nonstocking dealers will also compete with each other. Under the terms of the proposed pricing schedules, stocking dealers could get a price advantage of as much as 15% over nonstocking dealers, and nonstocking dealers could also receive up to a 15% price advantage over their nonstocking competitors.

After making a brief explanation of the requirements of Sec. 2(a) of the amended Clayton Act, the Commission advised the requesting party as follows:

"it is, of course, impossible to reach a definitive conclusion as to the economic impact of such a pricing proposal without an investigation. However, the Commission has given your request careful consideration, and it has concluded that it cannot give its approval to the proposal because it believes that the necessary ingredients are present from which it can reasonably infer that such a proposal would likely result in the anticompetitive effects proscribed by the statute. A pricing schedule which results in a price advantage of as much as 15% under the facts outlined in this case would therefore probably be illegal, unless it can

be justified by provable cost differences in the manufacture, sale or delivery of such products or unless the lower price is made in good faith to meet an equally low price of a competitor."

Commissioners ELMAN and NICHOLSON dissent from that part of the Advisory Opinion relating to discounts for stocking dealers.

Advisory Opinion Digest No. 265

Statute Involved: Section 5, Federal Trade Commission Act.

Deodorant spray represented as a drug.

Released: July 9, 1968.

The Commission announced today it had rendered an advisory opinion to a manufacturer of a personal deodorant spray concerning the legality of some proposed advertising.

Specifically, the Commission advised the requesting party that the product was not a drug but a cosmetic, nor had it been cleared, approved or endorsed by the Food and Drug Administration. Therefore, any claims which represent the product as a drug, or that it has been cleared, approved or endorsed by the government agency in question would be improper.

Based upon all the facts and scientific information available to it, the Commission also advised the requesting party that any advertising representations which go beyond the claim that the product inhibits the growth of body odor causing bacteria would violate Sections 5 and 12 of the FTC Act.

Finally, the Commission stated that, as a general rule, it would be inclined to question the use of any claim that a product is "new" for a period of time longer than six months.

Advisory Opinion Digest No. 266

Statute Involved: Section 5, Federal Trade Commission Act.

Magazine sponsored contest open to readers.

Released: July 17, 1968.

The Commission recently rendered an advisory opinion advising a magazine publisher that there would be no objection to a proposal to give purchasers or readers the opportunity to participate in a contest to win a house if implemented in the manner outlined below.

The plan as presented was to give the reader, whether a purchaser or not, the opportunity to participate in a competitive contest to win a house. The contestant was to send in a numbered coupon clipped from the magazine with a written answer of fifty words or less to a question as, for example, "Why do I believe in democracy?" The answer was to be judged by an in-

dependent panel, with the best essay being declared the winner. The contest was to take place every three months, at a prefixed date, in a public community event. The purpose of the number was to identify the contestant, with the judges knowing only the numbers of the participants and not their names.

Advisory Opinion Digest No. 267

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: July 17, 1968.

Tourmaline described in advertising as "Emerald Green" or "Precious".

The Commission was recently requested to render an advisory opinion as to the legality of describing green tourmaline as "Emerald Green Tourmaline" or as "Precious Tourmaline." The stone involved in the request was said to contain chromium, the same coloring agent which produces emerald when it occurs in beryl, and the stone resembled emerald in appearance.

The Commission advised that it was of the opinion that the words "emerald" and "precious" may not be used in connection with the word "tourmaline" to describe the stone in question.

Advisory Opinion Digest No. 268

Statute Involved: Section 5,
Federal Trade Commission Act.
Released: July 17, 1968.

Trade association code of ethics designed to discourage or prohibit price advertising.

The Commission announced today it had rendered an advisory opinion in which it stated that a joint agreement among competitors to refrain from price advertising would constitute a violation of Section 5 of the Federal Trade Commission Act.

The request which prompted the Commission's opinion stemmed from a proposal to use the following language in an association's standards of ethics:

"Advertising of rates or comparison of competitor's rates or charges, is prohibited on the basis that such advertising demeans the profession."

The present code now in effect uses the word "discouraged" in lieu of the word "prohibited."

In ruling that such a provision would be illegal, the Commission said:

". . . since price difference and price comparison may be valuable stimulants to competition, any agreement to suppress the advertising of the two would constitute an agreement in restraint of trade violative of Section 5 of the Federal Trade Commission Act.

"Moreover, as to the present use of the word 'discouraged' in the code now in effect, you are informed that any agreement to 'discourage'

advertising of rates or rate comparison would also be in restraint of trade and violative of Section 5 of the Federal Trade Commission Act. The Commission is aware that you have not requested this advice, and indeed under the Commission's Rules an advisory opinion is usually considered inappropriate because the practice is one which is already engaged in; however, since your adoption of this rule has come to the attention of the Commission, the Commission would be remiss in not suggesting its discontinuance."

Advisory Opinion Digest No. 269

Statute Involved: Section 2(d),
Amended Clayton Act.
Released: July 17, 1968.

Pooling of promotional allowances
by retailers for joint advertising
purposes.

The Commission was recently requested to render an advisory opinion concerning the legality of a proposal by a group of independent retailers to pool the advertising allowances due the members for purposes of joint advertising.

Under the proposal, all money earned by the members under the suppliers' cooperative advertising programs would be assigned to the group in a collective advertising effort for the suppliers. Each supplier would receive, on the basis of the amount of money earned from him by all members of the group, radio advertising through the medium of three minute programs, each of which would have one minute of time available for the suppliers' commercial messages. The content of the one minute commercial would be governed by the suppliers themselves and would not be connected in any way with the retailers' advertising.

As part of the proposal, for each program a supplier receives the retailers would receive broadcast time on the same stations for their message, which would be institutional in nature and would extol the advantages of dealing with independent retailers. Under this type of advertising program, it would not be possible to mention individual dealers nor will prices be mentioned in such advertising.

The opinion advised that the Commission could see no objection to the proposal on the understanding that the fund used by or on behalf of the participating group to purchase advertising space will consist only of the aggregate of advertising allowances properly available to the members individually under the terms of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. In brief, that Section prohibits the payment by sellers of allowances to some customers which are not made available on proportionally equal terms to all competing customers. In this connection,

the opinion further advised that it would be unlawful if the combined power of the group was used to induce from the suppliers allowances greater than those to which the individual members were entitled under this Section.

Advisory Opinion Digest No. 270

Statute Involved: Section 5, Federal Trade Commission Act.	Origin disclosure on skis imported in raw and finished domestically.
Released: July 17, 1968.	

The Commission was recently requested to render an advisory opinion as to the marking requirements applicable to a ski which is imported from abroad in an unfinished state and which would have to have the decal and the top finish applied in this country, as well as the final process for finishing the bottom or the running surface.

The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of this ski in a clear and conspicuous manner to prospective purchasers at the point of sale.

Advisory Opinion Digest No. 271

Statute Involved: Section 5, Federal Trade Commission Act.	Plan to penalize competitors who do not offer free design services to customers.
Released: August 17, 1968.	

The Commission recently advised a requesting party that his proposal, if adopted, would violate Section 5 of the Federal Trade Commission Act.

The plan and its background were described as follows:

It is customary in the specified market for sellers of components furnished by a single supplier to offer free design services to architects and engineers engaged in planning new construction.

When the contracts are let, however, that seller of components who has provided the free design services is not always the successful bidder.

It was proposed, therefore, that the supplier contract and agree with all whom he supplies that a money penalty be imposed on any successful bidder who had not provided the free design services. The prescribed penalty would be paid over to that unsuccessful bidder who in fact provided free design services, failing which the supplier might at his option, cut the offending bidder off.

The Commission noted that any direct, or indirect, agreement between competitors which interferes with the free establishment of a market price whether that price be expressed in money, service, or in any other manner, is unlawful.

Advisory Opinion Digest No. 272

Statute Involved: Section 5, Federal Trade Commission Act.

Sales promotion plan approved so long as offered savings are real.

Released: August 17, 1968.

The Commission recently approved a proposed sales promotion plan described as follows:

The requesting party proposes to offer major oil companies its services in the promotion of the retail sale of gasoline. Participating gasoline stations will be provided with 3 x 4 cards picturing some product, most probably a nationally advertised appliance. These cards will be distributed gratis to those who wish to have them. No purchase of any kind will be required.

The appliance pictured on the card will be offered for sale at a price substantially less than the price at which it is ordinarily available through customary retail outlets. The holder of the card may obtain the appliance by sending the card with remittance to a designated Post Office box. His purchase will be mailed to him. A purchase may be made without a card if remittance is accompanied either by a facsimile of the appliance or a word description thereof.

The plan was approved on the assumption that the offered savings would in fact be available as prescribed in the Commission's Guides Against Deceptive Pricing.

Advisory Opinion Digest No. 273

Statute Involved: Section 5, Federal Trade Commission Act.

Repair shop trade association publication of resale price schedule

Released: August 17, 1968.

for materials.

The Commission recently rendered an advisory opinion advising a trade association of independent shops engaged in rendering repair service that its proposal to disseminate a suggested resale price schedule for materials used would be likely to result in a violation of law.

The schedule in question consisted of two tables, one of which gave the shop owner a quick reference to suggested resale prices for materials and the other of which gave him an explanation of the total by itemization of each resaleable product. The schedule explained that after hours of study it was found that computing labor and materials charges by allowing a price for each hour of labor was very unfair to the shops and far below their cost of materials. Hence the schedule gave the shop a quick method of computing the price of materials to which would be added the cost of labor.

The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law. Even though couched in the form of a suggestion, the natural and probable result of such

an action by the association would be to persuade substantial numbers of the members to charge the prices suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a uniform price for materials. Such an agreement, the Commission stated, would be a clear restraint of trade under existing law.

It was the opinion of the Commission that the prices charged by the members for materials should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise.

Advisory Opinion Digest No. 274

Statute Involved: Section 2(a), amended Clayton Act.	Merchandising plan to offer smaller volume customers reduced dis- counts.
Released: August 17, 1968.	

The Commission recently rendered an advisory opinion in which a distributor of leather specialty goods was informed that a proposed merchandising plan under which those customers whose annual purchase volume is less than an arbitrary and fixed amount would be granted a smaller discount than would be granted those whose purchases exceed such amount cannot be approved because it appears on its face to violate Section 2(a) of the amended Clayton Act if it were put into operation.

The proposed merchandising program will continue the current discount of 50% off list to those whose annual purchase volume exceeds \$250. All other accounts will be granted 40% discount on orders of less than \$200 list and 50% discount on orders over this amount until their cumulative purchase volume reaches \$500 list at which time each will receive a retroactive rebate adjustment on past purchases and the current discount on subsequent purchases. A service charge of \$2 is to be charged on orders of less than \$20 net.

The Commission further pointed out that price discriminations to customers who in fact compete with each other in the resale of commodities of like grade and quality would violate Section 2(a) of the amended Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

Advisory Opinion Digest No. 275

Statute Involved: Section 5, Fed- eral Trade Commission Act.	Origin disclosure of imported watch band parts assembled in the Vir- gin Islands.
Released: August 17, 1968.	

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country or origin of watch bands which will be

assembled in the Virgin Islands wholly from parts imported from Hong Kong.

The opinion advised that in the Commission's view the country of origin of these watch bands must be disclosed in a clear and conspicuous manner either on the bands themselves or on the packages in which they are sold.

Advisory Opinion Digest No. 276

Statute Involved: Section 5, Federal Trade Commission Act.
Released: August 23, 1968.

Disclosure of foreign assembly of product made of domestic components (90%) unnecessary.

The Commission recently advised a requesting party that in the absence of facts indicating actual deception disclosure of the foreign assembly of a product made of domestic components would not be required.

The domestic components accounted for approximately 90% of the manufacturing cost of the finished product; foreign assembly accounted for approximately 10% of the cost of the finished product.

Advisory Opinion Digest No. 277

Statute Involved: Section 5, Federal Trade Commission Act.
Released: August 23, 1968.

Consumer saving plan organized by local merchants.

The Commission was recently requested to render an advisory opinion as to the legality of a proposed method of organizing and operating a consumers savings group.

Under the facts as presented, certain select merchants in a town would agree to give designated cash savings to the members of the group upon the purchase of merchandise for cash, which would be a percentage of the purchase price. This savings would not be paid directly to the consumer at the time of purchase, but would be remitted to the group and held in reserve to be disbursed on a cyclical basis. The group would retain no portion of the member's savings, but would earn its profits solely from the fee charged for the consumer's membership in the group and from interest earned on the funds while they were being held for the consumers.

The Commission advised that it could see no objection to the operation of the group in the manner stated provided the purchase prices to be charged the consumer on which his percentage savings were to be computed were in fact the retailers' own former prices for the articles sold within the meaning of Guide I of the Guides Against Deceptive Pricing. In the Commission's view, the entire proposal was based on an assurance to consumers that they would save a stated percentage of the purchase prices actually paid and that those prices would be the regular prices customarily charged

by the retailers or the prices at which the articles were openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent, regular course of business.

Advisory Opinion Digest No. 278

Statute Involved: Section 5, Federal Trade Commission Act.

Released: August 23, 1968.

Franchise agreement for chain of pizza carry-out shops.

The Commission recently issued an advisory opinion approving a proposed franchise agreement between a trademark-trade name owner and individual operators of pizza and sandwich restaurant-carry-out shops.

Some of the important provisions of the agreement are the following:

1. Either the licensee or the licensor may submit to arbitration any question concerning agreement termination rights and obligations, including return to the licensee of all or any portion of the initial fee.
2. Licensor must make available for sale to licensee the foods, paper products and supplies necessary for conducting the business but licensee is not required to purchase them from licensor.
3. Licensor will prepare and place advertising directed to ultimate consumers in the general area of licensee's shop; licensee will provide the funds for such advertising; licensor will give licensee a quarterly accounting of the use of such funds.
4. Licensor may direct information other than price to go into signs and advertising.
5. The food sold and service provided must meet standards of quality set by licensor.
6. Licensee is not to operate a similar business for 2 years after termination of the agreement within 2 miles of his former shop.

Advisory Opinion Digest No. 279

Statute Involved: Section 7, Amended Clayton Act.

Released: August 27, 1968.

Acquisition of financially troubled grain elevators by agricultural cooperative.

The Commission recently issued an advisory opinion to agricultural cooperative applicants who wish to acquire several country elevators of a financially-troubled direct competitor.

The applicants are a statewide federated agricultural association and affiliated local farmer cooperatives. Applicants, and the company with the operating plants sought to be acquired, purchase farm products from growers

and resell the partially processed products to further processors, canners and other intermediate distributors. The state organization offers to help the financially-troubled company by furnishing technical assistance on a contract basis in the farm supply and commodity marketing area to help the company in continuing to be an important factor in a particular industry. Individual market shares of the cooperatives are reported to be small.

The Commission advised the applicants it has no objection to the proposed acquisition of some of the assets of the financially-troubled competitor.

Advisory Opinion Digest No. 280

Statute Involved: Section 7, Acquisition of direct competitor in
Amended Clayton Act. dried food industry.

Released: August 27, 1968.

The Commission recently issued an advisory opinion to an applicant who sought premerger clearance to acquire a number of operating plants of a direct competitor.

According to the information submitted by the applicant, both companies purchase an agricultural product from growers and resell the partially processed product to further processors and canners. Both companies appear to be among the top four firms in the market and to have substantial shares of the market.

The Commissions expressed the opinion that it cannot approve the proposed acquisition because such an acquisition may substantially increase applicant's market power and thereby tend to produce anticompetitive effects in violation of the Clayton Act, as amended.

Advisory Opinion Digest No. 281

Statute Involved: Section 5, Federal Trade Commission Act, and
Section 2(f), Amended Clayton Act.

Released: August 27, 1968.

Trade association plan to secure uniform discounts from suppliers, and establish uniform clearance sales and alteration costs for retailers.

The Commission recently rendered an advisory opinion to a trade association of clothing retailers that its proposal to hold discussions, conduct studies and make recommendations to its members and their suppliers with respect to three problems which confront the industry would probably be illegal.

The association advised that competitive conditions have forced the retailers into longer and longer sales periods which squeeze profit margins in the stores and contribute to improper merchandise assortments for one-

third of the year. Second, it was stated that the cost of alterations was creeping upward as labor costs increase, thus adding to overhead expense and that only a limited number of stores charge for these alterations. Third, the association advised that manufacturers vary in the amounts of cash discounts they will give and in the time periods during which they will be allowed, thus confusing retailers and resulting in substantial clerical errors. The association felt that it would greatly simplify retailer record keeping if a uniform date of payment and uniform discount terms became an accepted practice in the industry.

In an effort to find solutions to these problems, the association contemplated three steps concerning which an opinion was desired. First, it asked if it could include articles in its bulletins about the benefits of starting clearance sales at later dates and otherwise publishing information designed to show that stores better serve customers when they operate as a one price store for the maximum amount of time during the year. Second, it inquired as to whether it could include cost information on alterations showing the inequities of not applying reasonable charges for alterations and as to whether local merchants could discuss, without specifics as to price, the merit of charging for alterations and urge local cooperation. Third, the association inquired as to whether it could include in its publications information on the desirability of uniform cash discounts, pass resolutions and urge manufacturers to cooperate.

The opinion advised that all three of these proposed courses of action would, in the Commission's view, be of questionable propriety under existing law. With respect to the passage of resolutions urging manufacturers to adopt uniform cash discount terms, it was the Commission's opinion that, even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth therein, there was implicit in such resolutions by the retailers too grave a danger that they would serve as a device whereby the concerted power of the members of the association was brought to bear to coerce the manufacturers to conform their discount policies to the restrictive standards of the resolutions, or, at the very least, as an invitation to enter into agreements among themselves to do so.

The other two proposals seemed to the Commission to involve activities by the association which would lead to suppression of competition among the members. In the Commission's view, the time and duration of sales and the furnishing of alterations without additional charge are methods of competition among the retailers. The natural and probable result of what the association proposed to do would be to limit competition in these areas and thus would constitute an unlawful restraint of trade. While the steps which the association contemplated may not be the equivalent of an agreement among the members to follow the recommended procedures, still if they had the effect of persuading substantial numbers of those mem-

bers to do so, it would raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Therefore, any actions by the association which would have a tendency to bring about that result could not, the Commission stated, meet with its approval.

Advisory Opinion Digest No. 282

Statute Involved: Textile Fiber	Origin disclosure of imported cloth
Products Identification Act.	(51%) for shirts domestically as-
Released: August 27, 1968.	sembled and sewn.

The Commission recently advised an apparel manufacturer that the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

The manufacturer proposed to contract with or establish a plant in Hong Kong where foreign-made shirt cloth would be cut into parts and simple sewing would be done. The parts would then be shipped to a plant in the United States where, through a process of assembling, sewing and finishing of the cut parts, individual shirts would be manufactured. From the cost data furnished it appeared that 60% of the cost of labor would be performed in this country and 40% in Hong Kong. The material and labor furnished in Hong Kong would account for 61.5% of the total cost of finished shirts and the labor performed in the United States would account for 38.5% of the total.

The Commission advised that it was of the opinion that, under the laws it administers, textile products produced and processed in this manner must be labeled as "Assembled and sewn in the United States of materials imported from Hong Kong."

Advisory Opinion Digest No. 283

Statute Involved: Section 5, Fed-	Origin disclosure on sewing kit with
eral Trade Commission Act.	contents of multiple foreign
Released: August 31, 1968.	origin.

The Commission recently advised a requesting party regarding information as to origin which should be set forth on a kit containing three domestic and eight foreign components from four different foreign countries.

Although the individual components are separately marked as to origin, this information is not readily available to a prospective purchaser at the time of purchase.

The Commission stated that a clear and conspicuous disclosure should be made on the container in the following terms, or in substantially equivalent terms:

"Some of the enclosed items are made in [countries] W, X, Y, and Z."

Commissioner ELMAN, dissenting:

I would have granted the applicant's request that it be permitted to mark the kit to read "domestic and foreign items enclosed."

Advisory Opinion Digest No. 284

Statute Involved: Section 5, Federal Trade Commission Act.

Origin disclosure of stainless steel cutlery on outside of package.

Released: August 31, 1968.

In response to a request for an advisory opinion, the Commission announced today it would be necessary to disclose the foreign country of origin of imported stainless steel flatware on the outer portion of the cover of the container.

Under the facts presented to it, the flatware will be properly marked as to its foreign country of origin on the underside of the handle when it is imported. Because of the manner in which the flatware will be repackaged in the United States, the foreign origin marking will not be seen by prospective purchasers through the cover of the container. Moreover, each container will be sealed with a plastic film wrapper thus making it virtually impossible to inspect the merchandise prior to the purchase thereof.

The specific question ruled upon by the Commission was whether it would be necessary to disclose the foreign origin on the outer portion of the container, in view of the fact that the disclosure on the flatware cannot be seen prior to the purchase of the merchandise.

In ruling that a meaningful disclosure would be required, the Commission said:

"Whenever an affirmative disclosure of the foreign country of origin is required in order to prevent deception, the general rule is that the making must be clear and conspicuous. This means that the disclosure must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Under the facts described in your letter, the container normally would not be opened until after the purchase has been consummated. Since the disclosure of origin on the underside of the flatware cannot be seen through the cover of the container, the Commission is of the opinion that the disclosure will have to be made on the outer portion of the cover of the container in order to inform prospective purchasers of a material fact bearing upon their selection."

Advisory Opinion Digest No. 285

Statute Involved: Section 5, Federal Trade Commission Act.	Formation of common marketing agent by three agricultural cooperatives.
Released: August 31, 1968.	

The Commission recently rendered an advisory opinion to the effect that it could see no objection to the formation by three agricultural cooperatives of a non-profit marketing association.

While the marketing association was to be formed by the three cooperatives under state law, it was contemplated that any other producer of the same products could become a member. At the time, there were several other corporations which were not marketing cooperatives but which were engaged in the production of the same products.

It was stated that the association would have no capital stock, would be a non-profit cooperative organized for the mutual benefit of its members, membership would be restricted to producers who patronize the association, voting rights were to be equal and no member was to have more than one vote. Property rights were to be unequal and in proportion to the patronage of each member to the total patronage of all members with the association. It was further provided that the association would not market the products of non-members.

The proposed contract with the producers provided that the association would be the exclusive sales agent of the producers for the purpose of marketing their products. The Association could, under the contract, market or direct the marketing of all products produced by the producers in such manner and under such prices as it deems best. The association could designate authorized handlers to market the products of the members and the producers must market through these handlers. The producers themselves could execute a Handler's Contract and become authorized handlers.

The Handler's Contract between the association and all authorized handlers provided that the handler was to act as the hired sales agent for the association and was to be governed by the rules, regulations, orders and prices issued by the association. The handler agreed therein not to sell for less than the prices recommended by the association. The handlers could, under the contract, market other products for the producers and could handle products for non-members.

The opinion pointed out that the purpose of the Capper-Volstead Act (7 U.S.C. 291, 292) is to permit persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations may make contracts or agreements as will effect such purpose and may have marketing agents in common. It has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of the cooperative associations are concerned. This

immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

The opinion further advised that the Commission had considered the proposal and was of the opinion that formation of the proposed marketing association by the three cooperatives would not result in violation of Commission administered statutes if implemented in the manner outlined. The Commission cautioned, however, that the opinion was limited to the formation of the proposed marketing association and was not to be construed as approval for any practice which may be predatory in nature, may result in unlawful monopolization, may restrain commerce to the extent that prices are unduly enhanced thereby, nor to conspiracies or combinations between the association and persons or entities not in this category.

Advisory Opinion Digest No. 286

Statute Involved: Section 5, Federal Trade Commission Act.
Released: August 31, 1968.

Origin disclosure of imported uppers on otherwise domestically-made (70%) tennis shoes.

The Commission recently advised a requesting party that no disclosure need be made as to the presence of foreign made uppers used in the manufacture of tennis shoes in the Virgin Islands.

The uppers accounts for less than 30% of the total product value of the shoes and the other components are of domestic origin.

Advisory Opinion Digest No. 287

Statute Involved: Section 5, Federal Trade Commission Act.
Released: September 6, 1968.

Trade association voluntary advertising guides.

The Commission recently announced its approval of advertising standards proposed for publication by a private association.

The association has come to believe that a particular commodity is, in some instances, being locally advertised to the deception of consumers and the unfair disadvantage of competitors.

It therefore devised a statement setting forth a number of practices which have heretofore been found unlawful by the Commission and proposed to invite industry members voluntarily to agree to avoid such practices. It intends also to make its statement available to advertising media with a request that the media voluntarily use the standards set forth in the statement to screen proposed copy for acceptance.

The Commission stated that:

"As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, and as long as each advertising medium exercises its own independent judgment, without coercion expressed or implied as to what copy it will accept or reject, the Commission would have no objection to your proposed document as written, or its proposed use."

Advisory Opinion Digest No. 288

Statute Involved: Section 2(f), amended Clayton Act.	Receipt of promotional allowance without concurrent availability to competitors.
Released: September 6, 1968.	

The Commission was requested to render an advisory opinion with respect to the legality of a respondent's proposed participation in a special promotion sponsored by one of its suppliers. The respondent, a retailer, is under an outstanding Commission order which prohibits it from inducing and receiving promotional allowances when it knows or should know that the allowances are not made available on proportionally equal terms by the supplier to all its other customers in competition with the respondent.

According to information provided by the respondent, the supplier essentially has offered to pay 50% of the respondents' advertising space and/or time costs up to a maximum participation of \$5,000. Further, the Commission understands that the supplier has at least two other retailer customers in the respondent's trading area and that the supplier has represented to respondent that it will at some undisclosed future time offer the special promotion to each.

On the basis of this information, the Commission advised that whether respondent's proposed participation in the subject promotion will be in compliance with the order to cease and desist depends in large part upon the general availability of the said promotion, a threshold determination which must be made by the respondent.

The Commission advised that if the subject promotion is available to the other known customers of the supplier who compete with the respondent, no problem would seem to be presented by respondent's participation in the promotion. On the other hand, if respondent knows or, as a reasonable and prudent businessman, should know that the promotion is not available to such other known customers at such time as respondent would participate in the promotion (and the information before the Commission strongly suggests that this is the case), respondent's participation in the promotion would be in violation of the order.

Accordingly, the respondent was directed to inform the Commission of any determination it makes to participate in this promotion.

N.G.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967)

Advisory Opinion Digest No. 289

Statute Involved: Section 5, Federal Trade Commission Act. Decomposed city garbage may not be described as "compost peat."
Released: September 6, 1968.

The Commission announced today it had rendered an opinion to a company which sought permission to use the term "compost peat" as descriptive of organic, decomposed municipal refuse.

Ruling that it had no objection to use of the word "compost" since the end product is the result of decomposed organic matter, nevertheless the Commission reached a different conclusion with respect to the use of the word "peat."

In rejecting use of the word "peat" to describe the end product in question, the opinion stated:

"The Commission believes that the purchasing public would generally understand 'peat' to be a natural product, that is, one that is formed naturally where vegetable matter has decomposed over a long period of time under particular conditions. Peat moss is a common form of such natural product. The organic material produced in your decomposition process would not be 'peat' as that term is so generally understood, and the Commission believes that to describe it as 'peat' would be misleading. Accordingly, you are advised that the Commission would find your proposed use of the term objectionable."

Under the facts presented to it, the requesting party proposes to contract with various cities to handle their municipal refuse. All nonorganic material will be removed from such refuse and sold to various users thereof. The remaining organic material consisting of vegetable matter emanating from food and garden sources, grasses, leaves, trees, wood cellulose and other plants will then be processed under very high moisture conditions during the decomposition stage. Thereafter, the material will be held in large pits for seven days and then removed to storage sites for further decomposition.

Advisory Opinion Digest No. 290

Statute Involved: Section 5, Federal Trade Commission Act. Membership in distributor association by Brewer under c & d order for price fixing.
Released: September 6, 1968.

The Commission has announced today it had rendered an advisory opinion

to a beverage manufacturer, currently subject to a cease and desist Order, covering the legality of a proposed reorganization of an industry association to which the manufacturer belongs.

Specifically the Commission was asked whether the manufacturer could properly sign the proposed articles of incorporation covering a state trade association, which is presently unincorporated and of which that manufacturer is now a member, where that manufacturer is covered by a Commission Order prohibiting it from engaging in price fixing or engaging in any conversations with competitors regarding prices or terms of sale. The association's members are manufacturers and distributors of a product produced by the inquiring manufacturer. The proposed articles of incorporation state the purpose of the association to be to promote, represent and develop the industry within the state. In light of the foregoing circumstances, the Commission stated that it had no objection to the signing of the proposed articles of incorporation by the inquiring manufacturer.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 291

Statute Involved: Section 7, No blanket approval for acquisition
Amended Clayton Act. of small baker by anyone.
Released: October 1, 1968.

The Commission recently rendered an advisory opinion in response to a premerger clearance request from the owner of a small baking company who wants to sell the business to anyone including corporations subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by Commission acquisition-prohibition orders are free, of course, to apply for prior approval to acquire the applicant's company in compliance with the order against the particular corporation.

From the data submitted by the applicant, it appears that, while the population had declined in its trading area and its sales have produced reduced revenues, the company has continued to operate profitably. No evidence was presented of any attempts to sell the business to any other independent baker or to anyone presently outside the baking industry.

Advisory Opinion Digest No. 292

Statute Involved: Section 5, Federal Trade Commission Act.

Paua shell described as "Marine Opal".

Released: October 1, 1968.

The Commission rendered an advisory opinion recently in which it concluded that costume jewelry containing a centerpiece consisting of a small inset of paua shell could not be described as "marine opal."

According to the Commission's opinion:

"... opal is a gem which is well known generally among the purchasing public and the trade and has certain well-established characteristics and properties. It is an inorganic mineral found in Australia which is far more expensive and preferable than the paua shell, which is an organic substance found in the ocean. Under these circumstances, therefore, the Commission has concluded that it would be deceptive to label a paua shell as 'opal' on the well-established principle that the consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else."

Commenting upon the inadequacy of the word "marine" to remove the deceptive nature of the word "opal," the Commission said that the word "marine" would only serve to enhance that deception. It reached this conclusion because the word "marine" would convey the impression, contrary to fact, that this is a variety of opal found in the ocean, when in fact just the reverse is true, i.e., opal is an inorganic mineral found in the ground.

Advisory Opinion Digest No. 293

Statute Involved: Section 5, Federal Trade Commission Act.

Night soil material may not be described as "Humus".

Released: October 1, 1968.

The Commission recently responded to a request for an advisory opinion (i) concerning the use of the term "humus" in proposed marketing of certain top soil material, and (ii) where there is anything in the proposed operation which is subject to Commission rules or regulations.

The application was made by a company which wants to market certain soil material as humus. The company submitted a partial analysis of the material as follows:

	<i>Marked—</i>		
	<i>Top 1'</i>	<i>3-4'</i>	<i>7-8'</i>
Water Holding capacity (percent) of its dry weight.....	950	906	916
pH.....	6.85	6.90	6.89
Moisture (percent).....	82.2	87.5	83.8
Ash (percent dry basis).....	6.8	12.4	9.0
Organic Content (percent dry basis).....	93.2	87.6	91.0

The Commission noted that the analysis presented above does not indicate the amount or degree of decomposition of organic matter that may have taken place, nor the mineral content of the soil.

The Commission invited attention to this definition of humus in *Soil: The Yearbook of Agriculture* (1957), prepared by the United States Department of Agriculture and published by the U.S. Government Printing Office (at page 759) :

HUMUS—The well-decomposed, more or less stable part of the organic matter in mineral soils.

The Commission declined to express an opinion on the marketing of the material as humus because an informed decision on the proposed course of action or its effects could be made only after extensive investigation or testing; requests for opinions in this category are ordinarily considered inappropriate for Commission advice under Section 1.1(c) of the Commission's Procedures and Rules of Practice. Applicant also asked whether there is anything in the proposed operation which comes under Commission rules or regulations.

Applicant was advised that the Commission's **TRADE PRACTICE RULES** for the **PEAT INDUSTRY**, as promulgated January 13, 1950 (a copy of which was enclosed), apply to proposed operations if the material to be sold comes within the following definitions under such rules :

“As used in these rules, the terms ‘industry product’ and ‘peat’ shall be understood as having the following meanings:

Industry Product: Any product marketed for use as a soil conditioner, or for any agricultural or horticultural purpose, which is composed, or is represented as being composed, wholly or in part of peat; also, any product marketed for any such purpose which is composed, or is represented as being composed, wholly or in part of a humus or muck derived from peat.

Peat: Any partly decomposed vegetable matter which is accumulated under water or in a water-saturated environment through decomposition of mosses, sedges, reeds, tule, trees, or other plants.”

The Commission invited attention to the note appended to Rule 3, calling for the voluntary nondeceptive disclosure of the degree of decomposition, and principal uses of the product, as well as the acid and ash content, and moisture holding capacity. If this practice is observed, the likelihood of deception should be much reduced, the Commission commented.

With regard to the second question, the Commission again invoked Section 1.1(c) of its Procedures and Rules of Practice. An informed decision by the Commission on the presence of any peat, or of any humus or muck derived

from peat, could not be made without extensive investigation or testing. Normal advisory opinion procedures do not provide for such testing or investigation.

Advisory Opinion Digest No. 294

Statute Involved: Section 5, Federal Trade Commission Act.

Advertising on food product wrapper.

Released: October 8, 1968.

The Commission recently advised a food product manufacturer that it would not object to advertising proposed to be placed on the wrapper for the food product.

The advertising would offer to those who respond a money making opportunity in the form of premiums or payments for the sale of a specified product. An inquirer would incur no obligation upon receipt of the plan, or thereafter, and would be free to accept or reject it at will. Anyone performing under the offer would be recompensed according to a clearly disclosed scale for the offer would be recompensed according to a clearly disclosed scale for services rendered. No monetary investment would be required.

Advisory Opinion Digest No. 295

Statute Involved: Section 5, Federal Trade Commission Act.

"Made in U.S.A." label on bearing imported in part.

Released: October 8, 1968.

The Commission announced today it had responded to a request for an advisory opinion in regard to the following two questions:

1. What percentage of imported components may be used in the finished product (bearings) without the necessity of disclosing the foreign country or origin thereof?
2. Would it be proper to stamp the two types of bearings, which are partly made in a foreign country, as "Made in USA"?

Because the party seeking the opinion did not know the cost of the imported components in relation to the total cost of the finished product, the Commission said that the first question appeared to be somewhat hypothetical in that it does not involve a specific proposed course of action. Under these circumstances, the Commission concluded that the question was not the proper subject of an advisory opinion.

With respect to the second question, the Commission concluded as follows:

" . . . the 'Made in USA' mark would constitute an affirmative representation that the bearings are made in their entirety in the United States. If the bearings did in fact contain foreign made components of

a substantial nature, it would be improper to mark the finished product as 'Made in USA' without a clear and conspicuous disclosure indicating the foreign country of origin of the imported components."

Advisory Opinion Digest No. 296

Statute Involved: Section 7, "Failing Company" theory applied
Amended Clayton Act. in sale of assets to competitors.
Released: October 8, 1968.

The Commission recently issued an advisory opinion granting premerger clearance for a company in imminent danger of dissolution to sell all or part of its assets to a direct competitor.

The selling company's financial affairs were in such state that it obviously would have ceased to be a competitive factor in its market in a matter of days. This being so, the Commission approved a sale to the only purchaser willing to, or in a position to, immediately salvage the assets.

Advisory Opinion Digest No. 297

Statute Involved: Section 7, "Failing Company" theory applied
Amended Clayton Act. in approving sale of some fixed
Released: October 8, 1968. assets to keep firm solvent.

The Commission recently advised an applicant that it has no present intention to take any action if the proposed sale of certain fixed assets to a direct competitor should be made, in view of the information submitted that:

- (i) The (applicant) company is in critical financial condition and failing;
- (ii) Efforts to find other purchasers have been unsuccessful, except that one other purchaser was found who wished to buy a smaller amount of the assets than ordinarily stated but who is not now in any position to buy any of the properties;
- (iii) The proposed sale is expected to generate sufficient funds to meet outstanding debts and provide necessary working capital to continue the company as a going concern and an active competitor.

Advisory Opinion Digest No. 298

Statute Involved: Section 5, Fed- "Made in U.S.A." description for
eral Trade Commission Act. imported lenses processed in U.S.
Released: October 8, 1968.

The Commission announced today it had rendered an advisory opinion

as to whether certain glass filter lenses used on welding helmets could be described as "Made in U.S.A."

Under the facts presented to the Commission, the glass out of which the lenses are made is imported and upon arrival in the United States it is subject to further processing, such as cutting into special sizes, grinding of the edges, cleaning, polishing and labeling as to different shades of intensity and packaging.

In denying use of the "Made in U.S.A." mark on such a product, the Commission said:

"... a 'Made in U.S.A.' mark on the finished product would constitute an affirmative representation that the lenses are made in their entirety in the United States. Since the lenses are composed of imported glass, it would be improper to mark the finished product as 'Made in U.S.A.' without a clear and conspicuous disclosure indicating the foreign country of origin of the imported glass."

Advisory Opinion Digest No. 299

Statute Involved: Section 5, Federal Trade Commission Act.

Origin disclosure on repackaged merchandise imported in bulk.

Released: October 11, 1968.

The Commission recently advised a requesting party that a product imported in bulk into the United States and thereafter broken and wrapped into a number of small packages and offered for sale to the general public should be clearly and conspicuously marked as to country of origin in such way as to be readily observable to a prospective purchaser on casual inspection.

Commissioner MacIntyre, concurring: The Commission's advice herein is in conformity with the public policy declared by Congress in 19 U.S. Code Sec. 1304. There it is required that any imported article or the container in which it is packed shall be marked in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of such article. The provision of law does not excuse the imported from penalties for violation thereof simply because the importer removed the imported article or articles from the original package and repacked the article or articles in new packages which failed to disclose the country or origin. The penalties for violation include fines of \$5000 or imprisonment for not more than one year, or both. It would be tragic for the Commission to issue any findings which would mislead any businessman regarding these requirements of the law.

Commissioners Elman and Jones, dissenting: The Commission, in disregard of prior decisions and announced Statement of Policy, is applying a *per se* rule requiring disclosure of foreign origin of imported products.

Advisory Opinion Digest No. 300

Statute Involved: Section 5, Federal Trade Commission Act. Promotional advertising with contest.
Released: October 11, 1968.

The Commission recently has been requested to furnish an advisory opinion concerning a proposed contest and advertising pertaining to it.

The Commission observed that the proposed advertising is deceptive. Statements of the nature and value of the prizes are misleading. The proposed advertisement discloses little of the nature of the contest in which readers are invited to participate. The contest might expire at any moment.

On the basis of the facts as presented, the Commission concluded that the proposed advertising, if circulated, would be in violation of Section 5 of the Federal Trade Commission Act.

The Commission noted that the proposed contest is so intertwined with the proposed advertising that the plan as a whole, if implemented, would be in violation of law.

Advisory Opinion Digest No. 301

Statute Involved: Section 5, Federal Trade Commission Act. Use of term "Danish" in advertising to describe furniture.
Released: October 22, 1968.

In amplification of Rule 7—Deception as to Origin—set forth in its Trade Practice Rules for the Household Furniture Industry, the Commission recently advised the requesting party as follows:

- (1) "Danish," "Danish Modern" and like terms should be used only as to furniture produced entirely within the Kingdom of Denmark;
- (2) "Danish designed" and like term should be used only as to furniture entirely designed or styled within the Kingdom of Denmark;
- (3) "Danish style," "in the Danish manner," "after the Danish style," and like terms may be used to describe furniture manufactured other than in the Kingdom of Denmark provided such furniture has the characteristics of Danish design as understood by the general public.

Advisory Opinion Digest No. 302

Statute Involved: Section 2(e) Amended Clayton Act. Promotional program involving "cents-off" coupons and demonstrators.
Released: October 22, 1968.

The Commission rendered an advisory opinion to the promoter of a promotional plan involving the use of "cents-off" coupons which are to be given out by girl demonstrators in connection with the sale of items sold only in grocery stores.

Offered to all competing retailers in a selected trading area, irrespective of whether they buy directly or through wholesalers, the coupons will be valid only for the week that the promotion is in effect. Supplying as many demonstrators and coupons as may be necessary to meet the demand therefor, larger stores will have as many as 3 girl demonstrators giving out coupons in attendance for 3 days and smaller stores will have 1 or 2 girls in attendance for 1 or 2 days. Participating manufacturers will pay the promoter a certain sum per each demonstrator, plus the amount of the value of the redeemed coupons. Participating retailers will receive nothing of value other than demonstrator services, except reimbursement for the exact value of the coupons which they have redeemed. In addition to being given out by the demonstrators, the "cents-off" coupons will also be attached to the shelf in front of the product that is being promoted.

For those stores which find the basic plan is not suitable or usable in a practical business sense, the promoter will furnish without charge an alternate plan consisting of a prominent bulletin board announcing the plan to consumers. Placed in the most advantageous position in the store by the owner, the bulletin board will also have an adequate supply of "cents-off" coupons attached thereto. In addition, coupons will also be attached to the shelf in front of each product being promoted, as in the case of the basic plan involving the use of demonstrators. If the retailer does not wish to use the bulletin board, he will be permitted to hand out the coupons as the customer passes by the cash register.

Notice of the availability of the basic and alternative plans will be made by (1) letter every six months to all wholesalers requesting them to notify their retail customers, (2) working with various trade associations on a continuous basis so that the associations will inform their members, (3) publishing ads every three months in two newspapers widely circulated among the trade, (4) letters sent to the buying offices of cooperatives and chain stores, and (5) use of the following statement printed on the back of each coupon: "For detailed information about this coupon call (promoter's name and telephone number)."

In the opinion, the Commission stated that the proposed promotional plan would not be in conformity with the law for the following two reasons:

"First, Section 2(e) of the amended Clayton Act requires that promotional services be furnished to all competing purchasers on proportionally equal terms, if a promotional service is furnished to one purchaser. If the length of time for which the service is being furnished varies as between competing customers, the end result will be that some customers will be furnished services in a greater proportion than others. In essence, the law requires that the services which are being furnished must be offered for a specified period of time which is uniformly applicable to all competing customers. Under your proposed plan, some stores may be furnished the

services of demonstrators for up to three days, whereas some competing stores will be supplied with such services for only one or two days. Because of this disparity in the amount of time during which demonstrators services will be furnished, the Commission believes that the plan does not comply with the required statutory proportionally equal treatment.

"The second defect in the proposed plan relates to the following statement which appears on the face of the 'cents-off' coupon: 'Good Today Only—During Demonstration.' According to the terms of the proposed plan, each coupon will be valid for one week. Therefore, the aforementioned statement which appears on the face of the coupon is misleading because it misrepresents the period of time during which one may take advantage of the alleged savings."

The opinion then pointed out that if the promoter decided to correct the two above-mentioned deficiencies, the Commission would withdraw its objection to the plan, provided the following two conditions are met.

"First, as the promoter of this plan, you must make it clear to each supplier and each retailer that even though an intermediary is employed, it remains the supplier's responsibility to take all reasonable steps so that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of Section 2(d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

"Second, with respect to this matter of notification, you have outlined five methods which you expect to utilize. The Commission is withholding judgement as to the adequacy of the fifth method, namely, the use of a statement printed on the back of each coupon. It is doing so because it does not know how the retailer will get possession of this coupon and it believes that the statement itself is not sufficiently informative to apprise prospective retailers about the plan. But regardless of whether the stated methods of notification or other are used, the ultimate test is whether the plan has been effectively communicated to all competing customers at or about the same time within the selected marketing area and to those who, geographically, are located on the periphery of that area and in fact compete with the favored retailers."

Advisory Opinion Digest No. 303

Statute Involved: Section 5, Federal Trade Commission Act.
Released: October 22, 1968.

Data processing for collection and dissemination of sales and production information.

The Commission recently issued an advisory opinion telling an applicant it does not object to a proposed program to employ data processing equipment for the rapid collection and dissemination of actual production and sales information.

The program is to be made available to poultry processors. Individual identity of participants will not be revealed to others except in long-and-short emergencies. It is understood that such a situation exists when a processor finds he has insufficient supply of chickens (i.e., he is "short") to fill the contractual obligation under a sales contract he has made; another supplier may have a surplus (i.e., he is "long"); the proposed program, in these emergencies, would permit the short and long suppliers to communicate with each other through the data processing equipment. Only in such a situation would any participants learn each other's identity.

The proposal involves the collection and reporting of actual production and sales data rapidly; it will not deal with predictions by participants nor with asking, suggested or "future" prices.

The service is to be made available solely to poultry processors on a daily basis; poultry distributors, applicant says, are not interested in participating. Other subscribers may receive weekly or monthly information summaries but not daily reports.

The Commission advised that it would have no objection to the proposal if implemented in the manner outlined in applicant's letter, but that this opinion is conditioned upon the submission, within nine months, of a full report indicating the manner in which the plan has worked in actual practice.

Advisory Opinion Digest No. 304

Statute Involved: Section 2(d), Amended Clayton Act.
Released: October 22, 1968.

Three-party promotional program under investigation.

The Commission has been requested to render an advisory opinion to a supplier regarding the use of a tripartite promotion plan. The requesting party is subject to an outstanding cease and desist order prohibiting it from making promotional payments to its customers in a discriminatory manner.

The supplier sells its product through grocery, department, discount, hardware and other retail stores. The Commission advised the requesting supplier that it had instituted an investigation of the operation of the promoter's program and therefore was of the opinion that the request was inappropriate at this time.

N.B.: Advisory opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

Advisory Opinion Digest No. 305

Statute Involved: Section 5, Federal Trade Commission Act. Released: November 18, 1968.	Below-cost sales provision in trade association advertising guide.
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In Advisory Opinion Digest No. 249, the Commission announced that a trade association's proposed "Guide to Ethical Advertising Practices" was unobjectionable save for its unqualified condemnation of advertising sales below cost.

The following revised sales below cost provision was subsequently found unobjectionable:

"Members will not use below cost advertising as bait advertising. However, either merchandise or services or a combination of both may be offered below a member's total cost for limited period of time in close-out sales, stock reduction sales, promoting offers, provided such offers are truthfully and non-deceptively made and the member fully performs according to his offer."

Advisory Opinion Digest No. 306

Statute Involved: Section 5, Federal Trade Commission Act. Released: November 25, 1968.	Computerized sales data and product requirements projection must be accessible to non-participants.
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The Commission recently issued an advisory opinion concerning a computerized inventory control system to be furnished suppliers by a third-party promoter.

The promoter proposes to computerize sales data and project product inventory requirements for subscribing suppliers pursuant to information periodically obtained from participating retailers.

The Commission advised the applicant (the promoter) that, on the basis of the information submitted, the Commission does not object to the proposal subject to two safeguards for non-participating dealers: first, that the promoter satisfy the Commission that its subscribing suppliers "will continue to provide personal salesman service or some non-computerized equivalent to those dealers who do not participate," and second, that sup-

pliers "make the results of the computer analyses of sales trends and other general market information available to non-participants if and as they desire it."

Advisory Opinion Digest No. 307

Statute Involved: Section 5, Federal Trade Commission Act.

Coined trade name and trademark connoting European origin deceptive even with disclosure.

Released: November 25, 1968.

The Commission recently issued an advisory opinion concerning permissible labeling of tablecloths converted, dyed and finished in the United States from cloth imported in the greige from Japan, and to be sold in interstate commerce.

Submitted for Commission consideration was a label containing a proposed trade name and trademark. The trade name is a newly coined word composed of the term for the nationality of a particular European country, with a suffix. The trademark looks like a European heraldic design.

The Commission advised the applicant that, in its opinion, use in commerce of the proposed trade name and trademark for the tablecloths in question would probably amount to a deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. The deception appears to be so pronounced, the Commission added, that it cannot be abated by qualifying words, "Made in U.S.A. of cloth imported from Japan."

Further, in the opinion of the Commission, Rule 34(b), 16 CFR § 303.34 (b), of the Commission's Rules and Regulations under the Textile Fiber Products Identification Act, applies because the form of the cloth is basically changed and therefore the country of origin (Japan) need not be disclosed. Commissioners Dixon and MacIntyre do not concur for the reason that this advice appears to them to be erroneous.

Advisory Opinion Digest No. 308

Statute Involved: Section 7, Amended Clayton Act.

Dairy merger by agricultural cooperative.

Released: November 25, 1968.

The Commission recently issued an advisory opinion telling an applicant it does not object to a proposed merger on the basis of the information available at this time.

The applicant (Company A) is a dairy farmer cooperative association whose members own cows producing raw milk; applicant operates processing plants in one state and sells dairy products principally to independent home deliverymen in two states. The Company (Company B) to be acquired operates a processing plant in one state and sells dairy products to independ-

ent home deliverymen, grocery stores and institutions in two states. The processing plants of the two companies are not in the same state. Members of Company A presently supply about fifty per cent of the raw milk needs of Company B and it is not anticipated that non-Company A members will be foreclosed as a result of the proposed merger.

Company A and Company B contend that the proposed combination will result in a stronger regional business entity to compete more effectively with integrated chain stores (having their own dairy facilities) and large national dairy companies in selling dairy products to consumers.

Advisory Opinion Digest No. 309

Statute Involved: Section 2(a) and	Below-cost price limiting provision
2(d), amended Clayton Act.	in cooperative advertising programs.
Released: November 27, 1968.	

The Commission recently rendered an advisory opinion regarding a proposal to include the following statement in cooperative advertising agreements to be drafted by the requesting party for use by manufacturer-clients for the purpose of placing a restriction on price advertising practices by their retailer-customers:

“Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer’s wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer’s mind.”

The requesting party explained that this provision is intended to assist manufacturer-clients to protect the quality of their brand image through providing them with the means for limiting the payment of promotional allowances to those retailer-customer advertisements which mention price at or above the retailer’s wholesale price level. He took the position that such limitation would not affect any retailer’s markup picture.

The Commission advised that the question posed does not readily lend itself to a categorical answer which, necessarily, would be affected by the facts surrounding any manufacturer-client’s use of the restriction. Considering the various possibilities which may arise, the Commission is of the opinion, however, that it cannot give its approval to the use of such provision in any advertising allowance program which may be used on a continuing, year-round basis. In such program a manufacturer customarily offers to pay, on proportional terms, a fixed percentage of his customer’s advertising costs at any time during the year. To incorporate such a restriction in that kind of promotional program would, in the Commission’s view, have a tendency to fix or establish a permanent floor under resale prices which would be of questionable legality under the antitrust laws.

The Commission further pointed out that it does not see the same ob-

jection to the use of such provision in situations where the promotional offer is made on an infrequent or intermittent basis during the year. In such instances the offer is usually made for a special purpose, such as to stimulate off-season sales or at times during the year to fit in with an overall marketing program. In these situations, the Commission advised, it does not foresee the same restrictive effects on resale prices when a manufacturer, who is otherwise complying with the law, provides that he will not pay any part of the cost of advertising featuring a price below the retailer's wholesale cost.

It is, of course, assumed that the promotional advertising allowance offer will be made to all retailers irrespective of the prices that they have been charging at other times.

Commissioner Elman, dissenting: In this advisory opinion the Commission holds that it is illegal *per se* for a manufacturer to include in a regular cooperative advertising program a provision that he will not reimburse a retailer for any advertisement featuring a loss-leader price below the wholesale price paid by the retailer. I emphasize the *per se* character of the ruling because these are the only facts before us. There is no indication whatsoever that the provision is part of a scheme whereby the manufacturer seeks to fix prices or place a floor under resale prices, or restrict price competition at the retail level. On the contrary, it is clear that each retailer remains entirely free to sell, and to advertise, the product at as low a price as he wishes, including below cost.

The question is whether a manufacturer who believes that advertisements featuring below-cost retail prices damage him and degrade his product is nonetheless compelled to subsidize such advertisements by retailers. The manufacturer's position, simply stated, is that a retailer may sell and advertise the product at any price he wishes, but that if he chooses to advertise the product at a below-cost price, the manufacturer should not be required to pay for the ad. Is this an unreasonable position? The Commission's answer is that it is illegal *per se*, without more.

The implications of the Commission's ruling are startling. While below-cost selling is not in all circumstances illegal, it is not merely an unfair method of competition, it is a crime under Section 3 of the Robinson-Patman Act, to sell goods at below-cost prices for the purpose of destroying competition or eliminating a competitor. *United States v. National Dairy Corp.*, 372 U.S. 29 (1963).

The Commission holds today, however, that a retailer who engages in such illegal below-cost selling may require one of his principal victims, the manufacturer, to become an involuntary accessory to the crime. It holds that a manufacturer cannot engage in a regular cooperative advertising program unless he also agrees to subsidize the advertisements of even those retailers whose only interest in his product is to advertise it, for selfishly predatory pur-

poses, as a below-cost "traffic builder." That such a ruling should emanate in 1968 from an agency of government supposedly concerned with the protection of competition and small business—and which continually disavows any hostility to cooperative advertising—is disconcerting, to say the least.

Advisory Opinion Digest No. 310

Statute Involved: Section 5, Origin disclosure on imported
Federal Trade Commission Act. watchbands and cases.
Released: November 27, 1968.

The Commission was recently requested to furnish an advisory opinion as to the necessity for the disclosure of the country of origin of a watchband or watchcase which was attached to a watch in a foreign country prior to importation into the United States.

The Commission advised that in its view the fact that watch cases are imported need not be disclosed and that the country of origin of a watchcase with a watch band permanently affixed thereto need not be disclosed, but that the country of origin of a metallic watch band of the detachable type must be disclosed.

Advisory Opinion Digest No. 311

Statute Involved: Section 5, Fed- Origin disclosure of imported upper
eral Trade Commission Act. material used in shoes. Use of re-
Released: November 27, 1968. known firm name implies made
domestically.

The Commission announced today it had rendered an advisory opinion to the supplier of certain synthetic fabric which is to be used in footwear as an upper material. The opinion dealt with various questions relating to the necessity to disclose the origin of the fabric, which is made wholly or in part in a foreign country.

Sold directly to shoe manufacturers, the material will be used in the manufacture of dress and casual shoes, including playtime or tennis shoes, but not work shoes or work boots. Under one method of production, the yarn would be extruded domestically but would be woven, dyed and backed in a foreign country. Such upper material made abroad would represent approximately 25% of total material costs for women's shoes and approximately 28% for men's shoes. Under the second contemplated method of production, the fabric will be made abroad in its entirety. Where the upper material is completely of foreign origin, it will represent approximately 35%–40% of total material costs for a pair of women's shoes and approximately 40% of total material costs for men's shoes.

In responding to the request for an advisory opinion, the Commission made the following general observations:

"... First, the Commission construes any affirmative representation that products are made in the U.S.A., as constituting an affirmative representation that the products are made in their entirety in this country unless there is a clear and conspicuous disclosure of the origin of the imported part or parts.

"Further, in the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material.

"Lastly, you have inquired as to whether disclosure would be required if the shoes are manufactured by a well-known American concern or bear a well-known American trademark. The answer to this question would depend upon whether, as a practical matter, the use of such name or trademark constitutes a representation of domestic origin. The Commission believes that each such case must be judged on its own merits in view of the surrounding facts and circumstances, and that no rule of general application can be announced."

Advisory Opinion Digest No. 312

Statute Involved: Section 2(d), Amended Clayton Act. Released: December 20, 1968.	Three-party promotional program, sale of TV advertising time to suppliers of products sold through grocery stores.
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The Commission recently issued an advisory opinion informing an applicant that his proposed three party promotional plan in the food industry would violate statutes administered by the Commission.

Under the plan, the promoter proposes to solicit sales of TV advertising time to suppliers of products retailed principally through grocery stores. The rates charged suppliers would be based exclusively on the television time furnished the supplier. In addition, each such supplier would receive the right to have its products promoted in the establishment of participating retailers.

Retail participation in the plan would be solicited by the promoter through invitations published in trade journals of general circulation to the retail trades. Retailers would participate in the plan by providing special in-store displays of products specified by suppliers who purchase advertising time on the promoter's programs and by agreeing with such suppliers to maintain during the period of the promotion a reasonable inventory of the products involved in the in-store promotion. The display obligation of each

participating retailer would be geared to the participating retailer's facilities and the product or products to be displayed by that retailer. In return, participating retailers would obtain advertising on the promoter's television programs in accordance with a formula giving each participating retailer a minimum 10-second advertising spot on a television program during the specified period of promotion. Additional 10-second spots would be allowed on the basis of the retailer's purchases during an immediate prior period of suppliers' products covered by the promotional plan.

On the basis of the information submitted in connection with the application for an advisory opinion, it appeared to the Commission that the proposed arrangements for individual negotiations between suppliers and retailers with respect to display obligations of the retailers would probably violate Section 2(d) of the Clayton Act, as amended, and possibly Section 5 of the Federal Trade Commission Act. Furthermore, the plan made inadequate provision for informing the retailers of their opportunity to participate.

Advisory Opinion Digest No. 313

Statute Involved: Section 5, Federal Trade Commission Act.

Markings of white gold ring with platinum prongs as 18K-Plat.

Released: December 20, 1968.

The Commission announced today it had rendered an advisory opinion in which it advised a ring manufacturer that it would be improper to place the following mark on rings composed of 18 karat white gold with platinum baguette prongs: "18K-Plat."

In rejecting the proposed mark, the Commission cited the following two reasons:

"First, since the prongs of the center stone are made out of white gold which resembles the color of the platinum baguette prongs, prospective purchasers might believe that the center prongs as well as the baguette prongs are also made of platinum. Second, to the uninitiated prospective purchaser, the proposed mark, coupled with the similarity in color of the entire ring, might mean that the ring is made in its entirety out of platinum consisting of 18 karat fineness."

Similarly, the Commission also rejected two other proposed markings ("18K-10% Plat" and "90% 18K-10% Plat.") because they leave the consumer to speculate as to the exact part of the ring which is composed of platinum. Concluding that these two alternative suggestions are unacceptable, the Commission said:

"Here, again, because of the similarity in color of the white gold and platinum the consumer might conclude that all of the prongs, including those for the center stone, are of platinum composition. Under these circumstances, it is not enough to merely say that the ring contains

10% platinum and 90% gold without disclosing the true composition of the various parts of the ring. In short, the Commission believes that the mark should clearly limit the platinum content to the baguette prongs and one possible suggestion would be as follows: '18K-baguette prongs Plat.' Any other language of equal clarity would, of course, be acceptable."

(APPENDIX)

Tripartite Promotional Program Amendment

JULY 11, 1968.

DEAR MR. -----: This is in further reference to the above-numbered matter and to the Commission's advisory opinion dated -----, in which you were advised as to the Commission's view with respect to the proposed promotional program there involved.

The Commission has been reexamining this and other advisory opinions rendered in recent years concerning three-party (supplier, promoter, customer) promotional assistance plans which have received its full or partial approval and has decided to modify this opinion.

This step is necessary because information which has subsequently come to the Commission's attention in connection with many such opinions which have been issued indicates that in some instances the customers of the participating suppliers have not been adequately advised as to the availability of the opportunity to participate in these plans or have not been advised as to the alternatives which are supposed to be available to those who are unable to use the basic plan. This step is, of course, absolutely essential to the legal operation of any such proposal, for a promotional assistance plan cannot be said to be available to customers who do not know of its existence or who do not understand its terms. It is not the Commission's desire at this time to rescind any of the opinions which have been issued, but, in view of these developments, it is the Commission's view that, as a condition of its continued approval of your plan, reasonable steps must be taken to see that the required notice is given to each customer who is entitled to participate, and that participants in your plan are put on notice of their obligations under the laws administered by the Commission.

Accordingly, the advisory opinion in the above-numbered matter is hereby modified to provide that:

(a) The promoter must make it clear to each supplier and each retailer that even though an intermediary is employed in this plan, it remains the supplier's responsibility to take all reasonable steps so that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan or proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to

participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of Section 2 (d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

(b) You are directed to submit a written report to the Commission within six months from the receipt of this letter indicating the manner and extent of your compliance with the requirement outlined in the preceding paragraphs.

Commission Enforcement and Policy Statements

Regulations under the Fair Packaging and Labeling Act.

Released: March 19, 1968.

The Federal Trade Commission published the final regulations implementing Section 4 of the Fair Packaging and Labeling Act in today's issue of the Federal Register. The Fair Packaging and Labeling Act (FPLA) vests regulatory authority in the Food and Drug Administration (with respect to foods, drugs, and cosmetics) and in the Federal Trade Commission (with respect to other consumer commodities). Both Agencies have not issued final regulations imposing new labeling requirements on consumer commodities covered by the Act.

The Commission's new regulations cover label representations pertaining to identity of the commodity, net quantity of contents, name and place of business of manufacturer, packer, or distributor, and number of servings, uses, or applications contained in a package. The similarity between the Commission's regulations under FPLA and those of the Food and Drug Administration will produce new standardization in labeling requirements for consumer commodities. (Under FPLA the authority of the States to adopt laws and regulations differing from those adopted by the Federal Agencies has been preempted.)

Among the major provisions of the Commission's new regulations are:

- Prohibition against the use in the name of a commodity of a component or ingredient not present in significant amounts.
- required declaration of street address, city, State and Zip Code in the declaration of place of business of the manufacturer, packer or distributor on the labels of consumer commodities.
- required distinguishing between the names of a manufacturer and packer (or distributor) on the label of a consumer commodity.
- Prohibition against the use of misleading and qualifying words in conjunction with net quantity declarations.

- separations of the required net quantity declaration and placement of the declaration on the principal display panel within the bottom 30 percent of the area of the label panel.
- required declaration for the first time of net quantity by weight of all bar soaps.
- required dual declaration on the label of the net quantity of contents, e.g., ounces followed by pounds and ounces present.
- required declaration of measure of area for bidimensional commodities. As applied to paper products for example this provision would require declaration of length, width, and area for such articles as tissues, towels, wrapping, etc.
- specification discouraging use of small fractions in the required net quantity declaration.
- mandatory type sizes for the required net quantity declaration set in relation to the area of the principal display panel.
- required declaration of net quantity of servings, uses, or applications represented to be present in a container.
- an effective date of January 1, 1969, for new label orders, and an effective date of July 1, 1969, for all commodities in commerce.
- required net quantity declaration for *each* component of a multi-component “kit.”

In a companion statement of policy the Commission indicated that it would make findings and decisions as to whether various commodities are covered by the Act in light of the stated Congressional policy of assisting consumers in making value comparisons.

Because of the traditional interest and activity of the States in the enforcement of weight, measures, and labeling laws, and because of the preemption provision of FPLA, the Commission sought and received the assistance of State officials in the adoption of these regulations.

Three-party Promotional Assistance Plans.

Released: September 21, 1965.

The Federal Trade Commission today issued the following statement regarding three-party promotional assistance plans:

“Since June 1962, when its Advisory Opinion procedure was established, the Commission has received many requests for Opinions regarding promotional assistance plans which have been within the purview of Sections 2 (d) and (e) of the Robinson-Patman amendment to the Clayton Act and Section 5 of the Federal Trade Commission Act. In this context, promotional assistance is defined as the payment of money or the furnishing of services or facilities by a supplier to a customer for the purpose of promoting the customer’s resale of the supplier’s products. Payments for or the furnish-

ing of advertising, demonstrators, displays, special packaging, prizes for contest, special handling of the supplier's products are typical examples.

In brief, the laws administered by the Commission provide that a supplier in commerce furnishing promotional assistance must offer it to *each* of his competing customers so that it is realistically available to them on proportionally equal terms. The basic test for a customer's eligibility under the law is whether, in reselling the supplier's product, he *competes* against any of those customers to whom the assistance is offered. If he does compete in its resale, the supplier's offer must be made to him, whether he operates a grocery, drug, variety or other type of store. In addition, a reasonable alternative means of participation must be included in such plans for eligible customers who are unable to use the basic plan.

From the standpoint of a supplier's customer, if he accepts such assistance with knowledge, actual or reasonably imputable, that his competitors selling the supplier's products have not been offered proportionally equal assistance by the supplier, he may be engaging in an unfair trade practice violative of Section 5 of the Federal Trade Commission Act. In this connection, the Commission's Guides for Advertising Allowances set forth information in greater detail as to the legal responsibilities of suppliers and their customers with regard to their joint promotional activities.

A number of the plans submitted for an Advisory Opinion, however, have been devised by a requesting party who is neither a supplier nor a customer but a hopeful intermediary who had approached both suppliers and customers to interest them in his plan. Examples of some of the plans submitted include furnishing in-store music with commercials, in-store projection or display of advertising messages, outdoor advertising, in-store display and distribution of recipe cards and the like.

In the Advisory Opinions rendered in response to such requests the Commission has pointed out that the fact that an intermediary is positioned between the supplier and the supplier's customers—the retailers—does not affect applicability of the law to the promoter's plan. Even though an intermediary is employed, it remains the supplier's responsibility to make certain that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of Section 2 (d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

Advertisements that Appear in Feature Article Format.

Released: November 28, 1967.

The Commission has recently considered the publication by various print media of advertisements that use the format and have the appearance of

news or feature articles. Generally the caption "ADV." or "ADVERTISE-MENT" appears at the top of such advertisements, but sometimes it is omitted. The Commission is concerned that omission of the caption "ADVERTISEMENT" may cause readers to believe that the advertisement is in fact a feature or news article. The Commission also wishes to point out that in some instances the format of the advertisement may so exactly duplicate a news or feature article as to render the caption "ADVERTISEMENT" meaningless and incapable of curing the deception.

The Commission believes that it is in the public interest that publishers and advertisers avoid any possible deception by not placing advertisements whose format simulates that of a news or feature article. Inclusion in such an advertisement of a by-line, particularly when accompanied by the writer's title (such as "feature writer" or "editor"), may also mislead readers as to its nature. Accordingly, the Commission cautions advertisers to avoid use of such devices in their advertisements, when they may tend to mislead readers.

Where an advertisement may have a general resemblance to the format a news or feature article, advertisers and publishers should print, in clear type of sufficiently large size to be readily noticed, the word "ADVERTISEMENT" in close proximity to the advertisement. Also, to avoid deception when an advertisement or an advertising section of this nature extends for more than one page, the word "ADVERTISEMENT" should be repeated on each page.

Foreign Origin Disclosure of Imported Merchandise.

Released: April 4, 1968.

The Commission made public today its conclusions resulting from a general review of the subject of the disclosure of foreign origin. The review was undertaken as a result of numerous inquiries which the Commission has received on this subject over the past several years.

As a result of its extensive analysis, the Commission has concluded that it is neither necessary nor desirable to announce any new or changed rules or statements of general policy in this area. The Commission believes that the public interest will be best served if it continues to deal with foreign origin matters on a product-by-product and case-by-case basis, in light of the particular facts presented.

It is settled law that sellers may not make affirmative misrepresentations which are material in inducing purchases of a product. By the same token, a failure to disclose material information may constitute deception of the consuming public. These general principles are applicable to the merchandising of imported products and substantial components.

The Commission and the courts have found in many cases not only the existence of a general consumer preference for American products but also

a specific preference for particular products made in the United States. The Commission is also aware that consumer preferences in some industries arise out of an association in the consumer's mind of product quality with the origin of the manufacturer or assembly of the product. Whether or not such a preference exists in the case of a particular product, and whether or not the failure to disclose the origin of an imported product or substantial component constitutes a material or actionable deception warranting Commission action, is, of course, a question to be determined on the basis of the facts and circumstances involved.

The Commission reaffirms its adherence to the rules and principles which have been announced in prior cases. It is also recognized that their application to particular situations may present difficulties in some instances. The Commission's advisory opinion procedure is intended to assist businessmen, so far as may be possible, in attempting to resolve such uncertainties.

In summary, the Commission recognizes that a consumer having all relevant and pertinent information about a product is enabled to make comparative evaluation of the many varieties of products offered in the marketplace. Such information increases the utility of the consumer's purchasing power by permitting him to choose more intelligently between competing products, and, to this extent, facilitates and promotes a more effective operation of the competitive process.

**Enforcement Policy with Respect
to Misrepresentation of Certain
Articles as Genuine and Authentic
Products of American Indian
Craftsmanship.**

Released: April 18, 1968.

The Commission has been concerned recently with acts and practices of manufacturers, importers and distributors in passing off as Indian made, goods which have not been produced by American Indian artisans or craftsmen. The Commission believes it necessary to prescribe guidelines in the interests of the purchasing public and to assist the manufacturers, importers, and distributors of these products to avoid possible violations of the Federal Trade Commission Act.

The Commission's staff has investigated the practices of a number of importers, manufacturers, and distributors of articles sold or offered for sale as curios, souvenirs, gifts, novelties, and toys which resemble or simulate, because of their appearance, design, or nature, products ordinarily associated with American Indian craftsmanship. This merchandise includes but is not limited to, such articles as tom-toms, tomahawks, dance rattles, headdresses, powder horn whistles, totem poles, dolls, spears, arrows, moccasins, whips, belts, beadwork, pottery, necklaces, bracelets, rings, and other jewelry. Frequently these articles are decorated with symbols, markings, and

designs which have an ethnic significance associated with American Indians.

Many of the foregoing products are made in whole or in part by machine. Although in some cases American Indians have been employed to finish or to assemble the product, in many instances they have not participated in its production at all.

Other products of this type are comprised entirely or in part of components which have been imported from foreign countries. While some of the foreign made merchandise bears markings which disclose its foreign origin, these markings are frequently so small and placed so inconspicuously upon the article that they are not readily discernible by the public.

The nature and appearance of both the domestic and imported products, and the representations made in connection with their sale, lead the public to believe that they are handmade products of Indian craftsmanship.

Typically, manufacturers, importers, and distributors sell and ship these products to various retail dealers located throughout the United States. Many of these dealers operate so-called "Trading Posts" or "Indian Craft Shops" in the vicinity of areas where Indians are known to reside. In the course and conduct of their business the manufacturers, importers, and distributors, affix to or place on the products, symbols and markings of a kind and character associated with American Indians and depictions of Indians or Indian scenes. Certain words phrases, statements, and representations are used in catalogs, trade journals, labels, and in other media, which directly or by implication convey the impression that the articles are products of Indian craftsmanship. Examples of such words and phrases include the following: "American Indian Made," "Made by Chief Deerfoot," "Genuine Indian Made," "Indian," "Genuine Indian (name of product)," "Handcraft Indian (name of product)," and "Reservation made."

Through the use of these false and misleading representations, and deceptive acts and practices, manufacturers, importers and distributors enable retailers and others to deceive and mislead the consuming public as to the source of this type of merchandise.

As the manufacturers, importers, and distributors of these products compete in commerce with corporations, firms and individuals manufacturing or selling curios, souvenirs, gifts, novelties and toys which are genuine products of Indian craftsmanship and with those selling simulated Indian products which are so marked and advertised as to disclose their true origin and nature, the existence of unfair competition is evident.

The Commission has noted the long-standing public policy of assisting Indians to become self-supporting members of society. In 1935, the Indian Arts and Crafts Board was created by statute in the Department of Interior (see 25 U.S.C. 305) to promote the development of Indian arts and crafts, and to expand the market for products of Indian arts and craftsmanship. According to information received by the Commission, more than 6,000

Indian and Eskimo artists and craftsmen earn annually a total of over \$2,000,000 from the sale of handcraft products, and it is expected that this volume will increase substantially as larger markets are developed and production is increased. However, there is little doubt that the efforts of the Board have been hampered and made more difficult by the unfair competition, and the deceptive acts and practices of those engaged in the manufacturer, importation, and distribution of simulated Indian products.

Clearly, remedial action is indicated. In the belief that the more knowledge businessmen have as to the requirements of laws designed to protect the consumer and foster open and fair competition, the greater the likelihood that they will conform to those laws, with attendant benefits to both the public and the business communities, the Commission is setting forth the following guidelines for manufacturers, importers and distributors of simulated Indian products.

First, it is the view of the Commission that the term "Indian made" or the unqualified terms "Indian," "American Indian" and terms of similar import, should not be used to describe or designate products which have not been handmade or handcrafted by Indians resident within the United States. (Nothing in this statement should be taken to restrict the use of accurate descriptions of products manufactured in the Republic of India.)

Second, products should not be offered for sale with direct or implied representations that they have been made by Indians when they have been made in part by machinery, or include components which have been so made. Of course, there is no objection to identifying any product components which have been handmade or crafted by Indians, or to describing truthfully the part that Indians have played in the fabrication of the product.

Third, simulated Indian products consisting in whole or in substantial part of components of foreign origin should not be offered for sale or distributed without disclosing the country of origin by legible marking or stamping on said merchandise or on a label or tag affixed thereto, which is of such a degree of permanency as to remain on or attached to the merchandise, in legible form until sold to the ultimate consumer thereof, and of such conspicuousness as likely to be observed and read by purchasers and prospective purchasers making casual inspection of the merchandise.

Fourth, manufacturers, importers, and distributors of simulated Indian products should not misrepresent directly or indirectly, in catalogs, advertising, labeling, marking, packaging, tags, or by any other means, the nature, composition, or origin of such products. For example, terms such as tribal or Indian names, derivations thereof, or symbols, designs, and markings of a kind or character associated with Indians, or depictions of Indians or Indian scenes should not be used in catalogs or other promotional materials

to designate or refer to products which have not been handcrafted or hand-made by American Indians.

The Commission believes that each manufacturer, importer and distributor of these products should carefully review its advertising, catalogs, labels, tags, and other media and determine whether it is complying with the standards set forth in this statement, which are based on applicable law. Thereafter action to effect any necessary changes should be promptly undertaken.

While the Commission is aware that firms will require a reasonable time to utilize existing stocks of merchandise and advertising materials on hand, and to make arrangements with overseas suppliers for necessary changes in the markings on imported products, it will expect these actions to be accomplished as soon as practicable.

Should a subsequent investigation disclose that such efforts have not been made, and the relevant facts show there is a violation of law, the Commission will move within the scope of its jurisdiction and remedial powers, to correct the illegality. Where it is shown that a particular company has engaged in illegal acts or practices, it is not a defense or justification to show that other companies are also engaged in similar activities.

**Guide Against Deceptive Use of the
Word "Free" in Connection with
the Sale of Photographic Film
and Film Processing Service.**

Released: June 5, 1968.

The Federal Trade Commission has issued a Guide which is intended to insure that the public will not be deceived by illusions of bargains in offers of so-called "free" film made in connection with charges for film developing and processing service.

The Commission stated that the Guide, which becomes effective September 3, 1968, is advisory in nature and was adopted to encourage voluntary compliance by sellers of photographic film and film processing service with the laws it administers. However, proceedings to enforce the requirements of law as explained in the Guide may be brought under the FTC Act.

It is emphasized that the Guide should not be construed as replacing or modifying any of the provisions of the FTC's Trade Practice Rule on Use of the Word "Free," approved December 3, 1953.

The text of the Guide is given below:

A common form of bargain advertising used to promote the sale of photographic film processing services is the offer of a roll of film, represented as being free to consumers who purchase a particular advertiser's service.

Film processors should avoid representing film as "free" when their quoted price for processing is not their regular price for such service, or, when the price charged for processing in connection with the "free" film representation is in excess of the price regularly charged by them for processing alone. A regular price is the price at which an article or service is openly and actively sold by the advertiser to the public on a regular basis for a reasonably substantial period of time in the recent and regular course of business. A price which (1) is not the advertiser's actual selling price, (2) is a price which was not used in the recent past but at some remote period in the past, or (3) is a price which has been used only for a short period of time, is not a regular price. Consequently, use of any price or amount, other than the advertiser's own bona fide regular price, in connection with a "free" film representation is deceptive.

"Free" film offers are understood by consumers to mean that the price charged by the advertiser is for processing alone and has not been raised to include a payment for the film. In other words, they understand that the film, in fact, is a gift to the consumer given by the advertiser in return for the processing business he receives. In such circumstances, if any portion of the represented price charged for processing includes any payment for the film to the processor, the "free" film offer is deceptive and consumers are misled.

Where a processor has not established a regular price for processing service by itself, he has no basis, except in the case of introductory offer, upon which to make a "free" film representation. Likewise, a processor may not justify "free" film offers, whether advertised with or without qualification, on the ground that his price for processing and film is equal to or less than the price charged by local developers for processing alone, in a given trade area. Only the industry member's own regular processing price may be used as a basis for the "free" film representation.

Continuous free film offers or the repetition of such offers with great frequency should be avoided. Continuous or frequent offers of free film made in connection with the sale of processing service are false and misleading since the processor's price for his service alone will, by lapse of time, become his regular price for processing service *and* film in combination. The film, in such circumstances, would therefore no longer be "free."

Introductory (temporary) offers of "free" film should not be advertised where processors do not, in good faith, expect to discontinue the offer after a limited time and commence selling processing service separately at the same price at which the offer of such service, together with the "free" film, has been made.

The Guide does not preclude the use of non-deceptive "combination" offers in which film and processing are offered for sale as a single unit at a single stated price, and where no representation is made that the price is being paid for one item and the other is "free." Similarly, film processors are not precluded from setting a price for processing which also includes furnishing the purchaser with a replacement roll of film at one inclusive price—again, where no representation is made that the latter is "free."

Rule Regarding Deception as to Transistor Count of Radios.

Released: June 7, 1968.

The Federal Trade Commission has promulgated a trade regulation rule regarding deception as to transistor count of radio receiving sets, including transceivers or so-called walkie-talkies. The rule becomes effective December 10, 1968.

The rule provides that "it is an unfair method of competition and an unfair and deceptive act or practice to represent directly or by implication, that any such radio sets contain a specified number of transistors when one or more of such transistors: (1) are dummy transistors, (2) do not perform the recognized and customary functions of radio set transistors in the detection, amplification and reception of radio signals, or (3) are used in parallel or cascade applications which do not improve the performance capabilities of such sets in the reception, detection and amplification of radio signals. *Provided, however*, that nothing in this rule should be construed to prohibit, in connection with a statement as to the actual transistor count (computed without inclusion of transistors which do not perform the functions of detection, amplification and reception of radio signals), a further statement to the effect that the sets in addition contain one more transistors acting as diodes or performing auxiliary or other functions when such is the fact (e.g., '6 transistors plus one diode')."

The record shows that marketers of radios, especially the less expensive imported sets, have included in the transistor count computation transistors which fall within the three categories prohibited by the rule, the Commission said.

Holding that this practice is deceptive and tends to divert business from competitors who do not misrepresent the transistor count of their products, the Commission pointed out: "With the advent of the radio receiving set, the purchasing public acquired a belief that the greater the number of functioning tubes in a radio the better it performs. Great emphasis in advertising and otherwise was placed on tube count. As early as 1942 the Commission found in a case that a substantial portion of the purchasing public believes that the greater the number of tubes in a receiving set, the greater will be its power

of detecting, amplifying and receiving signals. The record of this proceeding shows that transistors are now used in place of vacuum tubes in many radio receiving sets. Great emphasis has now been placed on transistor count. The Commission is of the view that the purchasing public's belief that the greater the number of tubes in a radio the better and more powerful the radio has shifted to a similar belief with respect to the number of transistors."

Rights and Duties of Consumers

Receiving Shipments of Unordered Merchandise and Obligations of Businessmen Shipping such Merchandise.

Released: June 25, 1968.

It has come to the attention of the Federal Trade Commission, primarily from consumer complaints, that the practice of sending unordered merchandise to prospective purchasers is widespread and increasing. Since recipients of such merchandise are usually not fully aware of their legal rights and obligations under such circumstances, they are often troubled as to the need to pay for the merchandise or return it, and wonder whether they are free to discard it without becoming liable for the purchase price.

Sending unordered merchandise with a stated purchase price directly to a prospective purchaser in and of itself often implies that he has an obligation either to pay for or to return the merchandise, regardless of his desire to keep or use it. Moreover, many merchants have enhanced this impression by representing in accompanying literature, directly or indirectly, that the prospective purchaser must pay for, or return the merchandise. The Federal Trade Commission is issuing this statement to advise both consumers and businessmen of the dangers inherent in such practices.

An individual receiving unordered merchandise should realize that he has no obligation either to return the merchandise or to pay for it, unless he uses the merchandise or desires to purchase it. This statement assumes that there is no written agreement in effect at that time between the recipient and the sender, as in a number of book and record club programs, to return or to pay for such items.

Merchants who send unordered merchandise without the prior consent of the prospective purchaser should also be aware that the Commission has recently issued complaints and cease and desist orders in two such cases.

In one case the Commission found that the manufacturer of a non-prescription drug product was sending unordered shipments of the product (along with an invoice) to retail drug stores and simultaneously placing advertisements in the local paper announcing that the product was available at that drug store. The druggists were put in the position of having to take affirmative action or else "become reluctant customers without having actually agreed to become customers." The Commission held that such

methods of sale constituted unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act and ordered the manufacturer to stop sending any merchandise to a retailer or using his name in an advertisement without the retailer's prior written consent.

In the other case a seller of merchandise mailed unordered shipments "on approval" to individuals along with an "Approved Invoice" stating the price of the items and the legend "Please return this invoice with your payment." This was subsequently followed with "reminder" notices and a series of letters which became progressively more forceful in first suggesting, then demanding, that payment be made. The Commission found that each of the seller's communications to the mailees, including the initial approval invoice, created the false and misleading impression that the mailees had to pay for the merchandise. Later communications suggesting that the items could be returned in lieu of payment were also held to be deceptive. The Commission ordered the seller to stop sending any communications requesting payment for, or the return of, unordered merchandise without disclosing that the recipient has no obligation to comply with such request.

The Commission intends to examine all complaints brought to its attention involving the sending of unordered merchandise in the light of the principles represented by these two cases. Specifically:

ABSENT A PRIOR AGREEMENT BETWEEN THE PARTIES, ANY SHIPMENT OF UNORDERED MERCHANDISE, AND ANY COMMUNICATION DESIGNED TO OBTAIN PAYMENT FOR, OR RETURN OF, SUCH MERCHANDISE, MUST BE ACCOMPANIED BY A CLEAR AND CONSPICUOUS DISCLOSURE THAT THE MERCHANDISE HAS BEEN SENT TO THE RECIPIENT UNSOLICITED, THAT THE RECIPIENT IS UNDER NO OBLIGATION EITHER TO RETURN THE MERCHANDISE TO THE SENDER OR TO PRESERVE IT INTACT, AND THAT THE RECIPIENT IS REQUIRED TO PAY FOR THE MERCHANDISE ONLY IF HE USES IT OR DECIDES TO PURCHASE IT.

**False and Deceptive Practices Used
by some Sellers of Home Repair
Products.**

Released: April 16, 1965.

With the coming spring, many people are faced with making needed home repairs, will be adding rooms to accommodate growing families and making general improvements on their homes.

Some fly-by-night operators also will be using this time of the year to nail down sales by hammering on doors of prospective customers and selling—

through deceptive practices and misrepresentations—home improvement and repair products.

To name a few, these high pressure salesmen will be using some of the following tactics: The “model-home” pitch, bogus “contests”, deceptive “referral” schemes, bait-and-switch techniques, fictitious “regular” prices, misleading guarantees, misrepresentations of interest rates and false designation of salesmen as graduates of a “home improvement academy.” All of these have been among the types of practices prohibited by the Federal Trade Commission in cases involving sales of siding, storm windows, awnings and other home improvement products.

In the model-home pitch, the prospect is told that he will be given a special discount price if he allows his home to be used to demonstrate the product, and that he will receive a commission of, say, \$100, on each sale made as a result of such showings.

In the referral scheme, he is promised a commission on sales made to friends, relatives or neighbors whose names he furnishes.

In the bogus contest, he is told that his home will be entered in a contest to determine which showed the greatest improvement, with winners to be given a prize such as a free trip to a foreign country or a new automobile.

The bait-and-switch technique involves the advertising of an attractive offer, not in good faith, for the purpose of obtaining leads. When the prospects respond, the salesman disparages the advertised product in order to sell more expensive models.

As to misleading guarantees, many purchasers find that the guarantee has conditions and limitations which are not disclosed until he signs the contract or the job is completed.

All of these practices, when false and deceptive, have been condemned by the FTC and the courts.

As to siding materials, prospective customers should be especially on the lookout for the salesman who misrepresents that: The concern he represents is a manufacturer of the siding materials and consequently can offer them at lower prices; his aluminum siding materials are manufactured by one of the leading aluminum companies, and he is connected or affiliated with such a company; and his siding materials are applied by factory trained installers.

Consumers can do a great deal to protect themselves against fly-by-night operators. Before signing any contract, the prospective purchaser should; Compare (1) prices with local, established concerns, and (2) quality of both materials and workmanship; not sign a contract until the fine print has been read and studied; and not be pressured into signing a contract because “this is the last chance” and the offer will not be available tomorrow.

However, if you, as a consumer, do get rooked, don't just charge it up to experience and forget about it. Bring your complaint first to the seller, if you can find him; report false advertising, if he has advertised, to the

media carrying it; report deception to local organizations concerned with better business standards; and write to the Federal Trade Commission, stating all of the facts.

By taking these actions, you may save your neighbors and others from the same, expensive experience you encountered by dealing with a fly-by-night operator.

Enforcement Policy regarding Deceptive Representations of Chemical Products Used to Melt Snow and Ice.

Released: July 16, 1968.

The Federal Trade Commission has investigated reports of damage to concrete surfaces caused by chemical products marketed for use in melting snow and ice on sidewalks, driveways, and other concrete surfaces. Such products contain and rely on calcium chloride, ammonium sulphate, nitrates, or other chemicals for their effectiveness.

Although these products are often represented to be safe for use on concrete, it appears that their use may result in flaking and scaling of concrete surfaces to which they are applied. Surface scaling of non air-entrained and poor quality air-entrained concrete has been frequently noted; heavy and repeated applications of such products have even caused damage to properly air-entrained concrete. (Air-entrained concrete contains controlled amounts of minute air bubbles which have been intentionally distributed throughout the concrete.) Damage is more likely to occur when these products are used on concrete surfaces on residential property as such concrete is usually no air-entrained.

Consumers should be alert to the possibility that use of chemical products to melt snow and ice may cause damage to their concrete surface, contrary to the representations made for such products. As there is ample reason to believe that the public is being deceived by representations as to safety of using these products, such deception resulting in property damage, the Commission thinks that remedial action is necessary. The Commission believes that the more knowledge businessmen have as to the requirements of laws designed to protect the consumer and foster open and fair competition, the greater the likelihood is that they will conform to these laws. Therefore, the Commission is setting forth the following guidelines for manufacturers, packagers, and distributors of such chemical de-icer products.

1. It should not be represented in any manner in advertising, labeling, or by any other means, that such products are safe for use or will have no damaging or harmful effects upon concrete surfaces.

2. The possible damaging and harmful effects resulting from the use of such products upon concrete surfaces should be disclosed in all advertising and on the packages in which the products are sold. These disclosures should be of such conspicuousness and clarity as to be noted by purchasers and prospective purchasers casually inspecting the products or casually reading, or listening to, the advertising.

The Commission believes that each manufacturer and distributor of these products should carefully review its advertising, catalogs, labels, and other media and determine whether it is complying with the guidelines set forth in this statement. The Commission expects the necessary changes to be made prior to the 1968-69 freezing season when the demand for such products will exist.

Should a subsequent investigation disclose that such changes have not been made, and the relevant facts show there is a violation of law, the Commission will move within the scope of its jurisdiction and remedial powers, to correct the illegality. Where it is shown that a particular company has engaged in illegal acts and practices, it will not be a defense or justification to show that other companies are also engaged in similar activities.

The Commission recognizes that this statement of enforcement policy is necessarily cast in general terms and that questions may arise concerning its application to particular cases. The staff of the Commission's Bureau of Industry Guidance will be available to advise and assist industry members to conform their practices to the guidance set forth in this statement.

In-Depth Investigation of Conglomerate Merger Movement.

Released: July 9, 1968.

The Federal Trade Commission announced today that it has directed its Bureau of Economics to undertake an in-depth investigation of the causes, effects and implications of the conglomerate merger movement in this country. Merger activity, the Commission noted, appears to have reached the highest levels in American industrial history with no signs of an early abatement. Unlike earlier merger movements, which were dominated by horizontal or vertical mergers among competitors or between buyers and sellers, the current wave of mergers reflects a proliferation of conglomerate mergers.

Conglomerate mergers may be of various types, but are usually divided into three categories, market extension, product extension, and other. Market extension mergers are those in which the two parties to a merger are engaged in the same general line of business activity, but operating in different geographical markets. Product extension mergers represent an extension of a firm's activity into another product line, but one that may be related functionally either in production, distribution or sale of products.

The remaining category of conglomerates includes those in which there is very little discernible relationship between the acquiring and acquired firms.

Under the Celler-Kefauver Act of 1950 the Commission and the Antitrust Division of the Department of Justice have concurrent jurisdiction over mergers which may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. A number of conglomerate cases have been established. Both the Commission and the Antitrust Division have also issued merger enforcement guidelines to assist business firms in the determination of the metes and bounds of merger activity within the context of interpretations of the law.

There is growing concern, however, on the part of the Commission, as well as Congressional committees, including the Senate and House Antitrust Subcommittees and the Joint Economic Committee, as to the long-run dangers of the continuation of the conglomerate merger movement. The Commission has already conducted a limited investigation of this matter, but has now directed its staff to expand the scope of the investigation to cover not only the shortrun anticompetitive aspects of such mergers, but also broader issues, including the relationship between conglomerate mergers and technical or business efficiencies, the economic performance of conglomerate firms in the market place, and the effect of conglomerate mergers on the competitive vigor of enterprises by their change in status from independent firms to subsidiaries or divisions of conglomerates, and the impact of such structural changes on long run competitive activity. A review will be made of recent merger developments in the light of the basis policy objectives of the Celler-Kefauver Act to prevent increases in the concentration of economic power, to encourage internal growth as a competition-promoting process, to preserve the competitive opportunities of medium-size and small businesses and to eliminate monopolistic tendencies in their incipient stages. The study will also explore various causes of mergers and whether new legislation may be necessary to bring the conglomerate merger movement under control. After the completion of the staff investigation, the Commission plans to hold a public hearing on this matter.

**Commission Enforcement Policy
with Respect to Vertical Mergers
in the Cement Industry.**

Released: January 3, 1967.

The Federal Trade Commission today released a statement setting forth its "Enforcement Policy With Respect to Vertical Mergers in the Cement Industry."

The statement explains the policy which the Commission expects to follow with respect to acquisitions by manufacturers of portland cement of ready mixed concrete producers, and other cement consuming concerns. The Commission's announcement today climaxed the Commission's concern with

the vertical merger movement in the cement industry which began in the early 1960's. Public hearings on an industry-wide basis were held last July, and many executives from cement and ready-mixed concrete companies gave the Commission their views.

The Commission concluded that vertical acquisitions by cement manufacturers, especially of sizable ready-mixed concrete companies, can have substantial adverse effects on competition in the particular market areas where they occur.

The Commission announced today that as a matter of general enforcement policy it would issue a complaint in the case of every future acquisition by a cement producer of any substantial ready-mixed concrete firm in any market to which such acquiring cement producer was an actual or potential supplier. The Commission stated that in general the acquisition of any ready-mixed concrete firm ranking among the leading four (4) nonintegrated ready-mix producers in any market, or the acquisition of any ready-mixed producer regularly purchasing 50,000 barrels of cement or more annually, would be considered a substantial acquisition. The Commission emphasized, however, that the effects of any particular acquisition would be decided on the merits of that case.

The Commission added that the general policy of challenging the acquisition of any of the top four (4) nonintegrated ready-mixed firms in a market, or of any cement consumer regularly buying 50,000 or more barrels annually, did not necessarily mean that the acquisition of smaller firms would go unchallenged. The Commission noted that cumulative purchases of cement by several smaller firms in a market could approximate those of a single larger ready-mixed company, and could have at least as severe anticompetitive effects as the acquisition of a single large firm.

The Enforcement Policy announced by the Commission does not exempt markets where vertical integration has already occurred. The Commission found that a partially integrated market could still be attractive to a new cement manufacturer, or to a cement company on the edge of such a market wishing to expand its geographic area of sales. The Commission therefore announced its intention to preserve the "open" portion of partially integrated markets to the fullest extent possible.

To carry out the announced enforcement program expeditiously and uniformly, the Commission stated that it would require all portland cement companies to file reports pursuant to Section 6 of the Federal Trade Commission Act at least 60 days prior to the consummation of any merger or acquisition involving any ready-mixed concrete producer. The Commission emphasized, however, that this requirement did not mean that cement firms must request Commission approval prior to the consummation of any acquisition or merger. The Commission will continue to give advisory opinions, as provided by its rules, regarding the legality of particular mergers.

Chairman Paul Rand Dixon and Commissioner Everette MacIntyre, while approving the enforcement criteria set forth in the Enforcement Policy, did not concur in the requirement that special reports be filed with the Commission 60 days in advance of any acquisition or merger.

**Commission Enforcement Policy
With Respect to Mergers in the
Food Distribution Industry.**

Released: January 3, 1967.

The Federal Trade Commission today released a statement setting forth its "Enforcement Policy With Respect to Mergers in the Food Distribution Industries."

The Commission noted there has been continuing trend toward concentration in food retailing. It concluded that whereas a number of forces were responsible for this development, "This growth in concentration has been caused in significant part, and certainly accelerated by, a nation-wide merger movement among large supermarket chains." The Commission added that it "has exercised continued surveillance over these developments, recognizing that whereas many were in response to normal and desirable forces, others might bring about unnecessary and irreversible changes inimical to the market structure and competitive behavior of food retailing. Much of the Commission's merger enforcement activity has been devoted to this sector of the economy."

In recent years the Commission has issued complaints challenging acquisitions by five of the country's leading chains—National Tea Company, Kroger Company, Grand Union Company, Consolidated Foods Corporation and Winn-Dixie Stores. All but one of these cases have been terminated by consent agreements or litigation.

The Commission explained that, "In view of the Commission's extensive legal activity in the area of food retailing, and the probability that market forces will continue to create an environment conducive to mergers in the industry, it is appropriate that the Commission spell out as clearly as possible those mergers which the Commission's experience and knowledge suggest are most likely to have anticompetitive consequences. This is not to imply that the Commission has sufficient knowledge or foresight to draw with precision the legal boundaries around every prospective merger in food retailing. Conditions inevitably change with time and circumstances. On the other hand, businessmen contemplating mergers have a right to know whether particular mergers are likely to be challenged by the Commission, and, perhaps, be forcibly undone after years of expensive litigation."

The Commission then set forth the criteria which it would use in identifying merger warranting its attention and consideration.

I. Mergers and acquisitions by retail food chains which result in combined annual food stores sales in excess of \$500 million annually raise sufficient

questions regarding their legal status to warrant attention and consideration by the Commission under the statutes administered by it.

II. Mergers and acquisitions by voluntary and cooperative groups of food retailers creating a wholesale volume of sales comparable to those food chains with sales in excess of \$500 million annually also raise sufficient questions regarding their legal status to warrant attention and consideration by the Commission under the statutes administered by it.

The Commission noted further that market extension mergers involving companies with combined annual sales of less than \$500 million generally do not pose a serious threat to competition except when they involve some competitive overlap. It indicated, however, that all acquisitions by food chains or wholesalers which resulted in combined sales of more than \$100 million would be investigated.

The Commission explained that in order to implement its enforcement program expeditiously and uniformly, it must know of prospective acquisitions and mergers in advance of their consummation. It therefore announced that, "Every food retailer and wholesaler with annual sales in excess of \$100 million will be required to notify the Commission at least 60 days prior to the consummation of any merger, acquisition or consolidation involving any food retailer or wholesaler."

The Commission emphasized that this action does not mean that grocery firms must request Commission approval prior to the consummation of future mergers. It added, however, that it would continue to provide advisory opinions regarding the legality of particular mergers, and invited those contemplating mergers to avail themselves of this program if they are uncertain as to the legality of a prospective merger.

Chairman Dixon and Commissioner MacIntyre, while approving the enforcement criteria set forth in this statement, did not concur in the action of the Commission in providing for the requirement that special reports be filed with the Commission 60 days in advance of any merger under the authority of Section 6 of the Federal Trade Commission Act.

Enforcement Policy with Respect to Product Extension in Grocery Product Manufacturing.

Released: May 15, 1968.

The Federal Trade Commission today released a statement setting forth its "Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing."

A product extension merger is one that unites two corporations whose activities are functionally related at the production or marketing levels, but

whose products are not close substitutes. Thus, in grocery products manufacturing the term describes any nonvertical, nonhorizontal merger that combines two firms engaged in the manufacture of household consumer products marketed through retail grocery stores.

This is the third Commission enforcement policy announcement in the merger area. The first two, dated January 3, 1967 applied to vertical mergers in the cement industry and mergers in food distribution. The Commission emphasized that such enforcement policy statements are not to be construed as implying that the Commission has sufficient knowledge or foresight to draw precise legal boundaries for every prospective merger. However, the Commission announcement is designed to provide the business community with information as to the kinds of product extension mergers in grocery products manufacturing which, based upon Commission experience, are most likely to raise concern as to their possible anticompetitive effects under Section 7 of the Clayton Act as amended by the Celler-Kefauver Act.

The Commission pointed out that it has taken an essentially pragmatic approach in assessing potential anticompetitive aspects of product and market extension mergers in grocery products manufacturing. Cases involving such questions were "*The Procter & Gamble Company*, Docket No. 6901 (November 23, 1963), rev'd, 358 F.2d 24 (6th Cir. 1966), rev'd and enforced, 385 U.S. 897 (1967); *General Foods Corporation*, Docket No. 8600 (March 11, 1966), aff'd, 386 F.2d 936 (3rd Cir. 1967); *Beatrice Foods Company*, Docket No. 6653 (December 10, 1965); and *Foremost Dairies, Inc.*, Docket No. 6495 (April 30, 1962).

According to the Commission's statement:

"Product extension mergers may adversely effect competition in several ways. One is by raising the barriers to entry of new firms, and thus preventing the creation of new capacity in the markets of the acquired firm. Among the factors affecting entry barriers are the relative size and market power of the acquiring firm, the degree to which it operated across many markets, the magnitude of its promotional activity and advertising expenditures, and whether or not it is a potential competitor of the acquired firm.

"Additionally, the relative size and market position of the acquired firm, the extent of oligopoly of the markets in which it operates, its growth potential, and the extent of abnormal profits it and others in such markets may enjoy, bear on the question of the need for the constraints of potential competition. The potential entrant, by providing the *threat* of entry, may restrain oligopolists in the market from securing monopoly profits, forcing them as a minimum to charge entry

forestalling prices. Or by actually entering the market, the potential entrant would add capacity to the industry, become an active competitor and erode the non-competitive profits of the oligopolists.

"Merging in, rather than building in, would remove both of these constraints on the potential entrants and might simultaneously raise the barriers to additional entrants."

The Commission's announcement contains an extensive description of the changing structure of grocery manufacturing, as well as the nature of the product extension mergers in food manufacturing, and the implications of recent structural changes. On the basis of such studies, the Commission set forth the following major criteria for assessing product extension mergers in grocery products manufacturing under Section 7 of the Clayton Act:

(1) Both the acquiring and acquired companies engage in the manufacture of grocery products. Grocery products include food and other consumer products customarily sold in food and grocery stores.

(2) The combined company has assets in excess of \$250 million.

(3) The acquiring company engages in extensive promotional efforts, sells highly differentiated consumer products, and produces a number of products, in some of which it holds a strong market position. A strong market position is defined as being one of the top four producers of a product in which the top four companies hold 40 percent or more of the value of shipments.

(4) The *acquired* company is either among the top eight producers of any one important grocery product, or has more than a 5 percent share of a relevant market.

The Commission instructed its staff to apply the above criteria with specific reference to mergers among manufacturers of grocery products, but pointed out also that the staff was to be concerned with mergers where (1) grocery manufacturers acquire nongrocery manufacturing firms selling products that are presold to consumers with advertising and promotion of the same general type used by grocery products companies and (2) nongrocery products manufacturers selling highly advertised and promoted consumer products acquire grocery products manufacturers.

The Commission stressed the fact that this announcement "should not be interpreted to mean that grocery products manufacturers must request Commission approval prior to the consummation of any merger or acquisition. However, the Commission shall continue to provide advisory opinions, as provided by its Rules of Practice, regarding the legality of particular mergers, and invites those contemplating mergers to avail themselves of this program in any situation where they are uncertain as to the legality of a prospective merger."

**Commission Enforcement Policy
with respect to Prospective and
Future Mergers in the Textile
Mill Industry.**

Released: November 22, 1968.

The Federal Trade Commission, with Commissioner Jones dissenting, today released a statement setting forth its "Enforcement Policy with Respect to Mergers in the Textile Mill Products Industry."

This is the fourth Commission enforcement policy announcement in the merger area. The first two, dated January 3, 1967, applied to vertical mergers in the cement industry and mergers in food distribution. The third applied to product extension mergers in grocery products manufacturing and was issued May 15, 1968.

"This enforcement policy statement," the Commission stated, "is issued to provide business organizations with guidance as to the kinds of future mergers in the textile mill products industry most likely to raise questions regarding their possible anticompetitive effects under Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act." The Commission emphasized "that it is not attempting to draw precise legal boundaries for every prospective merger," and that the announcement does not constitute an expression of the views of the Commission or any individual Commissioner on the legality of any particular merger or acquisition. Their objective, rather, is to delineate the types of future mergers which appear to require the Commission's attention in the discharge of its statutory responsibilities. The statement reviews changing structural conditions in the textile mill products industry, and outlines the criteria for identifying prospective and future mergers which, on the basis of the Commission's current knowledge and experience, would warrant close attention and consideration.

The market structure of the textile mill products industry, the Commission noted, has changed significantly during the last two decades, primarily because of a high rate of merger activity. Many of these mergers have been investigated by the Commission and the staff has also conducted an extensive economic study of the changing structure of the industry.

Textile products are principally in the intermediate stage between basic raw materials—such as cotton and wool produced by farmers, and man-made materials produced primarily by chemical companies—and the apparel trades and industrial users of textiles. In addition the industry produces many products in finished form for sale to the ultimate consumer (e.g., carpets and rugs, knit goods, sheets, towels, etc.). Essentially, textiles are considered a nondurable goods industry, partially selling consumer goods. As defined by the Census Bureau the "textile mill products" industry includes firms performing a variety of operations on all kinds of fibers. Broadly these operations may be grouped into three stages: fiber preparation and

yarn spinning; weaving, knitting or braiding of yarns into gray or unfinished fabric; and finishing of the fabric including bleaching, dying, printing, water proofing, coating, or otherwise treating it. Textile Mill Products is one of the major industries in the United States.

The Commission stated that:

"The textile merger movement, the growing integration, diversification and concentration, and the increased emphasis on product differentiation, have significantly altered the structural conditions which prevailed in the textile industry at an earlier date. The primary source of increasing concentration in textile mill products has been the large number of horizontal, vertical and product-extension mergers undertaken primarily by the leading firms. Concentration increases have occurred principally in the market share of the top four firms, and to some extent within the share of the top eight, establishing, in turn, an increasing size disparity between leading firms and other members of the industry. The firms making acquisitions have principally been those which have both the production and marketing know-how and the resources necessary to enter by internal expansion. Thus, as concentration has risen and the need for actual and potential entrants has grown, mergers and acquisitions increase barriers to the entry of small and medium-size firms and eliminate internal growth by established firms that are likely potential entrants into the various textile mill products industries. A continuation of merger trends threatens to remove competitive stimulation of internal expansion and trends toward ever higher levels of concentration."

The Commission, therefore, set out the following criteria for examination of prospective and future mergers which may raise significant questions of law or policy under Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act:

1. Any merger between textile mill product firms where the combined sales or assets of the firms exceeds \$300 million and the sales or assets of the smaller firm in the merger exceeds \$10 million.
2. Any horizontal merger in a textile mill product submarket where (1) the combined firms rank among the top 4 or (2) have a combined market share of 5 percent or more of any submarket in which the four largest firms account for 35 percent or more of the market.
3. Any vertical merger, either "backward" into the supplying market or "forward" into a purchasing market, where a particular acquisition or series of acquisitions may involve market shares of 10 percent or more of the relevant market or where the acquisition or series of acquisitions may tend significantly to raise barriers to entry in either market or to disadvantage existing non-integrated or partially inte-

grated firms in either market by denying them fair access to sources of supply or markets.

4. Any acquisition of a textile mill product firm with sales or assets of \$100 million or more and ranking among the four largest producers of a textile mill product by a non-textile mill product firm with sales or assets in excess of \$250 million and with a substantial market position in another industry. A substantial market position is defined as being one of the top four sellers of a product or service in which the four largest companies account for 40 percent or more of the market.

This announcement should not be interpreted to mean that textile mill products manufacturers must request Commission approval prior to the consummation of any prospective merger or acquisition. However, the Commission shall continue to provide advisory opinions, as provided by its Rules of Practice, regarding the legality of particular mergers, and invites those contemplating mergers to avail themselves of this program in any situation where they are uncertain as to the legality of a prospective merger.

Commissioner JONES, dissenting:

The Commission today has announced the issuance of its fourth set of guidelines setting out its future enforcement intentions respecting mergers in the broad field of textile mill products. In my judgment these guidelines do not have a sufficient substantive basis and are manifestly unfair to the industry when coupled with the simultaneously announced acceptance by the Commission of a consent order against Burlington Industries legalizing in effect the same acquisitions which are clearly contrary to the guidelines.

Earlier merger guidelines issued by the Commission in the cement, food manufacturing and food distribution industries followed and were based on an analysis of industry facts carefully developed in adjudicatory proceedings held before the Commission and, in the case of the cement industry, additionally on testimony adduced at a public hearing held expressly for the purpose of considering the merger and concentration trend in that industry.¹

The textile industry guidelines are not based on any such prior adjudicatory or public hearing records. The expressed rationale for the textile guidelines is essentially the general statement that anticompetitive performance

¹ The cement industry guidelines defining permissible limits of vertical integration were issued upon the heels of a Commission attack on no less than ten such mergers; the guidelines for product extension mergers in food manufacturing were issued following adjudication of several complaints against particularly significant acquisitions of this genre, e.g., Proctor & Gamble and General Foods. The guidelines with respect to mergers in the food distribution industry were promulgated following the conclusion of detailed studies by the National Commission on Food Marketing (*Food from Farmer to Consumer and Organization and Competition in Food Retailing*, Technical Study No. 7) as well as complete adjudication of one complaint (*National Tea*, Dkt. 7453) and development of a complete record in another case before it was finally settled (*Grand Union*, Dkt. 8458).

can be expected to follow upon the increased concentration which has occurred in the broad textile products market and in various product submarkets. Thus the instant guidelines describe the increasing concentration in both the aggregate textile products market and the individual textile product markets and assert the undocumented judgment that intense horizontal, vertical and product extension merger activity in this industry has increased barriers to competition. The guidelines recite the conclusion that entry has been made more difficult through increased capital requirements, the greater complexity of production and marketing techniques, and increasing product differentiation with the accompanying development of consumer loyalties which disadvantage potential entrants in winning customers from entrenched firms. They further assert that vertical mergers have foreclosed certain portions of the market and thus necessitated entry on a larger integrated and thus more expensive and difficult scale—again without specifics. They assert that product extension mergers may raise entry barriers by pitting multi-line firms with their easily available distribution channels against a distributionally disadvantaged single line entrant—again without any precise statement as to what these mergers are and how they have served or may serve to raise entry barriers in fact.

I do not doubt that increased concentration through mergers can operate to bring these undesirable anticompetitive effects about. The fact that increasing concentration has these probable effects in industries in general is not disputed, since careful research has shown this to be so. But at the same time the correlation between increasing concentration and undesirable anticompetitive performance, though high, is not perfect. Research showing such correlation does include some industries which constitute exceptions to the general statement.² In pointing out the textile industry for special guideline treatment, it stands to reason that the Commission must show precisely why textiles merit this treatment,³ i.e., why increasing concentration can be expected to yield actual or probable competitive injury specifically in this industry. We need more than a mere statement that it does, or a statement of what kinds of injuries such increasing concentration generally yields. We need evidence—even examples will do—based on actual textile industry experience which demonstrates how, rather than simply *asserts*, that competitive injury will probably result.

Adjudicatory proceedings or the holding of public hearings are designed precisely to adduce this type of specific evidence and to enable the parties

² See for example, Joe Bain, *Barriers to New Competition* Cambridge: Harvard University Press, 1962, pp. 190–201.

³ That the treatment may indeed be "special" is shown by the fact that about 70 percent of the broad U.S. census industries of which textile mill products are one example showed increases in concentration from 1963 to 1966.

to test the economic theory underlying the Commission's reason to believe that a given acquisition or a series of acquisitions are likely to lessen competition.

Merger guidelines can be both a significant enforcement tool and a valuable guide to the industry involved as to its future course. But if guidelines are to play this role and are to receive the respect and confidence of the public which is essential to their effectiveness, they must accord with the realities of the marketplace.

I believe, therefore, that merger guidelines should not be issued unless a marshalling and evaluation of available industry facts and expert opinion has taken place either through a record in an adjudicatory proceeding or in a public hearing. For this reason, I find myself unable to agree with the Commission's action to publish these guidelines at this time.

The issuance of these guidelines now is even more disturbing because of the Commission's simultaneous acceptance of a consent order against Burlington Industries, Inc. which in effect put a stamp of approval on a series of pre-guideline acquisitions made by Burlington which has enabled Burlington to move in the overall textile mill products industry from second to first place and similarly to advance its industry ranking to within the top four grouping in several product submarkets within this broader textile market. The Commission has been frequently criticized for adopting a merger policy which ignores or leaves untouched the largest firms in an industry and which concentrates its enforcement fire on the middle tier companies struggling to compete with their larger industry rivals. While I have never before believed that this criticism was either valid or fair, the Commission's action today for the first time in my judgment gives some solid substance to this criticism. The Commission has apparently decided to slam shut the merger door after permitting the largest industry member to enjoy a predominant and what could be an impregnable market position in the overall textile industry and in important submarkets of that industry.

I could understand a combined effort on the part of the Commission to challenge all acquisitions in this industry which in the Commission's judgment enhanced the concentration and anticompetitive trends which are foreseen in this industry together with the announcement of guidelines designed to prevent similar acquisitions in the future. I could understand—perhaps—a decision by the Commission that concentration trends in this industry had not reached proportions requiring any enforcement action at this time. But I cannot understand—and vigorously dissent from—a policy which permits one company to make the precise acquisitions which the Commission's guidelines state may have serious anticompetitive effects if made by other companies in the industry.

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Warning concerning Fire and Explosion Hazard of Paraffin Filled, Heat-Set Hair Rollers.

Released: July 18, 1968.

The Federal Trade Commission is concerned about the fire and explosion hazard involved in the use of paraffin filled, "heat-set" hair rollers. The Commission has noted that these products continue to be advertised and sold without warning of the hazard which arises if the water in which the curlers are heated boils away and the paraffin filler ignites.

The Commission feels it imperative that steps be taken immediately to prevent unnecessary injury, property loss and death. Accordingly, the Commission has sent letters to manufacturers of such products requesting them to include the following warning in consumer packaging:

"Warning: Fire may result from allowing water to boil away. In event of fire, DO NOT EXTINGUISH WITH WATER: an explosion will result."

They have also been requested that instructions for extinguishing such fires be provided by language to the effect that:

To extinguish, baking soda may be used as an expedient or smothering of the flames may be attempted with a pan lid or other non-flammable material. Observe the procedures and precautions for extinguishing grease type fires.

The Commission emphasized that not all industry members are engaging in this practice. At least one manufacturer contacted during the staff's preliminary inquiry advised that it has replaced the paraffin with a non-flammable substance.

The Commission has instructed its staff to deal promptly and effectively with this problem in the most expeditious manner.

**False and Misleading Advertising
Used by some Sellers of Light
Ray Insect Traps.**

Released: August 30, 1968.

A crack down on false and misleading advertising of light ray insect traps is underway by the staff of the Federal Trade Commission.

These insect traps are claimed to operate electronically by emitting different light rays that attract flying insects. These light rays are given off by ultraviolet, blue, green, and white light bulbs inside a lantern-like fixture connected to a light cord that fits into any 110 volt circuit. Usually there is a wire grid located around this lamp or bulb, which is charged with an electric current that electrocutes most of the insects coming in contact with it.

Investigators are pursuing complaints from consumers who say they are misled by advertised claims that these insect traps have been approved by the U.S. Government and major universities, and that they will clear large areas of all flying insects or the user can enjoy insect free living.

Although these types of traps do attract and kill some flying insects, those which have been tested will not eliminate all flying insects within a backyard nor will they permit a user to enjoy insect free living out of doors. None of these have been approved by the U.S. Department of Agriculture and major universities have not approved them.

A number of advertisers of these insect traps have corrected their advertising claims as a result of FTC's investigation. However, consumers should be alert to continuing advertising of insect traps that promise to eliminate and disintegrate all flying insects.

Corrections of false and misleading advertising representations are still underway. Therefore, each advertiser of these insect traps should review its advertising and eliminate claims which may be unwarranted.

**Commission Enforcement Policy
with Respect to Merchandise
which has been subjected to Pre-
vious Use on a Trial Basis and
Subsequently Resold as New.**

Released: December 31, 1968.

The Federal Trade Commission is concerned with an apparently prevalent practice of marketers of a variety of products who offer for resale merchandise which has been used by prospective purchasers on a trial basis and which upon return of the merchandise is replaced in inventory for resale as new. Such merchandise, which may have been refurbished, is offered for sale without any disclosure of previous use.

The practice is particularly prevalent where sellers of a product utilize mail order solicitations, usually through mail order firms or large and nationally known credit card organizations.

The range of products offered to the public is wide, including such items as household furniture, typewriters, calculators, pool tables, power tools, hand tools, tape recorders, ball point pens, cameras, label marking kits, phonograph records and portable radios.

Common to many of the solicitations is an offer to the prospective buyer to furnish for a specified time, frequently at no charge, the item of merchandise for inspection and use during the trial period. If the customer chooses not to purchase, he is permitted to return the item, usually to the manufacturer, at no charge. It is a common practice in such solicitations for the makers of the merchandise returned after trial use to "refurbish" such product and replace it in the firm's inventory for resale as new. The term "refurbish" appears to be a common characterization by marketers

of the operation performed upon returned merchandise. It could simply mean that the merchandise is inspected and if no damage or noticeable wear is evident in the working parts, or no blemishes or scratches appear on the surface of the item it is returned to inventory for resale. The term may also incorporate a process of cleaning, or other operations which create a like new appearance, prior to replacement in inventory.

Such failure to disclose the prior use of merchandise enables marketers, including mail order retailers, to deceive and mislead the consuming public as to the condition of the merchandise purchased. It is extremely difficult for the public to be aware that it is purchasing anything but a new product, since the merchandise, especially after refurbishment, has all the surface appearances of new, unused merchandise.

Failure to disclose material facts relevant to a purchaser's decision to buy or not to buy has been held to constitute an unfair and deceptive practice.

The Commission has recognized the mischief inherent in the resale of merchandise as new after it has been placed in the possession and use of customers, without disclosing such prior use on resale.

In addition, the Commission under its guidance procedures has focused attention on the problem of marketing used merchandise without appropriate disclosure of such fact through the promulgation of trade practice rules for several industries. Guidelines were established which provide for disclosure of the fact that products have been previously used.

Furthermore, the essential inequity of this practice becomes evident when manufacturers of competing product lines who clearly disclose that merchandise has been previously used, or do not offer such merchandise for sale as new, are placed in a disadvantageous competitive posture.

The Commission wishes to make clear its future enforcement policy with respect to disclosure by marketers of merchandise that has been the subject of previous use by virtue of trial offers to prospective customers.

FIRST, the Commission has consistently held that the consuming public has a preference for new or unused products as compared to those which have been previously used. The Commission therefore feels that knowledge on the part of a purchaser of the fact that merchandise being offered for sale has been previously subjected to trial use is relevant to a customer's decision as to whether or not to purchase the product.

The fact that returned merchandise is refurbished to a "good as new" condition does not warrant a failure to disclose prior use. Substitution of a used product for a new one without disclosing such fact is unlawful even though a qualitative equivalence is shown.

SECOND, merchandise which has been previously used on a trial basis and then returned should not be offered for resale by marketers, including

importers, distributors, or retailers or their agents, without clear and conspicuous disclosure of such fact in all the marketers' advertising sales promotional literature and invoices concerning the product, on the container in which the products are packed and, if the product has been refurbished or otherwise has the appearance of being new, on the product with sufficient permanency as likely to remain thereon until sale to the ultimate consumer.

Further, it is suggested that marketers maintain adequate inventory control records that reflect the disposition of returned merchandise. Maintenance of inventory control records will enable them to demonstrate that returned merchandise was not replaced in inventory and resold without disclosing the fact of its previous use to purchasers.

Mail order houses and credit card organizations promoting the sale of merchandise, through their extensive mail advertising capabilities, share responsibility for any deceptive advertising disseminated by them when the deceptive nature of the advertising is known or should have been known to them. This is especially true where they participate in the preparation of deceptive advertising.

The Commission intends to examine all complaints brought to its attention involving the marketing of merchandise which has been previously used on a trial basis without clear and conspicuous disclosure of such fact, in the light of the principles set forth above.

The Commission wishes to make clear, however, that this policy applies only to merchandise that has been used, and not to merchandise that has merely been inspected but not used.

Trade Regulation Rules

Nature of the Rules

Trade Regulation Rules stand as formal announcements of Commission policy covering applications of a particular statutory provision. Such rules express the experience and judgment of the Commission based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes administered by the Commission. The rules which may be nationwide in effect or limited to particular areas or industries or to a particular product or geographical market are binding upon all who are subject to the jurisdiction of the Commission.

How Initiated

A proceeding for the issuance of a Trade Regulation Rule may be commenced by the Commission upon its own initiative or pursuant to petition filed with the Secretary by any interested person or group stating reasonable grounds therefor.

Procedure

When the Commission has authorized the initiation of a Trade Regulation Rule proceeding a Notice of proposed rule-making is published in the Federal Register and otherwise made available to all known interested persons. This Notice gives opportunity to interested or affected parties to participate through the submission of written data, views or arguments. Oral hearing on a proposed rule may be held within the discretion of the Commission.

How Used

When Trade Regulation Rules are promulgated they are published in the Federal Register and mailed to all known interested or affected parties. On the effective date of such rules a compliance survey is initiated to ascertain the manner in which affected parties are complying with the rule. Additionally, where a Trade Regulation Rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.

Rules Promulgated

	<i>Adopted</i>
(1) Advertising and Labeling of Sleeping Bags as to Size	Sept. 18, 1963
(2) Deceptive Use of "Leakproof," "Guaranteed Leakproof," Etc., as Descriptive of Dry Cell Batteries	May 20, 1964
(3) Deception as to Nonprismatic and Partially Prismatic Instruments Being Prismatic Binoculars	May 26, 1964
(4) Misbranding and Deception as to Leather Content of Waist Belts .	June 27, 1964
(5) Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products	July 21, 1964
(6) Deceptive Advertising and Labeling of Previously Used Lubricating Oil	July 28, 1964
(7) Misuse of "Automatic" or Terms of Similar Import as Descriptive of Household Electric Sewing Machines	June 30, 1965
(8) Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television	Feb. 24, 1966
(9) Failure to Disclose That Skin Irritation May Result from Washing or Handling Glass Fiber Curtains and Draperies and Glass Fiber Curtain and Drapery Fabrics	July 14, 1967
(10) Relating to Discriminatory Practices in Men's and Boy's Tailored Clothing Industry	Oct. 18, 1967
(11) Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers	May 14, 1968

Industry Guides

Nature of the Guides

Industry Guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary

and simultaneous abandonment of unlawful practices by members of industry. Generally, the Guides deal either with a number of problems which effect an entire industry or particular problems common to many industries.

Guides set forth in plain language what the Commission considers illegal about particular types of business conduct ranging from improper advertising for products such as fallout shelters, shoes and tires to the use of such practices as deceptive pricing, bait advertising, misrepresentations of guarantees, the granting of illegal advertising allowances, and the furnishing of discriminatory services or facilities.

How Initiated

Industry Guides are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor by interested persons or groups.

Procedure

When it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial to the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission, a proceeding looking toward the promulgation of Industry Guides may be initiated. In furtherance of an initiated proceeding, the Commission may at any time conduct such investigations, make such studies, and hold such conferences or hearings as it deems appropriate. Upon adoption in final form, Industry Guides are published in the Federal Register and reprinted for distribution in pamphlet form.

How Used

Industry Guides are one of the tools used to provide interpretations as to specific and particular practices falling within the purview of statutes administered by the Commission. The Guides are advisory in nature and, in connection with their administration, industry members whose practices are found to deviate from Guide provisions are generally afforded opportunity to correct such practices under the Commission's nonadjudicatory voluntary compliance procedure.

Trade Practice Rules and Guides

- 348 Artificial Limb Industry.
- 424 Auto Pack (Relating to the Retail Installment Sale & Financing of Motor Vehicles).
- 210 Barre Granite Industry.
- 418 Bedding Mfg. & Wholesale Distributing Industry (Push Money Rule added 1-14-55).
- 491 Blueprint and Diazotype Coaters Ind.
- 549 Braided Rug Industry.

- 468 Brick and Structural Clay Tile & Allied Products Industry.
- 253 Buff & Polishing Wheel Mfg. Ind.
- 516 Building Wire & Cable Mfg. Ind.
- 389 Button Jobbing Industry.
- 421 Candy Manufacturing Industry.
- 305 Canvas Cover Industry.
- 297 Carbon Dioxide Mfg. Industry.
- 378 Catalog Jewelry and Giftware Ind. (The Jewelry Ind. rules promulgated 6-28-57 superseded above rules only insofar as they apply to jewelry products).
- 207 Cedar Chest Mfg. Industry.
- 451 Chemical Soil Conditioner Industry.
- 195 China Recess Accessories Industry.
- 427 Cocoa and Chocolate Industry.
- 479 Combination Storm Window & Door Industry.
- 434 Commercial & Industrial Floor & Vacuum Machinery Industry.
- 469 Commercial Dental Laboratory Ind. (Amended 6-4-57).
- 162 Common or Toilet Pin Industry.
- 301 Concrete Burial Vault Mfg. Ind.
- 396 Construction Equipment Distributing Industry.
- 461 Corset, Brassiere, & Allied Products Industry (Amended 1-26-65).
- 286 Cosmetic and Toilet Preparations Industry.
- 269 Cotton Converting Industry.
- 298 Covered Button & Buckle Mfg. Ind.
- 125 Crushed Stone Industry.
- 350 Curled Hair Industry.
- 163 Cut and Wire Tack Industry.
- 108 Cut Stone Industry.
- 403 Doll & Stuffed Toy Industry.
- 176 Embroidery Industry.
- 455 Engraved Stationery & Allied Prods. Ind. of New York City Trade Area.
- 472 Environment Testing Equipment Mfg. Industry.
- 204 Fabricators of Ornamental Iron, Bronze and Wire Industry.
- 192 Feather & Down Products Industry (Rule 12 revised 5-29-59).
- 410 Fine & Wrapping Paper Distributing Industry.
- 259 Fire Extinguishing Appliance Industry (Rule 4 revised 5-29-59).
- 530 Fluorocarbons Industry.
- 349 Folding Paper Box Industry.
- 405 Fountain Pen & Mechanical Pencil Ind.
- 540 Fresh Fruit & Vegetable Industry "Free" trade practice rule.
- 452 Frozen Food Industry.
- 435 Gladiolus Bulb Industry.
- 175 Golf, Baseball & Athletic Goods Ind.
- 399 Grocery Industry.
- 470 Gummed Paper & Sealing Tape Ind. (Rule 5 revised 5-29-59).
- 387 Hand Knitting Yarn Industry.
- 411 Handkerchief Industry.
- 383 Hearing Aid Industry.
- 328 Hosiery Industry (Amended 6-10-64).
- 288 House Dress and Wash Frock Mfg. Industry.
- 402 Household Fabric Dye Industry.

- 198 Household Furniture Industry.
- 114 Ice Cream Industry (D.C. & Vicinity).
- 449 Industrial Bag and Cover Industry (Rules 6 and 13 revised 5-29-59).
- 329 Infants' & Children's Knitted Outerwear Industry.
- 287 Interior Marble Industry.
- 515 Jewelry Industry (Amended 12-2-59).
- 131 Knitted Outerwear Industry.
- 546 Kosher Food Products Industry.
- 252 Ladies' Handbag Mfg. Industry.
- 450 Library Binding Industry
- 385 Low Pressure Refrigerants Industry.
- 359 Luggage and Related Products Industry (Amended 6-16-64).
- 327 Macaroni & Noodle Products Ind.
- 529 Manifold Business Forms Ind.
- 339 Marking Devices Industry.
- 391 Masonry Waterproofing Ind.
- 487 Melamine Dinnerware Industry.
- 492 Metal Awning Industry.
- 313 Metal Clad Door & Accessories Mfg. Industry.
- 437 Metallic Watch Band Industry (Amended 6-16-64).
- 171 Milk Bottle Cap & Closure Industry.
- 250 Millinery Industry (Rule 2 revised 12-10-54).
- 79 Millwork Industry.
- 265 Mirror Mfg. Ind. (Amended 6-16-64).
- 185 Mopstick Industry.
- 380 Musical Instrument & Accessories Ind.
- 263 Narrow Fabrics Industry.
- 464 Nursery Industry.
- 390 Office Machine Marketing Industry.
- 415 Oil Heating Industry of New England.
- 314 Oleomargarine Manufacturing Industry.
- 409 Optical Products Ind. (Amended 8-1-66).
- 457 Orthopedic Appliance Industry.
- 520 Outlet and Switch Box Mfg. Industry.
- 332 Paint and Varnish Brush Industry.
- 134 Paper Bag Industry.
- 251 Paper Drinking Straw Mfg. Industry.
- 422 Parking Meter Industry.
- 419 Peat Industry.
- 541 Phonograph Record Industry.
- 411 Photoengraving Industry of the Southeastern States.
- 392 Piston Ring Industry.
- 486 Plastics Housewares Industry.
- 533 Pleasure Boat Industry.
- 300 Popular Priced Dress Mfg. Industry.
- 447 Portrait Photographic Industry.
- 335 Poultry Hatching & Breeding Industry.
- 258 Preserve Manufacturing Industry.
- 262 Private Home Study Schools Ind.
- 120 Public Refrigerated Storage Ind.
- 150 Public Seating Industry Push Money Rule.

- 337 Putty Mfg. Industry.
- 216 Rabbit Industry.
- 431 Radio & Television Industry.
- 317 Rayon & Silk Dyeing, Printing & Finishing Industry.
- 404 Rayon, Nylon and Silk Converting Ind.
- 384 Razor and Razor Blade Industry.
- 543 Rebuilt, Reconditioned & Other Used Automotive Parts Industry.
- 442 Refrigeration and/or Air-Conditioning Contracting Industries.
- 528 Residential Aluminum Siding Industry (Amended 8-12-66).
- 353 Resistance Welder Mfg. Industry.
- 303 Saw and Blade Service Industry.
- 342 Ripe Olive Industry.
- 345 Sardine Industry.
- 203 Saw and Blade Service Industry.
- 267 School Supply & Equipment Ind.
- 107 Scrap Iron and Steel Industry.
- 432 Seam Binding Industry.
- 153 Set-Up Paper Box Industry.
- 376 Shoe Finders Industry.
- 272 Shrinkage of Woven Cotton Yard Goods Industry.
- 425 Slide Fastener Industry.
- 538 Stationers Industry (Amended 6-16-64).
- 485 Steel Bobby Pin & Steel Hair Pin Mfg. Industry.
- 360 Subscription & Mail Order Book Publishing Industry.
- 363 Sun Glass Industry (Amended 7-31-64).
- 420 Tie Fabrics Industry.
- 526 Tire and Tube Repair Material Ind.
- 444 Tobacco Smoking Pipe, & Cigar & Cigar Holder Ind. (Rule 8 rev. 5-29-59).
- 220 Tobacco Distributing Industry (Amended 7-9-64).
- 293 Toilet Brush Mfg. Industry.
- 334 Tomato Paste Mfg. Industry.
- 412 Trade Pamphlet Binding Ind. of the New York City Trade Area.
- 292 Tubular Pipings & Trimmings Mfg. Ind.
- 341 Tuna Industry.
- 343 Umbrella Industry.
- 217 Uniform Industry.
- 429 Upholstery & Drapery Fabrics Ind.
- 423 Venetian Blind Industry.
- 400 Vertical Turbine Pump Industry.
- 371 Wall Coverings Ind. (Amended 6-16-64).
- 123 Walnut Wood Industry.
- 144 Warm Air Furnace Industry.
- 190 Waste Paper Dealers & Packers Ind.
- 382 Water Heater Industry.
- 454 Waterproof Paper Ind. (Asphaltic Type) (Rule 6 revised 5-29-59).
- 302 Wet Ground Mica Industry.
- 394 Wholesale Confectionery Ind. (Philadelphia Trade Area).
- 406 Wholesale Confectionery Industry.
- 460 Wholesale Plumbing & Heating Ind.
- 316 Wine Industry.
- 545 Wire Rope Industry.

- 308 Wood Cased Lead Pencil Industry.
- 90 Woodworking Machinery Industry.
- 475 Work Glove Industry.
- 367 Yeast Industry.
- 801 Tire Advertising Guides.
- 802 Guides Against Deceptive Pricing.
- 803 Guides Against Bait Advertising.
- 804 Guides Against Deceptive Advertising of Guarantees.
- 805 Guides for Advertising Allowances and Other Merchandising Payments & Services, Compliance with Secs. 2(d) & 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act.
- 808 Guides for Shoe Content Labeling and Advertising.
- 811 Guides for Advertising Fallout Shelters (Revised 6-14-65).
- 815 Guides for Advertising Shell Homes.
- 816 Guides for Advertising Radiation Monitoring Instruments.
- 819 Guides for the Mail Order Insurance Industry.
- 821 Guide for Avoiding Deceptive Use of Word "Mill" in the Textile Industry.
- 824 Guides Against Debt Collection Deception (Revised 4-2-68).
- 825 Guides Against Deceptive Labeling & Advertising of Adhesive Compositions (Amended 4-5-66).
- 839 Guide Against Deceptive Use of the Word "Free" in Connection with the Sale of Photographic Film and Film Processing Service.
- 841 Guides for the Watch Industry.
- 842 Guides for the Beauty & Barber Equipment & Supplies Industry.

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ADVISORY OPINION DIGESTS, JANUARY 17, 1969, THROUGH
SEPTEMBER 24, 1969—DIGESTS 314 THROUGH 366

[News releases, from Federal Trade Commission, Office of Information, Washington (D.C.)]

ADVISORY OPINION DIGEST No. 314.—ADVERTISING BY MANUFACTURERS IN AN
INDEPENDENTLY PUBLISHED PERIODICAL

JANUARY 17, 1969.

The Federal Trade Commission was recently asked to express an opinion with respect to the legality of payment by manufacturers for the purchase of advertising space in a periodical published by a firm which has no connection whatever with any retail customer of such manufacturers and which will supply or otherwise make the periodical available without cost to all retailers.

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate Sections 2 (d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry retailers; the periodical is not designed to be usable only by particular retailers, or classes or groups of retailers; every effort will be made to distribute the periodical as broadly as possible among industry retailers; and distribution will not be limited to any particular retailer, or group or class of industry retailers.

The Commission advised that if the periodical is made available, in a practicable business sense, to all competing customers of a participating manufacturer, then no objection would be raised to payments by that manufacturer for advertising space therein. Further, that appropriate measures should be taken by the publisher to advise participating manufacturers that the periodical will serve to supplement, not supplant, their usual methods of notifying retail customers regarding the availability of their sales programs and that advertising the details of such program in the periodical will not relieve them from this statutory obligation.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 315.—FOREIGN ORIGIN DISCLOSURE OF WEARING
APPAREL PARTLY MADE IN A FOREIGN COUNTRY

JANUARY 17, 1969.

The Commission announced today it had rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of textile products processed in Puerto Rico and the Dominican Republic from fabric produced in the United States, and thereafter exported to the mainland United States.

Specifically, the Commission ruled upon the following two questions:

1. Must a semi-manufactured product with less than 50% of the value added in a foreign country be labeled in any way before entering U.S. territory?

2. If said product is then finished in Puerto Rico and shipped for distribution in the U.S. mainland, can it be labeled "Made in U.S.A."?

In response to the first question, the Commission said that it will not be neces-

sary to disclose the foreign country of origin where less than 50% of the value is added to the product insofar as the laws of the Commission are concerned.

In regard to the second question, the Commission expressed the opinion that it would be improper to label such as product as "Made in U.S.A." because this would constitute an affirmative misrepresentation that the product is made in its entirety in the United States.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 316.—FOREIGN ORIGIN DISCLOSURE OF IMPORTED BEARINGS

JANUARY 17, 1969.

The Commission announced today it had rendered an advisory opinion in regard to the proper marking of imported bearings.

According to the facts presented in the matter, the top of the container in which the bearings will be packaged will carry the following statement: "The (word of a particular foreign country) Bearing". Also printed on the top of the container is the statement: "Made in (country of origin)". Etched on the outer race of each bearing is the inscription of the name of the foreign country of origin.

Most of the bearings are sold to domestic manufacturers who use said bearings in their manufacture of heavy earth moving equipment and farm machinery. The bearings normally represent less than 2% of the total cost of the finished equipment. Domestic manufacturers who use the bearings in their production of machinery and equipment compete with one another for both domestic and foreign markets.

Specifically, the following two questions were raised:

1. Are the bearings marked with sufficient clarity to disclose they are manufactured in a certain foreign country?
2. Is it necessary for the manufacturers who use the imported bearings in their machinery and equipment to disclose the country of origin of the bearings?

In response to the first question, the Commission said that its examination of the markings revealed they were adequately marked to show their foreign country of origin.

With respect to the second question, the Commission said that it would not be necessary for the manufacturers who use the bearings in their machinery and equipment to disclose the foreign country of origin of the bearings.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 317.—TUITION REFUNDED IF NO JOB OFFERED WITHIN 90 DAYS

JANUARY 28, 1969.

The Commission advised that it could not rule on advertising for a school which would offer a refund of all charges for tuition, registration and incidental fees to its graduates who do not receive an offer of employment within 90 days after graduation.

The offer will be subject to the following three qualifications:

1. It will not be made to students eligible for imminent draft into the armed forces.
2. The student must use the placement service of the school and must be available for interviews.
3. The student must work at placement through other sources.

Although the advertising did not so state, the offer of employment would not be considered valid by the school unless the offer is limited to the geographic area specified in the student's application form.

Because the proposed plan may be subject to such a wide variety of interpretations, and also depending upon the amount and extent of its implementation, the Commission expressed the view that it was not in a position to rule upon the legality of the plan.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 318.—COMMISSION REFUSAL TO GRANT BLANKET APPROVAL TO SMALL DAIRY TO BE ACQUIRED BY ANY CORPORATION SUBJECT TO COMMISSION ACQUISITION-PROHIBITING ORDERS

FEBRUARY 4, 1969.

The Commission recently rendered an advisory opinion in response to a pre-merger clearance request from the owner of a small dairy who wants to sell the business to any one of three national firms in the dairy industry, two of which are subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by orders prohibiting certain acquisitions are free, of course, to apply for prior approval to acquire the applicant's business.

From the data submitted by the applicant, it appears that his business continues to operate profitably despite extremely competitive and rapidly changing conditions in the milk industry in his area. The applicant enjoys a substantial share of the markets in which he operates. No evidence was presented of any attempts to sell the business to any other independent dairy firm or to anyone now outside the dairy industry.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 319.—SALES PRICE AND LEASE RATE FOR A BOOK NEED NOT BE IDENTICAL

FEBRUARY 4, 1969.

The Commission recently issued an advisory opinion concerning charges by a publisher in connection with the distribution of its publications.

The publisher offers reference books to customers on lease (the publisher picks up the obsolete volumes upon the issuance of a new edition or upon the expiration of the lease) or for purchase.

The Commission advised the publisher that no law administered by the Commission requires it to charge the same amount for the lease as for the sale of a book.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 320.—DISCLOSURE OF ORIGIN OF IMPORTED COMPONENTS USED IN MANUFACTURE OF FIREARMS

FEBRUARY 7, 1969.

The Commission announced today it had rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of certain imported components to be used in the manufacture of revolvers and automatic pistols. If such disclosure is required, a question is raised as to the proper location of that disclosure.

Specifically, the advisory opinion involved the use of components imported from both Germany and Italy, such as barrels, cylinders and hammers. The remaining components were of domestic origin.

With respect to the question of whether a disclosure of the origin of the imported components would be required, the Commission said:

"In the absence of any evidence to the contrary, the Commission believes that the question of foreign origin disclosure largely depends upon the importance which prospective purchasers would attach to the fact, if known, that a substantial number of the components of the finished product are of foreign origin. It is the Commission's judgment that the imported components in both factual situations, namely, the barrels, cylinders and hammers, represent such an integral and essential part of the finished product that prospective purchasers would in all probability manifest a deep concern over their origin and manufacture. If such is the case, then the failure to reveal the origin of the imported components would play a vital, if not decisive, role in the customers' selection or purchase. Under these circumstances, the Commission is of the opinion that the

failure to reveal the country of origin of the imported components in both factual situations would likely result in deception to consumers and unfair injury to competitors."

In regard to the question of whether the disclosure should be made on the product or the container, the Commission cited the well-established general rule that the disclosure should be clear and conspicuous. This means, the Commission said, that it must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. If the merchandise is displayed in such a manner that a disclosure on the product would not be seen prior to the purchase thereof, it would be necessary to place the disclosure on the container. On the other hand, if the merchandise is displayed in a manner which would permit purchasers to observe the disclosure on the product, it would not be necessary to make a disclosure on the container.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 321.—SALE OF AMERICAN MADE PRODUCTS—
REFUSAL TO DEAL—EXPORT TRADE—FAIR PACKAGING AND LABELING ACT

FEBRUARY 7, 1969.

The Commission recently issued an advisory opinion to an American manufacturer in response to his request concerning sale of one of his products, with or without labels. He asked for the opinion because a dealer in another state has recently placed a substantial order for the product, specifying that it must be shipped in unlabeled containers. The supplier believes the dealer may intend to resell the product in export trade. The manufacturer does not enjoy a monopoly.

The Commission advised the applicant that, under laws administered by the Commission.

"(1) You may legitimately refuse to sell a specific product to a customer who asks for it in an unlabeled container :

"(2) No labels are required on American made merchandise sold in export trade; however, an American exporter should determine what foreign laws govern the operations; and

"(3) Packaging and labeling of domestically sold consumer commodities are governed by the Fair Packaging and Labeling Act (Pub. Law 89-755) and the regulations issued thereunder. (A copy of the Act and regulations as issued by FTC are enclosed for your guidance.) 'Asco' Opaque, as described in your correspondence, is a consumer commodity as defined in Section 10(a) of the Act, therefore packaging or labeling of this product must be in accordance with the regulations. However, Section 500.2(d) of the regulations which defines the term 'package' contains several exceptions which appear to apply to the facts in your situation. In addition, your attention is invited to the exception contained in Section 500.2(e) wherein the term 'label' is defined. Subsection (2) excepts, from application of the regulations, written, printed or graphic matter affixed to or appearing upon commodities sold or distributed to industrial or institutional users."

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 322.—SUPPLIER ADVERTISING IN AN INDEPENDENTLY
PUBLISHED PERIODICAL

FEBRUARY 7, 1969.

The Federal Trade Commission was recently asked to express an opinion with respect to the publication and distribution of a monthly publication designed to supply wholesale and retail outlets, without cost to them, with information concerning promotional allowance programs instituted by manufacturers selling to such outlets, and with particular reference to two specific questions:

1. Will a manufacturer who places in the publication a clear and timely description of the terms of a promotional program offer and the conditions

upon which payments will be made be regarded as having notified a customer, who in fact receives the publication, of the availability of that promotional offer?

2. In the case of a promotional offer which extends over a six-month period, will such manufacturer be regarded as having so notified a retailer, who in fact receives the publication each month, if the description is placed therein only once, prior to or at the beginning of the six-month period? If not, how often must the notice be republished? At three-month intervals? In each monthly issue?

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned nor controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate Section 2 (d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry wholesalers and retailers. The periodical is not designed to be usable only by particular resellers, or classes or groups of resellers; every effort will be made to distribute the periodical as broadly as possible among industry resellers; and distribution will not be limited to any particular reseller, or group or class of industry resellers.

The Commission advised that if the periodical is made available, in a practical business sense, to all competing industry resellers of a participating manufacturer's products, then no objection would be raised to payments by that manufacturer for advertising space therein.

Regarding the two specific questions, the Commission advised that although a listing by a manufacturer of the details of his promotional allowance program in the publication would appear to be adequate and sufficient notification to recipients thereof that such programs are available and under what specific conditions, such listing does not, however, relieve any manufacturer-advertiser from his statutory obligation of informing those resellers who may not receive the publication regarding the availability of such program.

And further, as to the second specific question, in view of the fact that the publisher will update the master mailing list every three months, the Commission required that notices of extended promotional offers be republished each calendar quarter. It was pointed out, however, that the quarterly notice republication requirement was being imposed to coincide with presented facts and that notice given at less frequent intervals may be adequate in other situations. If the required notice is in fact given it is immaterial whether it is republished at any particular interval of time so long as all those entitled to promotional assistance are made aware in timely fashion of any benefits to which they may be entitled under a published program.

Commissioner MacIntyre would have agreed with the Commission's position to advise this applicant that in that event it should utilize the proposed course of action the Commission would not initiate proceedings against such course of action. However, he does not agree with the Commission's use of the language it did use in this advice because of its indication that the Commission has made an adjudicative matter out of a non-adjudicative matter and without an adequate record for such action.

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ADVISORY OPINION DIGEST NO. 323.—DISCLOSURE OF IMPORTED ELECTRONICS EQUIPMENT

FEBRUARY 13, 1969.

Rather than labeling an imported product as "made" in a certain foreign country, the Commission said it would interpose no objection to a disclosure which stated that the merchandise was a "product" of a certain foreign country.

The advisory opinion was rendered in response to a request from an importer of electronics equipment which enters the United States in a completely finished state. Included in the equipment are radios, tape recorders, transceivers, etc.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 324.—FREE HOSIERY

FEBRUARY 27, 1969.

The Commission announced today it had rendered an advisory opinion in regard to the propriety of advertising which offers information for "free hosiery for life" in connection with the sale of hosiery.

According to the proposed plan, one who responds to the advertisement will receive information offering the recipient a job selling hosiery, and for every certain number of hosiery which is sold the recipient will receive a free pair of hosiery.

In the advisory opinion which was rendered, the Commission said that the use of the word "free" under the above circumstances would be deceptive and therefore in violation of Section 5 of the Federal Trade Commission Act, unless the initial advertisement and any subsequent promotional material contains a clear and conspicuous disclosure of all the conditions or prerequisites to the receipt and retention of the free merchandise.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 325.—MARKETING TEN YEAR OLD EQUIPMENT AS NEW IS DECEPTIVE

FEBRUARY 27, 1969.

The Commission recently issued an advisory opinion concerning the marketing now as "new" of ten year old equipment which has never been used and is still in the original shipping cartons.

The Commission wrote the applicant for the advisory opinion:

"According to the information you submitted, your company is not the original manufacturer of the equipment you are interested in marketing as 'new'. Further, it is understood you have recently obtained a license to manufacture similar equipment. Also, you state there have been no model changes since the ten year old equipment was produced.

Having considered the matter, the Commission hereby advises you that you would risk violating Section 5 of the Federal Trade Commission Act if you marketed the ten year old equipment as 'new'; such an act would clearly be deceptive. Of course, you are free to describe the equipment accurately and disclose that it is ten years old and has never been used."

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 326.—COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR PRODUCT ASSEMBLED IN PUERTO RICO OF DOMESTIC AND FOREIGN COMPONENTS

FEBRUARY 27, 1969.

The Commission's opinion was recently requested as to the legality of marking as "Made in the U.S.A." a Puerto Rican produced product composed for the most part of domestic components but containing some components originating in the United Kingdom.

In the Commission's view, the unmodified marking "Made in U.S.A.", or equivalent, would be an affirmative representation that the product in question is in its entirety of domestic origin.

Since in the situation described, the product in question is not wholly of domestic origin the Commission is of the opinion that the marking "Made in U.S.A.", or equivalent, would be improper, unless additional and accurate disclosure is made of the presence of the imported components.

The requesting party was further advised that the Commission would not object if the product in question were to be marketed with no accompanying identification of, or claim as to, country of origin.

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ADVISORY OPINION DIGEST No. 327.—DISCLOSURE NOT REQUIRED OF ORIGIN OF
IMPORTED UPPER MATERIAL USED IN SHOES

MARCH 4, 1969.

The Commission announced today it had rendered an advisory opinion to a manufacturer of athletic shoes stating that it would not be necessary to disclose the country of origin of the imported upper material.

The imported upper material will represent approximately $\frac{1}{3}$ of total material costs, and the remaining $\frac{2}{3}$ will be composed of material made either in the United States or Puerto Rico. Concluding that a disclosure of the imported upper material would not be required, the Commission said:

"In the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material."

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 328.—ORGANIZATION OF WAREHOUSE DISTRIBUTION
CENTER FOR A JOBBER BUYING GROUP

MARCH 4, 1969.

The Commission recently issued an advisory opinion warning of probable violations of law in the proposed organization by an automotive replacement parts manufacturers' representative of a warehouse distribution center-buying group of jobbers.

According to the information submitted, the applicant is now, and intends to continue to be, a sales agent for several automotive parts manufacturers. He proposes to organize and operate a warehouse distribution center for automotive parts, obtaining quantity discounts on purchases from suppliers and then reselling at a 5% to 7% markup to "member" jobbers. The quantities will be the result of pooled orders from the jobbers. Jobbers will be "members" only in the sense that they will contribute \$1,000 each to the applicant in return for the privilege of sharing some of the quantity discounts on purchases from suppliers. The applicant and his wife will be the sole owners, operators and employees of the warehouse distribution center. Drop shipments will be used when orders are large enough to obtain quantity discounts for the particular orders. The applicant intends to organize only one jobber in each of the smaller towns and perhaps two or more in large towns "where they would not be competing for the same customers." The center will place orders with manufacturers, receive goods not otherwise drop-shipped and distribute them, bill jobber-customers (i.e., "members"), and slowly accumulate an inventory in its warehouse.

The Commission is of the opinion that the applicant would probably violate Section 2(c) of the amended Clayton Act if he receives commissions from manufacturers who he represents as a sales agent on purchases for his own account for resale to jobbers.

The Commission also pointed out that, while buying groups of jobbers are not illegal per se, they may function in ways to violate Section 2(f) of the amended Clayton Act if they refuse membership to jobbers who compete with each other and thereafter obtain unjustified price discriminations.

For further information, also enclosed in the advisory opinion letter was a statement released November 25, 1966, by the Commission concerning drop-shipping in the automotive replacement parts industry.

Commissioner Elman did not concur in the foregoing action.

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ADVISORY OPINION DIGEST No. 329.—DISSEMINATION OF UNIFORM WARRANTY
PLAN BY TRADE ASSOCIATION TO MEMBERS

MARCH 19, 1969.

The Commission recently rendered an advisory opinion to a trade association of retailers that its proposal to circulate a uniform warranty among its membership would likely result in violation of Commission administered laws.

The warranty in question, applicable within 100 miles of a dealer's store, provides:

"The extent of the liability of this firm to service merchandise purchased from us is limited to this policy and it is in addition to any written guarantee included from the manufacturer involved.

"Under conditions of normal usage, our store warrantees (sic) our (products) to be free from defects in workmanship and structural materials for a period of one year from the date of purchase. This guarantee does not apply to damages resulting from negligence, misuse, or accidents.

"We will repair or replace at our option any defective item, or part, at absolutely no charge. In determining the cause or nature of the defect, and the manner of repair; the judgment of this firm will be final."

The Commission concluded that it could not render advice with respect to that portion limiting retailer liability to the warranty terms nor to the comment that the warranty is in addition to any manufacturer's written guarantee. This position was taken for the reason that the question of warranties is being currently examined, specifically as they relate to the automotive industry, and any Commission statement along these lines at this time would be premature.

Nor could the Commission approve the remainder of the proposed warranty for the reason that it is not a simple, generalized guideline intended to assist the membership in drafting warranties embracing their own terms but is, in fact, an actual one year warranty incorporating predetermined and definite terms and conditions for use without change by members. For this reason the Commission advised that should the proposed warranty be selected by all or a substantial number of Association members the likely purpose and probable result would be the adoption of anti-competitive uniform terms and conditions by the membership and would, therefore, be objectionable.

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ADVISORY OPINION DIGEST No. 330.—PROPOSED ADVERTISING FOR ORTHOPEDIC PILLOW

MARCH 19, 1969.

The Commission was recently requested to render an advisory opinion with respect to proposed advertising for a pillow intended for orthopedic and therapeutic purposes, which would represent that the device was designed for use in cervical spine, low back pain cases and by cardiac patients.

The opinion advised the advertiser that while the Commission has no objection to representations that the device might afford temporary relaxation and comfort under certain conditions, any representations in advertising that the pillow is health device particularly useful for cervical spine, low back pain and cardiac cases would appear to have the capacity and tendency to deceive.

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ADVISORY OPINION DIGEST No. 331.—DISCLOSURE OF ORIGIN OF IMPORTED FOOD PRODUCT

MARCH 19, 1969.

The Commission rendered an advisory opinion to a trade association which involved the question of whether it is necessary to disclose the origin of an imported food product. Imported in its entirety, the product is later sliced and packed in containers in the U.S. for sale to the general public.

Ruling that the product's origin must be disclosed, the Commission said:

"... as to this product, the country of origin may be a material fact to many consumers in deciding whether to make a purchase, and that it should therefore be disclosed to them in an appropriate manner at the point of sale."

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ADVISORY OPINION DIGEST No. 332.—PUBLICATION OF ADVERTISING STANDARDS BY
PRIVATE ASSOCIATION

MARCH 19, 1969.

The Commission recently announced its approval of advertising and selling standards proposed for publication by a private association.

The association has come to believe that certain unfair and deceptive practices are being used by a number of firms providing a particular service. It has therefore devised a "Statement," similar to a Code of Ethics, setting forth a number of practices which have heretofore been found unlawful by the Commission and which should not be engaged in by members of the industry. It proposes to invite industry members voluntarily to agree to avoid such practices as "bait" advertising, false disparagement of competitors, deceptive pricing, deceptive advertising of guarantees, and misleading use of the word "free".

The objective of the "Statement" is to maintain accuracy and truth in advertising and selling of the service involved. Among other things the "Statement" provides, all advertising shall be accurate and clearly disclose the true nature of the offer. Advertising as a whole should not create a misleading impression, even though each statement or illustration, when considered separately, may be literally truthful. Advertisers at all times should be in a position to substantiate the accuracy of any claims made in their advertising."

The Commission advised that:

"As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, the Commission would have no objection to your proposed document as written, or its proposed use."

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ADVISORY OPINION DIGEST No. 333.—MANUFACTURER-WHOLESALE RELATIONSHIPS: DIFFERENT DISCOUNTS; REFUSAL TO DEAL; TERMINATION OF FURTHER SALES

APRIL 18, 1969.

The Commission recently issued an advisory opinion in response to a request from a manufacturer concerning several courses of action he proposes to take in his sales relationships with wholesalers.

The manufacturer now grants all wholesalers a 40% discount off the list price of his products. Proposed are new contracts, providing the 40% discount to a Full Service Dealer or Wholesaler who performs certain specified functions, and only 25% to a Part Service Dealer or Wholesaler "who does not fulfill all the functions set forth" in the definition provisions for a Full Service Dealer or Wholesaler.

The Commission advised:

"To the extent that an additional discount is sought to be justified on the basis of functional services such as stocking and display performed by so-called Full Service Dealers or Wholesalers [function No. 4 of applicant's proposed wholesaler agreement], no advisory opinion can be provided at this time because the Commission contemplates an inquiry looking toward a rule-making proceeding involving this question as it pertains to another industry.

"Moreover, as to the other functional criteria for Full Service Dealers or Wholesalers set forth in applicant's proposed wholesaler agreement, the Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him.

"You also ask if you may refuse to deal with a wholesaler in one town who is reselling your products to wholesalers in another town. The Commission is of the opinion that such refusal to deal could amount to a violation of Section 5 of the Federal Trade Commission Act. Therefore, the Commission cannot approve the proposal.

"Additionally, you ask if you may terminate further sales to a wholesaler who is establishing his own network of wholesale dealers, obligated by contract to purchase their supplies exclusively from him. This wholesaler, as does the one involved in your second request, is departing from the traditional role of the wholesaler in the beauty and barber supply business by refusing to confine his sales to beauty schools and salons and has, in effect, entered into competition with your company as a supplier of [your] products to wholesale

dealers. The facts provided do not give any basis for viewing the wholesaler's exclusive dealing arrangements as violative of the antitrust laws. Without reaching the question of whether you might terminate further sales to the wholesaler if the exclusive dealing contracts were illegal, the Commission believes your proposed termination of the wholesaler would appear to be anti-competitive and thus contrary to the provisions of Section 5 of the Federal Trade Commission Act. The proposal, therefore, cannot be approved."

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ADVISORY OPINION DIGEST No. 334.—LOCATION OF FOREIGN
ORIGIN DISCLOSURE

APRIL 18, 1969.

The Commission advised an importer of candles and candle holders in regard to the proper location of the foreign country of origin disclosure thereof.

After importation, the product will be assembled in a combination blister package of 8 candles and 8 holders on a display card for resale to the general public. The imported holders and candles will be marked with their respective country of origin. However, this identification as to foreign origin will not be readily seen by prospective purchasers making a casual inspection of the merchandise prior to the purchase thereof.

In regard to the question of whether the disclosure should be made on the product or on the fact of the display card, the Commission said:

"... the general rule is that the disclosure must be clear and conspicuous. This means that it must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof."

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ADVISORY OPINION DIGEST No. 335.—REFUSAL OF MEMBERSHIP IN
TRADE ASSOCIATION

APRIL 18, 1969.

A national trade association recently asked the Commission if the association might properly refuse membership to a member's competitor at the member's insistence.

The Commission noted that, as a general rule, a trade association may deny membership for failure to meet reasonable qualifications, but may not deny membership to a potential member if to do so would unreasonably restrain interstate or foreign trade or commerce.

Since no information was submitted as to why a member publisher would want to refuse membership to a competitor or as to what the competitive effects of such a refusal would be, the Commission was unable to be more specific with respect to the question than the statement of the general rule set forth above. In the absence of such information, the Association would have to make its own determination as to the propriety of any specific denial of membership within the confines of the general rule as it applies to conditions which exist in its industry.

Thus while the Commission could not categorically rule that denial of membership under the conditions described would be illegal, it also could not give its affirmative approval to the proposal because of the factual uncertainties involved.

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ADVISORY OPINION DIGEST No. 336.—LEGALITY OF MEMBERSHIP BY BREWER IN
BEER WHOLESALERS' TRADE ASSOCIATION

APRIL 16, 1969.

Responding to an application from a beer wholesalers' association the Commission recently advised the applicant that:

"... it is not illegal *per se* for suppliers to belong to a wholesalers' trade association, but particular care must be exercised to avoid violation of law. In

the case of an industry where distributors are in a weak bargaining position, *vis-a-vis*, their suppliers and where the industry on the supply side is concentrated, these circumstances may lead to vertical restraints on the distributors violative of the antitrust laws for example in the area of pricing decisions. These considerations may apply in the case of the beer industry. The necessity of preserving its members' independence in making business decisions should, of course, be taken into consideration by trade association when they formulate membership policies.

"The Commission further advised the applicant that it is not a violation of the antitrust laws to exclude suppliers from membership in a wholesalers' organization."

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 337.—DISCLOSURE OF ORIGIN OF IMPORTED HAND SPRAYERS AND SQUEEZE BOTTLES

APRIL 25, 1969.

The Commission recently issued an advisory opinion concerning the proper labeling as to the origin of imported, small, plastic, hand-operated sprayers and two-piece plastic squeeze bottles.

The applicant advised the Commission that the imported articles would be sold in quantity to manufacturers or suppliers of cleaning liquids or other industrial accounts. These purchasers would furnish the imported articles to industrial users for dispensing cleaning liquids supplied by these purchasers.

The Commission advised the applicant that on the basis of the facts as presented the country of origin of the imported sprayers or squeeze bottles should appear conspicuously on the cartons in which they are shipped to his customers. In the absence of any affirmative representation that these products are made in the United States or any other representation that might mislead the ultimate purchasers or users as to the country of origin and in the absence of any other facts indicating actual deception, the failure to mark the origin of these articles on them would not be regarded by the Commission as deceptive. Accordingly, no marking is required on these articles with reference to the country of origin.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 338.—DISCLOSURE OF ORIGIN OF IMPORTED SEAM RIPPER BLADES

APRIL 25, 1969.

The Commission announced it had rendered an advisory opinion concerning the proper marking of the origin of seam ripper blades imported from Germany. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 339.—DISCLOSURE OF ORIGIN OF IMPORTED FISHING LURES

APRIL 29, 1969.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure at the point of sale of the foreign country of origin of its imported fishing flies.

Under the factual situation presented in the ruling, the flies will be shipped to retailers for resale packaged one dozen loose in a plastic box. Each box will contain from 1 to 4 flies made in a foreign country and 8 to 11 flies of domestic origin. Fishermen normally will purchase the flies single and not by the dozen.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 340.—LOCATION OF DISCLOSURE OF FOREIGN ORIGIN

APRIL 29, 1969.

In response to a request for an advisory opinion, the Commission announced it had advised an importer of fuel injection parts and units, which are to be used as replacement parts in engines, that it could disclose the foreign origin thereof on the container rather than on the product.

The engines are purchased by industrial and commercial users, and by individual consumers as well. Whenever possible, the imported products will be marked with the country of origin on the nameplate. Furthermore, the imported parts and units may be packaged individually or in certain specific quantities per box. Because a number of the imported replacement parts are either too small to permit country of origin identification on the product itself, or may have highly finished surfaces which would be destroyed with marking, the question was raised as to whether it would be permissible to make the disclosure only on the container.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 341.—DISCLOSURE OF ORIGIN OF IMPORTED MOTORS

MAY 1, 1969.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of certain electric motors or components thereof which are imported from Poland.

According to the facts presented by the requesting party, the imported motors will be attached in the United States to domestically-made gear trains. Moreover, the imported motor will represent approximately one-third of the total cost of the finished unit, i.e., the motor and the gear train.

Concluding that a disclosure would not be required under these circumstances, the Commission said:

"In the absence of any affirmative representation that the imported motors are made in the United States, or any other representation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts presented, the failure to mark the origin of the imported motors or components thereof will not be regarded by the Commission as deceptive." Chairman Dixon and Commissioner MacIntyre disagree because they believe the advice is improper.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 342.—LOCATION OF TERM "IRREGULAR" TO DESCRIBE SHIRTS

MAY 1, 1969.

In response to a request for an advisory opinion, the Commission advised a manufacturer that irregular men's dress and sport shirts should be stamped "irregular" on the neck band, not on the shirttail.

Whenever an affirmative disclosure is required, the Commission said, it is a well-established principle that it must be made with such clarity that it will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Because of the manner

in which shirts are ordinarily folded and displayed at the point of sale, the Commission added, an "irregular" stamp on the shirttail would not normally be seen by prospective purchasers until after the sale has been consummated.

Concluding that the disclosure should be made in the neck band, the Commission said:

"Although the disclosure may be placed in any location so long as it complies with the aforementioned principle, experience indicates that the best possible location in most cases would be in the neck band. This is where most prospective purchasers look at a shirt because this is where the size and fiber identification normally are placed. Under these circumstances, therefore, the Commission would not accept a disclosure made on the shirttail. It would, however, accept a legible disclosure made in the neck band as being in compliance with Sec. 5 of the FTC Act."

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 343.—DISCLOSURE OF ORIGIN OF IMPORTED CIRCULAR SAW DISCS

MAY 2, 1969.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of imported circular steel saw discs.

After importation, the manufacturer will add tungsten carbide tips to the imported discs. Domestic parts and labor represent approximately 80% of total production costs, with the remaining 20% representing the cost of the imported discs. The finished blades will be sold to cabinet shops, schools, builders, industrial concerns and hobbyists.

Commissioner MacIntyre did not concur.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 344.—PREMERGER CLEARANCE NOT GRANTED: GROCERY STORES IN CONCENTRATED MARKET

MAY 2, 1969.

The Commission recently advised an applicant for an advisory opinion that it cannot grant clearance for a proposed merger of two grocery retailing corporations operating in the same metropolitan marketing area.

Applicant is the owner of 3 supermarkets having 1.5% share of the particular market. The proposed purchaser is a regional supermarket chain having 18% to 20% of the same market with a ranking of second among all the companies selling groceries in the area. The market is concentrated with the four leading companies sharing 57% according to one survey and 74% of all sales as calculated by another analyst.

The Commission advised the applicant that it believes that the proposed merger would raise substantial questions of legality under the merger laws and that it therefore cannot grant the clearance requested.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 345.—SURVEY OF CERTAIN PROFESSIONAL COMPENSATION IN INSTITUTIONS

MAY 5, 1969.

The Commission recently issued an advisory opinion with respect to a proposed survey of certain professional compensation in employing institutions.

The applicant proposed to conduct a survey of employing institutions by means of a questionnaire to ascertain the compensation being paid to specified professionals. Respondents to the questionnaire would not be identified. The results of

the survey would be reported as national and regional averages and they would be published and distributed to the trade and public press. No conclusions would be drawn nor would recommendations be made.

The Commission advised the applicant that implementation of the proposed course of action in the manner described probably would not violate any of the laws administered by the Commission.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 346.—PROMOTER'S RESPONSIBILITY IN TRIPARTITE PROMOTIONAL ASSISTANCE PLAN

MAY 5, 1969.

The Commission recently issued an advisory opinion relative to the duty and responsibility under the laws administered by the Commission of a promoter or intermediary in a tripartite promotional assistance plan.

The Commission expressed the view that the fact that an intermediary is positioned between the supplier and the supplier's customers does not affect the applicability of the law to the plan. Such a plan must still provide all of the supplier's customers who compete with each other in reselling his products an opportunity to participate on proportionally equal terms. In this regard, the plan should contain suitable alternatives for customers who may be unable, as a practical matter, to participate in the primary proposal.

The legality of such arrangements, in the Commission's view, is measured by whether the promoter and the suppliers using the plan have met this obligation toward the supplier's customers or whether participating customers have actual or constructive knowledge that they disproportionately benefit under the plan.

In the light of these general principles, the Commission declined to approve the proposed promotional plan for two reasons—(1) the proposal did not appear to be a complete plan offering practical alternatives for those customers unable to participate in the primary proposal, and (2) even if it did contain alternatives usable by all competing customers, they would apparently not all be notified of the entire plan so that each may choose which alternative is suitable for his own use.

The Commission stated that if the proposed promotional assistance plan were implemented, Section 2 (d) or (e) of the Clayton Act, is amended, and/or Section 5 of the Federal Trade Commission Act would probably be violated.

Commissioner Elman did not concur in this action of the Commission.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 347.—DISCLOSURE OF ORIGIN OF IMPORTED SHOES

MAY 8, 1969.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure of the foreign country of origin of its imported shoes.

Under the factual situation present in the ruling, it was assumed that the shoes were entirely of foreign manufacture and after importation they were to be sold to the general public.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 348.—DISCLOSURE OF ORIGIN OF IMPORTED TURPENTINE

MAY 24, 1969.

The Commission advised a company that a "Packaged in U.S.A." statement standing alone would not be sufficient, and that it would be necessary to make a clear and conspicuous disclosure on the package of the foreign country of origin of the imported turpentine.

Under the factual situation presented for a ruling, the company plans to import turpentine from either Portugal or the U.S.S.R. After importation, the turpentine will be repackaged here in the United States into one gallon, one quart and one pint containers for resale for general consumer use.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGESTS NOS. 360 THROUGH 363

AUGUST 14, 1969.

The Federal Trade Commission today made public the following advisory opinion digests. In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinions themselves and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 360.—USE OF DESCRIPTIVE PHRASE TO DESCRIBE FURNITURE

The Commission recently issued an advisory opinion with respect to the use of a descriptive phrase such as "[Trade Name] furniture combines modern production methods with hand-carving and finishing" to refer to certain furniture.

The manufacturing procedure for the furniture calls for a prototype to be completely constructed and carved by hand. Then, the prototype becomes a pattern for an intricate machine which "rough cuts" the carvings on subsequent pieces for assembly production. Each piece so manufactured then has intricate hand detailing, carving and finishing to the extent that each piece is, in fact, different in artistic detail from the one which follows it. Each piece is numbered and signed by the craftsman who completes it.

The Commission expressed the view that using a descriptive phrase such as "[Trade Name] furniture combines modern production methods with hand-carving and finishing" to refer to furniture manufactured in the manner described probably would not violate the Federal Trade Commission Act, Section 5.

ADVISORY OPINION DIGEST No. 361.—CREDIT REPORTING PLAN BY TRADE ASSOCIATION

In response to a request for an advisory opinion, the Commission ruled that it would interpose no objection to a credit reporting plan by a trade association, as long as five conditions are met.

The proposed plan would cover only past due accounts in three categories: (1) where legal suit has been filed, (2) those accounts which have been turned over to a bona fide collection agency, and (3) where the debtor has gone into bankruptcy. The secretary of the association would keep a list of such accounts reported to her by the active members. In response to an inquiry from an active member concerning a particular customer, the secretary would, without disclosing the name of the reporting member, advise the inquiring member whether or not any one of the three aforementioned adverse credit actions had been reported. Available only upon the specific request of an active member, the credit information would not be for broad publication to all members of the association.

In addition, a reporting member would have to submit, evidence in support of any one of the three adverse credit actions being reported. Absent such evidence, the reporting member would have to refer the secretary of the association to a reliable source where this information could be confirmed. The purpose of this requirement is to prevent the reporting of any rumors with respect to a customer's credit rating.

The Commission advised that the exchange of credit information concerning delinquent debtors through a trade association is not unlawful under Sec. 5 of the FTC Act provided:

(1) the members of the association are left free to determine on the basis of their individual judgment whether or not to sell to delinquent debtors and on what

terms; (2) there is no agreement among members in regard to credit terms, prices, or any other joint action which illegally restrains trade; (3) that the reporting member indicates that a debt turned over to a collection agency was treated by the debtor as offset or was otherwise disputed, where that is the case; (4) the association furnishes to the debtor the same credit information reported by a member at the time the request is answered; and (5) in order for the debtor to have the opportunity to correct his credit record, if he believes it needs correcting, the association must pass on to the inquiring member any explanatory statements which the debtor may submit; the identity of the inquiring member need not be revealed to the debtor. As long as the proposed plan meets these five requirements in actual operation, the Commission would interpose no objection with respect thereto.

ADVISORY OPINION DIGEST NO. 362.—FULL DISCLOSURE OF FACTS NECESSARY WHEN SELLER OF ONE PRODUCT MAKES GIFT OF ANOTHER PRODUCT TO PURCHASER IN EXCHANGE FOR NAMES OF PROSPECTIVE PURCHASERS

In response to a request for an advisory opinion, the Commission advised a manufacturer under an order prohibiting it from representing, directly or indirectly, that its products can be had at no cost to the purchaser or that such products can be had in exchange for the names of a given number of prospective purchasers, unless a full and complete disclosure is made of the facts and circumstances surrounding the offer, that it consider the following to constitute sufficient disclosure:

1. Purchaser to furnish, at time of purchase, the names and addresses of six prospective purchasers.

2. Prospects must reside in the sales area of manufacturer's distributor making the original sale.

3. For voluntarily furnishing such names and addresses purchaser will receive, without charge, another specifically designated product of the manufacturer.

4. The additional product will be presented immediately upon completion by the purchaser of the names and addresses of the six prospective purchasers requested.

5. Any representation or arrangement not contained in this disclosure shall not be binding upon the manufacturer or its distributor.

6. No purchaser is required to participate in the program. Participation is strictly voluntary on the part of the purchaser.

ADVISORY OPINION DIGEST NO. 363.—PRICING OF REPLACEMENT GLASS FOR AUTOMOBILES

The Commission recently issued an advisory opinion with respect to the pricing system of a dealer in replacement glass for automobiles.

The dealer would grant discounts from the list price of automobile window glass to all customers. If an individual purchases a window, he would receive a discount of 20% from list price. If an insurance company sends the individual in, the discount would be 30%. (In this case, the bill would be sent to the insurance company and the individual.) If an automobile garage purchases the glass, the discount would be 50%. All sales are made within one state.

The Commission expressed the view that implementation of the proposal in the manner described and under the circumstances stated probably would not violate any law administered by the Commission.

ADVISORY OPINION DIGESTS NOS. 364 THROUGH 366

SEPTEMBER 24, 1969.

The Federal Trade Commission today made public the following advisory opinion digests. In conformity with Commission policy concerning publication

of digests of advisory opinions, this news release is the only material of public record. The advisory opinions themselves and all background papers are confidential and are not available to the public.

ADVISORY OPINION DIGEST No. 364.—ORIGIN DISCLOSURE OF IMPORTED CERAMIC THREAD GUIDES

The Commission recently issued an advisory opinion relative to the disclosure of the foreign origin of imported ceramic textile and thread guides.

The Commission understood that the guides are the size of a dime and that it is difficult, if not impossible, to mark the country of origin on each guide during production. Markings after production is completed would be very difficult and very expensive. The guides are not sold to the general public, but are used in industry for the manufacture of other products.

The Commission expressed the view that conspicuously marking on the package or container in which the guides would be shipped to their ultimate user the words "Made in [name of country] exclusively for [name of importer]" would be an adequate disclosure of the country of origin provided the guides were made exclusively for the applicant.

ADVISORY OPINION DIGEST No. 365.—REQUEST DENIED FOR APPROVAL TO SELL DAIRY COMPANY TO ANY DAIRY COMPANY UNDER COMMISSION ORDER

The Commission recently rendered an advisory opinion denying a request of a medium-sized dairy company for blanket approval to sell to any company under a Commission Order.

The company was the largest independent dairy company in its large marketing area, had the largest sales volume of dairy products in the area, had sales in excess of \$5,000,000, was profitable, no other hardships were demonstrated, and efforts to sell to companies not under Order had not been adequately explored.

The Commission advised that it cannot give blanket approval to sell the company in question to any company under Commission Order. It further advised that the denial of such request is without prejudice to the submission to the Commission by any company under Order of a request to purchase such dairy. In such event, any such submission will be duly considered by the Commission, and it will then decide upon the basis of the facts then presented.

ADVISORY OPINION DIGEST No. 366.—LABELING OF IMPORTED MAGNETIC RECORDING TAPE

The Commission recently issued an advisory opinion with respect to the labeling of imported magnetic recording tape.

In commenting upon the proposed labels as submitted, the Commission expressed the view that (1) the words indicating the foreign country of origin should appear on the front or principal display panel; (2) the term "recording tape" should be used as the specification of the identity of the commodity and that it should comprise a principal feature of the principal display panel; (3) in view of its understanding that recording tape is of uniform width, the length of the tape should be expressed in terms of feet followed in parentheses by a declaration of yards and common or decimal fractions of the yard or in terms of feet followed in parentheses by a declaration of yards with any remainder in terms of feet and inches; and (4) the place of business of the manufacturer, packer, or distributor should include the street address, city, State and Zip Code; however the street address may be omitted if it is shown in a current city directory or telephone directory.

The Commission invited the applicant's attention to its Regulations under Section 4 of the Fair Packaging and Labeling Act for additional information.

Total number of advisory opinions issued by Commission, 1962 through 1969

Fiscal year :

1962	1
1963	40
1964	30
1965	58
1966	46
1967	83
1968	136
1969	¹ 126

Total ----- 520

¹ Record Room reports show 127 adv. opins. for fiscal year '69. One Comm. action was not rec'd until after these figures were prepared.

Total number submitted to commission, 1962 through 1969

Fiscal year :

1962	¹ 1
1963	66
1964	41
1965	78
1966	68
1967	131
1968	173
1969	174

Total ----- 732

¹ For one month only.

By Statute—Total number of Advisory Opinions issued from fiscal years 1962 through 1969

Restraint of trade—Clayton Act :

Sec. 5	109
Sec. 2(a)	38
Sec. 2(c)	11
Sec. 2(d)	64
Sec. 2(e)	43
Sec. 2(f)	12
Sec. 6	1
Sec. 7	35

Webb-Pomerene ----- 2

Capper-Volstead ----- 3

Deceptive Practices :

Sec. 5	226
Sec. 12	19
Sec. 15	1

Textile Act ----- 11

Wool ----- 2

Fair Packaging and labeling ----- 2

Truth in Lending ----- 1

Total ----- 580

Total number of advisory opinion digests published, 1962 through 1969

Fiscal year :

1962	0
1963	0
1964	0
1965	2
1966	59
1967	76
1968	123
1969	99

Total ----- 359

FTC ADVISORY OPINIONS ISSUED, CLASSIFIED BY STATUTES, FISCAL YEARS 1962-69

	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of trade:								
FTC Act.....	0	6	11	10	10	19	25	28
Clayton Act:								
Sec. 2(a).....	1	5	2	2	1	9	12	6
Sec. 2(c).....	0	2	1	2	2	1	1	2
Sec. 2(d).....	0	10	4	6	11	12	12	9
Sec. 2(e).....	0	8	4	4	5	8	4	10
Sec. 2(f).....	0	2	3	2	0	1	2	2
Sec. 6.....	0	0	0	0	0	0	0	1
Sec. 7.....	0	4	2	8	1	3	6	11
Webb-Pomerene Act.....	0	0	0	1	1	0	0	0
Capper-Volstead.....	0	0	0	0	0	1	0	2

FTC ADVISORY OPINIONS ISSUED, CLASSIFIED BY STATUTES, FISCAL YEARS 1962-69

	1962	1963	1964	1965	1966	1967	1968	1969
Deceptive practices:								
FTC Act:								
Sec. 5.....	0	10	7	24	19	26	76	64
Sec. 12.....	0	0	0	4	0	5	6	4
Sec. 15.....	0	0	0	0	0	0	0	1
Textile and furs:								
Wool Act.....	0	0	0	0	1	0	1	0
Textile Act.....	0	0	1	0	0	0	2	8
Fair Packaging and Labeling Act.....	0	0	0	0	0	0	1	1
Truth-in-Lending Act.....	0	0	0	0	0	0	0	1

PROCEEDINGS OF THE SEVENTH ANNUAL CORPORATE COUNSEL INSTITUTE
HELD AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, ILL.,
OCTOBER 10 AND 11, 1968

(Edited by John C. O'Byrne)

THE USE OF ADVISORY OPINIONS AND VOLUNTARY COMPLIANCE PROCEDURES IN
DEALING WITH THE FEDERAL TRADE COMMISSION

(By Hugh B. Helm, Federal Trade Commission, Washington, D.C.)

A paper presented at the Seventh Annual Corporate Counsel
Institute, October 10 and 11, 1968. Copyright Northwestern
University School of Law, December, 1968

Mr. Chairman, Ladies and Gentlemen, it is a great pleasure for me to appear on the program of this highly regarded institute. Particularly, it is an honor for me to follow one of the leaders of the American Bar, Mr. Barton of White and Case.

This is a good time to remind you that the remarks I make today and the opinions on the law that I may enunciate are entirely my own and there may be or may not be someone at the Federal Trade Commission who agrees with me, probably not.

Nearly everybody knows that the Federal Trade Commission was established by Congress on request of President Woodrow Wilson by enactment in 1914 of the Federal Trade Commission Act. This Act gives the Commission jurisdiction over unfair methods of competition in commerce and unfair or deceptive acts in commerce. Of course there is much more than this is to the Act but these powers under Section 5 are the main ones you are interested in. The Commission has exercised jurisdiction over nearly every kind of business in America under the Federal Trade Commission Act. This Act supplements the Sherman Act. Sherman Act violations are stopped in their incipency as unfair methods of competition under this our basic act.

The mission of the Federal Trade Commission very simply put was and is to preserve competition in business. President Wilson said:

"The businessmen of the country desire something more than that the menace of legal process... be made explicit and intelligible. They desire the *advice*, the definite *guidance* and *information* which can be supplied by an administrative body, an interstate trade commission."

The general jurisdiction conferred on the Federal Trade Commission by the FTC Act, particularly Section 5 of the FTC Act, places in the Commission the duty to stop "unfair methods of competition in commerce, and unfair and deceptive acts or practices in commerce." Violations of the Sherman Act have been held to be unfair acts of competition under the FTC Act.

Now there is also a special jurisdiction conferred on the Federal Trade Commission by several special statutes passed by Congress since the FTC Act which I shall now list:

Clayton Act (15 U.S.C. 12), as amended by the Robinson-Patman Anti-discrimination Act (Public Law 692, 74th Congress); Export Trade Act (15 U.S.C. 61); Packers and Stockyards Act, 1921 (7 U.S.C. 181); Wool Products Labeling Act of 1939 (15 U.S.C. 68); Trade-Mark Act of 1946 (15 U.S.C. 1051); Fur Products Labeling Act (15 U.S.C. 69); Flammable Fabrics Act (15 U.S.C. 1191); Textile Fiber Products Identification Act (15 U.S.C. 70); Fair Packaging and Labeling Act (Public Law 89-755, 89th Congress); and other public laws (such as Administrative Procedure Act.)

Of these acts passed since the FTC Act, by far the most important has been the Robinson-Patman Act passed in 1936 to amend the Clayton Act. The main purpose of this act was to protect small business from big business and its "deep pocket" by prohibiting discriminatory acts and practices having a probable substantial effect on competition if they could not be cost justified or were not for the purpose of meeting competition. Certain other acts and practices were made illegal per se by the Robinson-Patman Act, all to the purpose that small business would have a fair chance against the big resources of big business.

For forty-six years, the lawyers of the Federal Trade Commission were kept busy directing investigations, drawing complaints and prosecuting violations of the FTC Act. In 1936 the same procedure was put into effect enforcing the Robinson-Patman amendment to the Clayton Act. Lawsuits under these two statutes were our main business. We did a good job at it, and won most of our cases including those appealed. Today these two statutes are still the two main statutes enforced by the Federal Trade Commission. Most of our cases have been and are brought under these two statutes. Most of our business is transacted under their jurisdiction. These and the others listed previously are the statutes that confer jurisdiction to act on the Federal Trade Commission. All our activity proceeds under them, including Advisory Opinions. We can give an advisory opinion under any of these Acts.

In 1961, Paul Rand Dixon became Chairman of the Federal Trade Commission. At that time he reorganized the staff completely and it has functioned quite well ever since. Today, Mr. Dixon is still Chairman having been reappointed last year. He has now been Chairman longer than any other man in the history of the Federal Trade Commission.

The staff of the Federal Trade Commission is organized under the Executive Director. There are four special offices under him, Secretary, Program Review, General Counsel and Hearing Examiners. In addition there are six operating bureaus each under a Director. They are: Deceptive Practices, Economics, Field Operations, Industry Guidance, Restraint of Trade, Textiles and Furs. These bureaus are divided into divisions relevant to the mission of the bureau. An Organizational Chart is included at page 44 for your future convenience in dealing with the Federal Trade Commission.

One of the first things that Chairman Dixon changed after his first appointment was the emphasis and thrust at the Commission on litigation. This is somewhat strange, in a way, because Chairman Dixon had been one of the top trial lawyers at the Federal Trade Commission in his long career there. However, he changed the thrust from litigation and the emphasis from litigation—to consultation and advice on *future* courses of action and voluntary compliance on *present* courses of action where they violate statutes administered by the Federal Trade Commission.

The history of the Federal Trade Commission prior to Chairman Dixon can be read in one reported case after another. Some accepted the Commission's Order and went no further.

Others pursued their right of appeal to the Circuit Courts of the United States and even to the Supreme Court of the United States. The way was long, cumbersome and indeed expensive. One distinguished attorney at the Federal Trade Commission was 17 years in litigation on one case. Seventeen years to get the word "Liver" out of Carter's Little Liver Pills. This case of course was an exception, but it shows what a tough minded corporate litigant can do if they wish to tie up the Federal Trade Commission in expensive litigation. There comes to mind the Cement Institute case which was fought by some 40 law firms for the respondent members of the Cement Institute and its members for about eight years, with over 50,000 pages of oral testimony. The complete record with exhibits cost over \$500,000. The three years of trying the record before the Commission cost the industry 5 million dollars. Commissioner Everette MacIntyre was one of the three FTC counsels in this case. He has just served one 7 year term and been reappointed for another seven years. Many, many others could be cited, although I would say the average litigated case could run the full course before the Commission and the Circuit Court on appeal and certiorari denied by the Supreme Court in about two years. Now think, not only how expensive this litigation is, but how disrupting to the business involved and how worrisome to the corporate executives who must manage and pursue this course of action. Think of what it can do to the corporate image with the public. More than this, think of the pitiful plight of the small businessman without vast corporate resources to wage this kind of battle.

As a trial attorney, Chairman Dixon experienced all of this and knew it well. And when he became Chairman, he did not forget it. Many people had said there ought to be an easier way to handle enforcement. There ought to be a fairer way to do this for those involved. There ought to be a less costly way to do this for the little fellow.

Most businessmen big or small are honest and want to do the right thing. Nobody wants to get in trouble with the Federal Government—tax-wise, fraud-wise or business-wise. It is too expensive and it is too time consuming. It is not good publicity for the business or the executive who finds himself or his business so involved. Nevertheless, there is a hard core of hard cases which can be treated no other way and the Federal Trade Commission, no more than any other Government agency is not about to dispense with litigation entirely. There will be trial attorneys at the Federal Trade Commission after we are all dead and gone, but I venture to predict that there will never be as many trials or as many people engaged in litigation again as the history of the Commission reveals prior to the appointment of Chairman Dixon because he found another way to obtain compliance and enforce our statutes. To accomplish this, two major programs were set up for business to approach on an individual basis.

The advisory opinion procedure was set up in 1962 and about the same time the voluntary compliance procedures were set up as they appear in the rules today. Let us examine the voluntary compliance procedures first.

If your business is already engaged upon a course of action and becomes involved with the Federal Trade Commission voluntarily or involuntarily, the voluntary compliance procedure is open to you, provided you are not a hard core violator with a prior record against you and provided you act in good faith. What does good faith mean? It means you cooperate fully with the Commission's people. You give them the information they ask for whether it is records or oral testimony when you apply to file an assurance of voluntary compliance.

If you have been in and out of the Commission's investigatory sights, off and on for the past years, don't be surprised if the Commission's attorneys tell you it is not in the public interest to allow you to file an assurance of voluntary compliance. In such case you may have to take a consent order, which we will go into later.

The voluntary compliance procedure involves your contacting the Commission and asking whether or not your individual enterprise is now violating the law. If the appropriate operating division concludes you are violating one of our statutes, then you will want to file an assurance of voluntary compliance and receive a closing letter from the Commission. Authority to have issued such a letter by the Secretary for the Commission is given to the Director and Assistant Director of the following four operating bureaus if no Commissioner objects within five days:

1. Deceptive Practices
2. Restraint of Trade
3. Textiles and Furs
4. Industry Guidance

All four of these bureaus handle voluntary compliances. An assurance of voluntary compliance does *not* admit or deny you have violated any law; nor does it give immunity from Commission action in the future. As a practical matter a closing letter through one of the four bureaus signed by the Secretary for the Commission on an application for an assurance of voluntary compliance will ordinarily lay the matter to rest.

The file in a voluntary compliance matter is usually transmitted to the Office of Legal Records to be available for reading and copying by any member of the public interested in so doing. In unusual situations, the Commission may grant confidentiality to the applicant for good and sufficient reason presented to them on application.

The assurance of voluntary compliance should be the most often used procedure in the work of the Commission. It is simple and informal in method and practice. An applicant may apply to any of the divisions of the four operating bureaus as previously set forth. It is used where a recurrence of unlawful conduct appears unlikely and may be effectively prevented without a formal order to cease and desist. The sole test is whether "the public interest will be fully safeguarded" by informal nonadjudicatory disposition, and in every case informal nonadjudicatory disposition, and in every case informal information should be fully developed so as to permit a comprehensive application of this test to the acts or practices involved.

Another nonadjudicatory procedure available to business is the Trade Regulation Rule. This is a handling of an industry-wide violation *en masse* or can even be handling of a statutory violation on a nationwide basis. This procedure is particularly apt when the Commission on investigation of a complaint is told by the respondent businessman that *everybody is doing it*. Not for an individual violation although an individual may be an applicant. A trade regulation rule will get it stopped by all at the same time. It can be likened in technique to a hearing on a show cause order, although it is not absolutely necessary to have a hearing. We have always found it important to have hearings. More teeth than Guides or old T.P.C. Rules. Due process must always be had and care taken to proceed according to the Commission's Rules and Statutes such as the Administrative Procedure Act.

The effect is not the same as an order, but violation of such a rule is an invitation to litigation. I'm afraid this procedure is not too well understood by business. If you are interested in a trade regulation rule or think the issuance of one should be explored for your industry, you should apply to the Division of Trade Regulation Rules, Bureau of Industry Guidance. They will be happy to work with you and advise you on your problem.

I will merely note in passing that there are also *special rules* which you will find set forth in the outline. They are:

- (1) Wool and Fur
- (2) Flammable Fabrics
- (3) Textile Fiber Products
- (4) Fair Packaging and Labeling Act.

The procedures are set out in the Rules of Practice and have been very effective in dealing with specialized matters. The Commission has also the power to issue Quantity Limit Rules under Section 1.13 as authorized by Section 2(a) of the Robinson-Patman Act. There is, and has been very little activity in this regard.

Another very important nonadjudicatory procedure is the issuance of *guides*. This is done by the Division of Industry Guides in the Bureau of Industry Guidance. As the rules say, the industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. A guide is in effect an advisory opinion on a present course of action issued to a whole industry or many, many businessmen dealing with the interpretation of a portion of the Commission's statute. The Commission has full power to investigate the desirability or the possible need for issuance of a guide. Further, the guide may be issued on the Commission's own motion, on being convinced of the need for it or on application of an industry or an industry individual. Some 500 individual interpretives are issued by the Division and Bureau each year.

So far, assurances of voluntary compliance, trade regulation rules, special rules and guides have all been short of an order—they are nonadjudicatory.

We come now to a type of voluntary compliance which goes beyond any of these and involves the issuance of a complaint and order. This is the *consent order procedure*. Where a business does not qualify because of its past record for an assurance of voluntary compliance, it can still take a consent order which is issued by the Commission following a consent order agreement entered into between the respondent business and the Commission's attorney. This procedure has the advantage of saving time and money of a trial and the publicity incident thereto. The Commission maintains a consent order staff in the form of a special division headed by an Assistant General Counsel. If they won't let you file an assurance of voluntary compliance, they will nearly always let you take a consent order.

If your business is about to embark upon a *proposed* or *new* course of action *not now in operation*, you may seek advice and approval from the Federal Trade Commission by filing a request with the Secretary for an advisory opinion. This is true even if you are already under an adjudicative order of the Commission.

If you are already under an order, you will file for an advisory opinion under 3.61(c) of the Rules. This application is filed with the Compliance Division, Bureau of Restraint of Trade or the Compliance Division, Bureau of Deceptive Practices, depending upon the nature of your previous violation. Otherwise, you will inquire about an advisory opinion from the Division of Advisory Opinions, Bureau of Industry Guidance. Applications for advisory opinions under 1.1 or 3.61(c) may be filed with the Secretary of the Commission.

Years ago, President Wilson in his own words had sounded the need for the advisory opinion procedure:

"It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety."

Now what is an advisory opinion? Rule 1.1 of the Commission Rules of Practice states:

"Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy to consider requests for such advice and, where practicable, to inform the requesting party of the Commission's views. A request ordinarily will be considered inappropriate for such advice:

(a) where the course of action is already being followed by the requesting party; (b) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated by the Commission or another governmental agency; (c) *where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.*" Rule 1.3 states:

"(a) Where the course of action is already being followed by the requesting party; able to the Commission, and if practicable, the Commission will inform the requesting party of its views and may take such other action as may be appropriate.

"(b) Any advice given is *without prejudice* to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. *The Commission will not proceed against the requesting party*, with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

Thus we see that an advisory opinion is a written opinion voted by all five or a majority of the five Commissioners participating on a proposed or future course of action presented to them in writing by a requesting party not under investigation and not under order of the Commission or another governmental agency as to the proposed or similar course of action.

It is not an opinion by the staff.

It is by the Commission.

It is not on a *present* course of action, that is a matter of *voluntary compliance or consent order*.

It is not an opinion on a *past* course of action or a *future course of action covered by an order*. That is an advisory opinion to be obtained through the proper compliance section because it involves an outstanding order. This action is governed by Rule 3.61 of the Commission's Rules of Practice, as hitherto noted.

It is not a declaratory judgment although some lawyers confuse an advisory opinion with a declaratory judgment.

A distinguished former member of our Advisory Opinion staff, Mr. William Denny Dixon, has defined an advisory opinion in an excellent law review article on FTC Advisory Opinions in Vol. 18 of the Administrative Law Review quoting from Page 71:

"An advisory opinion is a binding ruling by the legal or administrative body having lawful jurisdiction of the subject matter on the legality of a proposed future course of action contemplated by the party requesting the opinion."

This brings us to the most important feature of the advisory opinion. *It is binding upon the Commission*. Just like a cease and desist order in a litigated case. An advisory opinion is binding on the Commission until rescinded or overruled. It is not a mere "railroad release" good as of the time of issue only. It is good until revoked or rescinded. I might say here, that I know of only two advisory opinions out of some 563 handled by the Commission that have been rescinded. This particular instance involved bad faith on the part of the requesting party.

Commissioner Elman is fond of quoting Mr. Justice Brandeis on legal advice and I am very fond of hearing it. It is the best advice to the businessman involved in the modern complexities of law and government, I know. It goes like this:

"Now, I do not believe * * * that the difficulty for the businessman is nearly as great as he imagines it to be. * * * If you ask me how *near* you can walk to the *edge* of a precipice without going over, I can't tell you, for you may walk *on* the edge, and all of a sudden you may step on a smooth stone, or strike against a little bit of a root sticking out, and you may go over that precipice. But if you ask me, how *near* you can go to that precipice and *still* be safe, I can tell you, and I can guarantee that whatever mishap comes to you, you will not fall over that precipice. * * * You must not expect that you can go to the *verge* of [the] law without running any risks. Why should you? You do not in any other relation of life that I know of."

When you request an advisory opinion through the Division of Advisory Opinions, we may not *precisely pinpoint* the legal edge of the problem but we will get you an opinion from the Commission telling you where it is safe to tread.

How do you get an advisory opinion? Rule 1.2 Procedures of the Commission and Rules of Practice states in part:

"The request for advice should be submitted in writing to the Secretary of the Commission and should include *full and complete information* regarding the proposed course of action. Conferences with members of the Commission's staff may be held before or after submittal of the request. Submittals of additional information may be required. The original submittal should *affirmatively show that the proposed course of action is not currently being followed by the requesting party* and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency."

The procedure is as simple as we can make it. There is no special form or format. The requesting party simply submits his request in writing, usually in the form of a letter either to the Division of Advisory Opinions or to the Secretary of the Commission. This written request should contain enough information to enable the staff to prepare a memo to the Commission intelligently stating the proposed course of action and its predictable effects and the question or questions about its legality for which answers are desired. If you don't give enough information, the staff attorney to whom it is assigned will either write or call you for what he needs. If the information is not available, the Commission may *not be able* to give an opinion because of the necessity for an investigation, or the need for scientific tests.

However, the requesting party generally get an opinion within 30 to 60 days. In the case of an involved pre-merger clearance request, requiring extensive economic analysis, the time may be extended. Recently, when the Commission was reviewing the whole foreign origin question, the elapsed time was much longer. But all requesting parties were advised of the problem and their requests in effect suspended until the Commission thrashed the matter out in the public interest.

When you get an advisory opinion from the Federal Trade Commission what do you get?

The requesting party receives a *letter signed by the Secretary of the Commission* by order of the Commission. This letter is rarely over two pages in length and quite often only one page. It is the opinion and is not released to anyone else in order to preserve the identity of the requester in confidence. However, the text or a digest of the text is usually issued as a press release for the guidance of others throughout the nation. This is all in accordance with Rule 1.4 of the Commission's Rules of Practice and announced policy.

We occasionally have requests to see the *memorandum of the staff* transmitting the request for advisory opinion to the Commission with the staff recommendation. This is *never* released to anyone as it is an *intra agency* communication and therefore *confidential*.

How has the advisory opinion worked?

Has it been worthwhile? The answers are quite clear by now. The procedure has worked well indeed. It has been very worthwhile.

We have handled and processed some 563 advisory opinions to date and published about 300. Not only this, but hundreds and hundreds of voluntary compliance affidavits have been placed before the Commission for action without litigation.

We have had a good many advisory opinion requests by trade associations dealing with the selling practices, compliance of labeling rules, dealings with customers, conditions of membership, exchange of information, guaranteed pricing, product standards, range of prices in advertising and uniform hours. We

have had advisory opinion requests covering cooperatives and the Capper-Volstead Act and establishing of a common sales agency under the Capper-Volstead Act. We have had requests under the Clayton Act covering functional discounts, free merchandise, aggregate purchases and back-haul allowances, tripartite promotional plans. We have had advisory opinions under deceptive advertising and deceptive practices. We have had advisory opinions on the following products:

aluminum siding	office equipment
apparel	oxygen administering device
automotive and equipment	paper stock
badminton sets	pen sets
bags	photoengraving
books	plastics and products
brush, shaving	prefabricated building
building materials	produce
chamois	projection equipment and allied
chemicals	publications
concrete blocks	radio and allied
corsages	real estate
cutlery	recipes and allied
deodorant	records and record player
diamonds	servomotors
drugs and pharmaceuticals	sewing machines
electrical machinery and equipment	shingles
electronics	ship supplies
general merchandise	shopping carts
grocery industry and allied	shopping center
home improvements industry and allied	silverware
house furnishings	skip-tracing material
iron and products	sports equipment
jewelry industry	textiles
leather and products	thimbles
machinery and equipment	tile cement
magazines	time clocks
materials handling equipment	toiletries
maternity products	toys
medications	trading stamps
milk	trailers
mobile homes	typewriters
newspapers	X-ray film

We have had advisory opinions involving the *meaning and use of the following words*:

back-haul	mink oil
chamois	missing heirs
embossing	most warranted
free	national
full-cover	new
golden	pure, clear color
gold filled	rebuilt
government	reconstructed
Greenland	remanufactured
karat	reward
leather	rolled gold plate
like	safe and effective
like grade and quality	satisfaction guaranteed
lifetime guarantee	suede
list price	solid gold
made in U.S.A.	type
man-made	U.S. made
manufacturing	velvet
medically prescribed	14-K

The Commission has given advisory opinions to very little people, such as the man who wrote in and said he had advertised that for a \$1.00 sent through the mail, he would by return mail advise his party about a cheap, safe

deodorant. For the \$1.00 he would send the purchaser the recipe to mix baking soda and water and apply to the person. This was found to be all right, scientifically and legally, and the man got a favorable opinion. The Commission has given advisory opinions to an association of some of the largest corporations in the United States who applied for a *code of ethics* to regulate the conduct of their door to door salesmen.

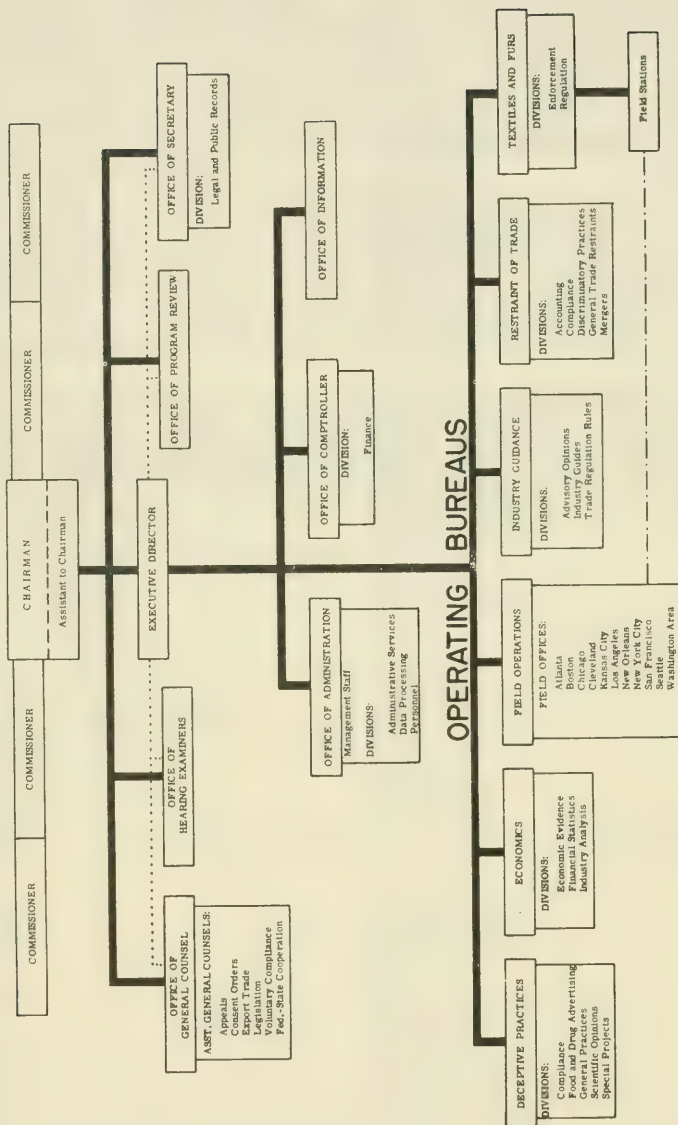
The advisory opinions are widely quoted and increasingly sought. When it is remembered that a single trial attorney cannot handle more than four litigated cases during a year and an attorney-adviser on the Advisory Opinion staff can handle 30 to 50 advisory opinions in a year, the saving in time and money is quite obvious.

We don't want you to get into trouble. We don't want you to violate any of our acts. The Federal Trade Commission will keep you *out* of trouble if you will simply *ask* us for advice on matters under the laws we administer.

The voluntary compliance procedure is open to you at all times if you haven't been in trouble with us before. If you have been in trouble with us and have an order against you the compliance division will give you advice if you will apply to them. They can process an advisory opinion for you as to whether or not your proposed course of actions complies with the order outstanding against you.

Any business planning or contemplation of a new or changed course of action for the future can be passed on by the Commission through the advisory opinion procedure. We will tell *whether or not* it probably violates any of our statutes. The Commission will be bound by its opinion. This service is *quick* and it is *free* to all who *comply with our rules on the subject*. And I submit the price is right. Be safe; save your worry; save your time and save your money. Ask us in advance.

FEDERAL TRADE COMMISSION



Approved: *Carl P. Davis*
Chairman

..... ADMINISTRATION ONLY.
----- ADMINISTRATIVE SERVICES AND
FORMAL INVESTIGATIVE MATTERS.

AUGUST 28, 1969, REPORT OF PROGRAM REVIEW OFFICE, FEDERAL TRADE COMMISSION, ON BUREAU OF INDUSTRY GUIDANCE: DIVISION OF ADVISORY OPINIONS, DIVISION OF INDUSTRY GUIDES, DIVISION OF TRADE REGULATION RULES

UNITED STATES GOVERNMENT MEMORANDUM

AUGUST 28, 1969.

To: The Commission.

From: Office of Program Review.

Subject: Commission minute of July 21, 1969, on programs and methods relating to the Bureau of Industry Guidance.

This report is made pursuant to the subject Commission instruction which stated:

"The Office of Program Review was directed to submit a report to the Commission by September 1, 1969, of programs and techniques by which the Bureau of Industry Guidance's basic function might be accomplished in lieu of its present exclusive concern with drafting and administering guides, rules and advisory opinions."

Premises and Perspective

The minute raises this initial issue: What is it basically that the Commission is trying to achieve through its industry guidance operations? The Commission as a whole has three primary objectives: to provide information and publicity on competitive conditions, to protect the consumer in the market place, and to maintain competition. To attain these fundamental ends, the Commission can choose among three principal means: education, guidance which would include voluntary compliance, and litigation. Through industry guidance used as a *fact-finding* process, the Commission could provide industries and businessmen with clear and definite guidelines on the reach of the trade regulation laws.

The underlying industry guidance purpose is to get a greater degree of compliance with Commission-administered laws on an industry-wide basis. Guidance efforts are misdirected if geared simply to promote good public relations with industries or to collect business opinions on Commission policy directions. The industry guidance objective extends to preventing law violations that might otherwise take place. There exists, therefore, a continuing need in the Commission's enforcement matrix for industry guidance in order to narrow the field of uncertainty in the laws that the Commission enforces.

The main proposition advanced in this report is that the Commission and its Bureau of Industry Guidance take a broad approach to guiding industries, rather than apply limited rules and guides resources to particular companies and to fragmented industries. Instead of developing narrow and specific rules in the main, the thrust of industry guidance would concentrate on industry factfinding and formulating broad standards by which the Commission would live and act. Achieving a better definition of Commission standards can result in the same impartial treatment to respondents under like circumstances. Crystallizing standards may also contribute to maintaining the Commission's independence from outside pressure, since diffuse decisions and lack of definite standards create a legal vacuum for external influences on an administrative agency.¹

Rulemaking in this broad sense becomes in essence a method of factual inquiry on the Commission's own motion. It is not merely another ad hoc process to make rules or guides in response to outside petitions that include requests from firms or industries facing competition from producers of substitute products. To obtain and appraise facts for designing important and reliable rules and guides, the basic technique is internal Commission-initiated industry analysis of key industries.

¹ Friendly, *The Federal Administrative Agencies* 19-26 (1962). A recent case in point is *Occidental Petroleum Corp.*, FTC Docket No. C-1450, decision and dissents (1969).

The selection of industries for Commission examination could be made rationally through an inter-bureau task force device. This legal-economic panel would start the industry-selection process by looking over the 400 manufacturing industries in the economy, and chart and rank industries in descending order by industry size, concentration ratios, and other structural industry features.² The task force could then produce a concise list and legal-economic analyses of target industries whose main structural characteristics (concentration, product differentiation, barriers to entry) disclose a proneness to trade practices that rules, guides or other sanctions could restrain or contain. Program plans that emerge would rest on a constructed analytical scheme.

Commission-generated industry analysis of strategic industries would enrich the economic significance of Commission activities and industry guidance commitments. The economic analysis of the kind indicated would attempt to penetrate all the outcroppings of monopoly and market deception in the industry, rather than deal solely with reported large-scale industry involvement in a single practice. On the policy-making level, "the enforcement agencies cannot develop policy or intelligently allocate their limited resources except on the basis of knowledge of economic structure and competitive conditions in particular industries and markets."³ (Emphasis supplied)

Programs

The proposed projects outlined below, if implemented, could materially strengthen the industry guidance mission and move the Commission toward the central goal of precise articulated standards:

1. Hazardous products inquiry.

Rulemaking expanded and applied as a method of inquiry can supply the Commission with an alternative means for gathering facts to frame major policies. There is, for example, neither a discernible government-wide stance nor a stated Commission policy dealing with the potential hazards of all the products the consumer ingests or uses. The Commission has an opportunity to take the lead in this major consumer area and develop the Commission's policy position on hazardous consumer goods.

Much of the industry guidance work in this vital consumer area is hanging fire awaiting the policy report, slow in coming, of the National Commission on Product Safety. More than enough time has elapsed and we should not wait any longer for that Commission's recommendations, if any. We should move out in front now and use the rulemaking process to prohibit the sale of inherently dangerous consumer products. Rules are potent instruments to extend Commission-enforced laws to the limits.

The industry guidance bureau could take hold of the dangerous products problem and try to establish and direct an inter-agency group to ascertain the magnitude of this problem and devise concerted multi-agency solutions. If such an inter-agency panel cannot be formed, then at least the industry guidance staff could maintain continual liaison with agencies and commissions assigned product safety responsibilities. The liaison arrangement could uncover for Commission attention on a regular basis those consumer products whose product advertising exceed the claims allowed in the product labeling.

As an alternative or supplement to an inter-agency task force or liaison on product safety, the industry guidance force could set up and chair an inter-bureau committee within the Commission to survey and determine the range of hazardous products—the ten product lines most in need of rulemaking—that are unsafe for the consumer. This panel would also identify the principal products that require more disclosure to the consumer on performance characteristics. In terms of techniques this inquiry might be organized around related problems, such as product safety and product performance. The program planning process would be thought of in terms of problem-solving, using the investigational resources of various professional disciplines (economics, law, medicine, engineering and chemistry). This multidiscipline unified approach to developing programs characterizes the technique of "systems-oriented" planning.

² Industries can be ranked by concentration ratios using U.S. Department of Commerce, Bureau of the Census, Annual Survey of Manufactures—1966, *Value-of-Shipments Concentration Ratios by Industry* (1968).

³ Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, reprinted from 78 Harv. L. Rev. 387 (1964).

The total cost of this suggested major hazardous products inquiry, and of the subsequent programs outlined need not necessarily increase total Commission dollar outlays. The formalized assurance of voluntary compliance matters, which take a heavy toll on guidance time,⁴ should be streamlined and interlocked with the guides unit. The industry guidance force would focus on its primary missions: finding facts on industry structure and behavior, *industry* guidance, and the development of definite Commission standards that place Commission enforcement on an intelligible and predictable basis.

2. Broad rulemaking project on oligopoly power.

The main difficulty in making the best use of Commission resources appears conceptual in nature, arising in part from either the avoidance or misstatement of major monopoly conditions. Antitrust resources tend to be applied to the noisy problems of the moment to the exclusion of the more important ones. There is some anomaly, for instance, in antimonopoly emphasis on new conglomerates rather than dealing with established conglomerates and entrenched oligopoly power.

To redress this enforcement imbalance, the Commission could resort to rule-making procedure that examines into and obtains the supply and demand facts in specific concentrated industry situations as the prerequisite to formulate legal doctrines and Commission standards to cope with oligopoly power. The oligopoly problem appears focused in a relatively few large major industries, such as computers, copying equipment, sulfur, automobiles, tractors, steel, and heavy electrical equipment. The industry guidance bureau, reinforced with economists on loan, could form an inter-bureau "sight unit" or task force to probe into and appraise the market structures and exclusionary practices of a limited number of oligopoly industries.

The relevant factfinding technique for this program is in-depth industry analysis. This competitive-analysis procedure contrasts with the dragnet legal approach that looks for incriminating documents and attempts to assemble all information having any bearing on competition. Industry analysis applied to concentrated industries centers on facts critical to the assessment of monopoly power. These indicators include: (1) the number and size distribution of sellers (and buyers) in the industry and the persistence of high economic concentration over several Census years; (2) the identification of past large mergers by oligopoly firms that have gone unchallenged; (3) the degree of vertical integration and resale price maintenance used by leading manufacturers in the highly oligopolistic industries examined; and (4) entry barriers and promotional expenditures of the largest firms.

The competitive-analysis approach takes the market-by-market route, checks into how competition is carried on in the industries concerned, and contrasts the various tactics of competition used by different sized firms.⁵ This economics procedure inquires into the determinants of success or failure for firms in the industry. The technique also considers and prescribes the economic functions that the industry must perform to serve the public interest.

From the facts on oligopoly power in specific industries marshalled by the proposed inter-bureau legal-economic panel, the Commission would be better positioned to decide whether to prepare and issue concrete standards. The Commission would also have the option to bring a compact series of cases challenging tight oligopoly as a joint or shared monopoly that contravenes Section 5 of the Commission's organic act. It has been contended recently that Section 2 of the Sherman Act can apply to oligopoly power persistently maintained over a substantial period of time.⁶

The emergent Commission standards could draw the dimensions of Commission policy on oligopoly control. The approach to limit oligopoly power might move in the direction of allowing significantly more economic freedom to nonoligopoly firms and thus provide some incentive or pressure for voluntary deconcentration by old-line oligopolies.⁷ Entry barriers might be lowered in concentrated markets

⁴ FTC *Workload and Manpower Report*, No. 26 (June 30, 1969).

⁵ I. R. Barnes, *The Primacy of Competition and the Brown Shoe Decision*, 706 Geo. L.J. 717 (1963).

⁶ Turner, *The Scope of Antitrust and Other Regulatory Policies*, 82 Harv. L. Rev. 1225 (1969). Another view is that Section 1 of the Sherman Act is an appropriate weapon to use against noncompetitive pricing in oligopolistic industries, the pricing practice construed as a variant of cartel behavior. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562 (1969).

⁷ Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 345 (1967).

through Commission rulemaking that promotes potential competition in concentrated product lines.

3. *A planned long-range nationwide consumer education program.*

There is a perennial need for the Commission to acquaint consumers as well as business with what the Commission is doing and why it is being done. Educating consumers to protect themselves in the market place seems a logical extension to guiding business in the ways of self-regulation. The proposed consumer education program would emphasize the development and dissemination of informational materials through consumer groups and communications media.

Establishing a strong consumer education project within the existing guidance bureau could broaden the base of guidance activities by providing a consumer-interest orientation. The skills used to draft guides and rules seem transferable to producing informative consumer information materials. Making fuller and more efficient use of current guidance resources keeps Commission costs down.

The consumer education program would seek out and maintain contacts with consumer organizations. The program output could include television filmstrip presentations on consumer problems and guidelines for inner-city legal aid units. The program might also develop a planned strategy of coordinated speech-making by Commissioners and principal staff to explain consumer protection policies.

As an educational device speech-making by Commission personnel in past years has been reactive, arising largely from invitations of business organizations. In the proposed consumer program the Commission would take the speech-making initiative, develop an agenda of the most important subjects that should be brought before the public, and then create the opportunities where these speeches could be made to have maximum utility. In this way Commission speech-making could be used affirmatively to articulate Commission consumer protection policy.

4. *Expanded advisory opinions program.*

There ought to be some apparatus under which a small businessman and other parties could come to the Commission in good faith and get a yes or no answer on the legality of what they are now doing. The present Rules of Practice (Section 1.51) limit requests for advice to "a proposed course of action." The advisory opinions function should be broadened in a new program that would encompass existing courses of action.

The Commission would have to reassess the rationale for the limitation placed in its current policy on outside requests for advice. It seems reasonable that an applicant for advice should be told where he stands as long as he is not under investigation for the practice in question. As a matter of new policy it is proposed that the Commission revise its Rules of Practice to indicate that advisory opinions can be rendered on actual courses of action.

With an advisory opinions force separated from enforcement pressures, the Commission has an independent information source for decision-making. The enforcement-litigation outlook can tend to regard no as a better answer than yes, since it is the only simple formula which is sure and safe. The advisory opinions staff should not have to hammer into shape a multi-bureau consensus recommendation that requires concurrences from economics and enforcement divisions and bureaus. For the Commission to benefit from staff competition in ideas and analyses, the advisory opinions staff could consult other units on the economic or legal issues in question but it should call the shots on the advice recommendation. It should refer copies of its reports to other appropriate bureaus and those bureaus could elect or not to present their views to the Commission.

In line with the Commission's mission to effect cooperative law observance, the Commission needs a place like the advisory opinions unit where a businessman can discuss with Commission staff serious problems of competition and seek advice. This consultative arrangement does not mean that the Commission has to give away anything to the business sector. The program to extend advice to current practices would focus on requests from small-business men and on small-business problems.

5. *Trade Association Program.*

Commission and court decisions in over 200 cases since the Commission's inception found that trade associations eliminated competition using diverse practices such as market and customer allocations, price fixing, and assignment of sales quotas to members. Trade associations have also used schemes to elimi-

nate indirect methods of competition among their members by such tactics as standardized terms of sale. There are now about 2,000 trade associations that belong to the American Society of Association Executives, and these associations have roughly a membership of five million business firms.

The proposed association project would develop a solid foundation of fact concerning the structure and operations of the nation's largest trade associations. This program is designed both as a means of gathering facts on trade association practices and as a method of gaining association observance of Commission-administered laws. The enforcement alternative is to launch a systematic anti-monopoly project to probe into restrictive activities of the major associations.

Under the guidance plan, whenever a large trade association meets we would have a Commission man present to participate in industry seminars and encourage the members to use the Commission's various guidance proceedings. The program proposed would operate, however, primarily as a low-cost Commission method of identifying problems of monopoly and competition in the trade association area. Permanent and regular channels of communication would be formed between the large associations and the guidance staff regarding anticompetitive, noncompetitive and deceptive practices problem areas. The work or output of the guidance force would include rules or administrative interpretations to reach existing and proposed association practices.

As an alternative to the above proposal, trade associations comprised of industries within the Commission's purview could be required to register with the Commission and file copies of their by-laws and membership lists, updated annually. The associations would also report to the Commission their data collection methods under this plan. Facts on the composition, mode of operation, and data collection activities of trade associations could provide the Commission with clues to the location of unlawful trade practices.

CONCLUSION

Industry guidance and rulemaking viewed primarily as a fact-finding process can make a significant contribution to achieving a better definition of Commission standards. The appropriate analytical technique is industry analysis using the modern concepts of industrial organization economics applied in the Commission's Procter & Gamble merger decision.

The instant report proposes five new industry guidance programs: hazardous products inquiry, rulemaking on oligopoly control, consumer education project, enlarged advisory opinions service, and systematic trade association surveillance.

In the final analysis, however, an effective industry guidance operation depends in large measure on a strong Commission enforcement program involving principally major industries and large corporations.

JOHN J. HURLEY,
Economist.

IV. RESPONSE TO PART OF QUESTION 3

Enclosed herewith is a summary of Commission votes on the question of whether the Solicitor General should be requested to file petitions for certiorari to the Supreme Court after adverse decisions in the courts of appeals.

From January 1, 1961 the Commission was reversed by courts of appeals in thirty-three cases involving the Robinson-Patman Act. Three categories of cases are reported. The first involves proceedings where the courts of appeals reversed the Commission and either vacated its order, directed the Commission to dismiss its complaint or remanded the case for further proceedings before the Commission. In the second category, the courts of appeals modified the cease and desist order entered by the Commission and enforced the order as modified. The third category includes four cases, *Pacific Molasses v. FTC*, *FTC v. Jantzen, Inc.*, *Universal-Rundle Corp v. FTC* and *Flotill v. FTC*. In these proceedings, the Commission was reversed because of procedural defects.

Also included are Commission votes on other significant actions taken in these proceedings in addition to petition for certiorari.

The cases are arranged by date of decision in the courts of appeals. A description of votes cast in each case is followed by copies of Commission minutes and, when it occurred, copies of requests to the Solicitor General to file petitions for certiorari.

ANHEUSER-BUSCH, INC.

1. *Anheuser-Busch, Inc. v. F.T.C.*, 289 F. 2d 835 (7th Cir. 1961).

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. On March 31, 1961 directed General Counsel to request Solicitor General to petition for certiorari. *Vote*: 4-0, Commissioner, Kern not participating.

2. On June 20, 1961 General Counsel directed to file a motion for remand of proceeding to Commission. *Vote*: 4-0, Commissioner Kern not participating.

3. On July 6, 1961 instructed General Counsel to advise Commission of legal status of this matter and what alternatives are open to the Commission. *Vote*: 5-0.

4. On July 27, 1961 received memorandum from assistant General Counsel Hobber advising that no further proceedings were possible and ordered filed. *Vote*: 5-0.

MARCH 31, 1961.

ANHEUSER-BUSCH, INC. v. FEDERAL TRADE COMMISSION, 7TH CIRCUIT, No. 12,284
(DOCKET 6331—ANHEUSER-BUSCH, INC.)

Memorandum of March 24, 1961, from Acting General Counsel Morehouse recommending approval of the accompanying letter requesting the Solicitor General to seek review by the Supreme Court of the January 25, 1961, decision of the United States Court of Appeals for the Seventh Circuit in the above case.

Mr. Anderson, in his transmittal memorandum of March 31, 1961, concurred in Mr. Morehouse's recommendation.

After consideration, on motion of Mr. Anderson, it was directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the decision in question, and the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by Mr. Morehouse, was approved and ordered forwarded after signature by the Chairman.

Mr. Kern does not participate in this matter.

JUNE 20, 1961.

Mr. Dixon presented the following matters :

- (1) *ANHEUSER-BUSCH, INC. v. FEDERAL TRADE COMMISSION* 7TH CIRCUIT, No. 12,284 (DOCKET 6331—ANHEUSER-BUSCH, INC.)

Mr. Dixon reported his consideration of joint memorandum of June 16, 1961, from Assistant General Counsel Hobbes and Attorney Francis C. Mayer of the Office of the General Counsel, approved by the General Counsel, reporting pursuant to the action of June 12, 1961, on the legal steps which can be taken to get this case back to the Commission for further proceedings. Messrs. Hobbes and Mayer expressed the opinion that if further action is to be taken by the Commission in this case, it should be done by leave of the Court of Appeals, but advised that they did not predict that such a remand could in fact be secured.

After consideration, on motion of Mr. Dixon, the Office of the General Counsel was directed to file, in the United States Court of Appeals for the Seventh Circuit, a motion for remand of the above proceeding to the Commission.

Mr. Kern did not participate in the foregoing action.

JULY 6, 1961.

Mr. Dixon presented the following matters :

- (1) *Anheuser-Busch, Inc. v. Federal Trade Commission*, 7th Circuit, No. 12,284 (Docket 6331—Anheuser-Busch, Inc.)

Mr. Dixon reported that Assistant General Counsel Hobbes had advised him, pursuant to the action of June 12, 1961, that all avenues for review of this matter have been exhausted.

After discussion, on motion of Mr. Elman, the General Counsel was instructed to advise of the legal status of this matter and what alternatives are open to the Commission.

JULY 27, 1961.

- (1) *Anheuser-Busch, Inc. v. Federal Trade Commission*, 7th Circuit, No. 12,284 (Docket 6331—Anheuser-Busch, Inc.)

Mr. Dixon reported his consideration of this matter in view of memorandum of July 18, 1961, from the General Counsel submitting memorandum of the same date from Assistant General Counsel Hobbes reporting pursuant to the action of July 6, 1961. Mr. Hobbes expressed the opinion that further Commission proceedings in this case are not legally possible, but advised that he could see no barrier to future proceedings against territorial price discriminations on a theory of injury to the competitive structure, as contrasted with injury to particular competitors, thus inviting a test of that theory in the Seventh Circuit or elsewhere. The General Counsel concurred in Mr. Hobbes' conclusions.

After consideration, on motion of Mr. Dixon, the above memoranda were received as information and ordered filed.

APRIL 3, 1961.

HON. ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C.

Re *Anheuser-Busch, Inc. v. Federal Trade Commission*, 7th Cir. No. 12284—
FTC Docket 6331.

DEAR MR. SOLICITOR GENERAL: On January 25, 1961, the United States Court of Appeals for the Seventh Circuit rendered its opinion in the above-entitled case setting aside, for the second time, an order of the Federal Trade Commission. Upon its first consideration of this case, the Court held that the local price cuts of Anheuser-Busch, Inc., ("AB"), were not discriminations in price within the intent and meaning of the statute. 265 F. 2d 677 (1959). On certiorari the Supreme Court unanimously reversed, holding that a difference in price constitutes a discrimination in price, 363 U.S. 536 (1960). The case was remanded and, once again, the Court has held the Commission's order invalid.

The case arose under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. § 13(a)), which provides in pertinent part:

That it shall be unlawful for any person . . . to discriminate in price between purchasers . . . where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . .

At the conclusion of its opinion the Court stated:

. . . we conclude that the inferences on which the findings of the Federal Trade Commission were based are so overborne by evidence calling for contrary inferences, as set forth in this opinion, that the findings of the Commission cannot, on the consideration of the whole record, be deemed to be supported by substantial evidence. (Slip Op. p. 14.)

The Commission is mindful of the Supreme Court's holding that "substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Court of Appeals.'" *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 401 (1958). However, it is well established that when the findings of the Commission are in fact supported by substantial evidence on the record considered as a whole, then they are conclusive. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-488 (1951). It is also well settled that the drawing of reasonable inferences from the evidence is a function of the Commission as trier of the facts, and also that the Commission's findings may rest on such reasonable factual inferences, as well as on direct evidence. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 739 (1945). Inferences of the Commission may not be set aside merely because a court would have drawn different ones. *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U.S. 50, 60 (1943). The possibility of drawing two inconsistent inferences from the evidence, although we do not admit that it exists in this case, will not prevent the Commission from drawing one of them. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). It is not the province of the courts to assume the administrative function to the extent that the agencies become mere fact-finding bodies. *Gray v. Powell*, 314 U.S. 402, 412 (1941).

Under the guise of review, the Court has tiptoed through a voluminous record picking and choosing¹ random facts in an attempt to avoid the impact of overwhelming evidence of injury and the clearly reasonable inferences drawn by the Commission.² In doing this, the Court has entirely failed to observe the guiding standards of the Supreme Court, which, in similar situations, has never failed to review the record to determine the existence of all facts and inferences bearing on the question of whether the statutory injury to competition has been established.³

Since the Court's opinion is predicated upon its view that the Commission's findings and conclusions are not supported by substantial evidence, recital of the pertinent facts is necessary. The basic facts are not in dispute. AB manufactures and distributes beer, including premium-priced and premium-advertised Budweiser, on a nationwide basis in competition with other brewers. It now occupies and for many years past has occupied a major position in the brewing industry. It was the nation's leading seller of beer in 1953 and 1954, with total assets in 1954 of \$165,000,000. Its lead in sales over its nearest competitor in 1953 was a significant 1,461,222 barrels, and though it suffered sales reverses in 1954 it continued to be the nation's leading seller, accounting for 7% of the national sales.⁴ The St. Louis market was dominated by four brewers: AB, Falstaff

¹ See *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 117 (1937).

² It is only upon such a fragmented view of the record that the Court could comment: A primary result of AB's price reductions was that the consumers of beer in St. Louis enjoyed a lower price on Budweiser. . . . (Slip Op. p. 7.)

While AB's two price reductions undoubtedly contributed to moderate changes in the division of the beer sales in the St. Louis market. . . . (Slip Op. p. 7.)

AB forthrightly met its robust competition in the St. Louis market. . . . (Slip Op. p. 11.) [All emphasis supplied.]

³ See *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

⁴ This was not the situation in the St. Louis market where AB enjoyed a steady increase in sales.

Brewing Corporation, Griesedieck Western Brewing Company ("GW") and Griesedieck Brothers Brewing Company ("GB"). In 1953 AB ranked fourth in sales, with 12.5% of the market. It followed GW, which had 38.9%, Falstaff, which had 29.4%, and GB, which had 14.4% of the sales.

AB's major competitors in St. Louis were all *regional* brewers as distinguished from *national* brewers, which, like AB, sell and ship into all states in significant volume. Falstaff sold in 25 states, with 14% of its total sales accounted for by the St. Louis market. GW sold in 20 states, with 25% of its entire production sold in the St. Louis market, and GB sold in 13 states, with 24% of its total sales being concentrated in this market. AB, the nation's leading seller, sold in all 48 states, the St. Louis market accounting for only 3.5% of its gross sales. With assets of \$165,000,000 AB was competing with Falstaff, with assets of \$32,450,659, and GW, with assets of \$16,101,589. The record does not disclose the assets of GB but shows that it was the smallest of the three St. Louis competitors. In 1953, the total sales of AB exceeded the combined total sales of its three St. Louis competitors and its assets were more than twice the combined total assets of the three regional competitors.

In the spring of 1953 a strike closed the plants of the other four national shipping brewers and, as a result, AB became the nation's leading seller by a wide margin. This was accomplished while, at all times and in all places in which they competed, Budweiser was sold at a higher price than the beers of its local St. Louis competitors. After the strike, the national shipping brewers, including AB, increased prices generally, though in varying amounts depending upon the locality. AB increased its prices 15c per case in all areas served by the St. Louis brewery, except St. Louis, the rest of Missouri, and Wisconsin. AB's three St. Louis brewery competitors (Falstaff, GW and GB) did not increase their prices, although many other regional and local brewers in many sections of the country followed the price increase. This was the first time that all the regionals and locals failed to follow price increases instituted by the national brewers. In the St. Louis area, since prices remained at former levels, the differential between the price of AB and its St. Louis brewery competitors remained unchanged, but the differential increased in all other states in which AB competed with the St. Louis brewers.

This, then, was the setting for the two price cuts upon which the Commission's action is based. Before January 1, 1954, AB was selling its Budweiser throughout the country at prices which varied from a low of \$2.93 for the standard case of 24 twelve-oz. returnable bottles to a high of \$3.79 for the same quantity of beer. On January 4, 1954, and again on January 21, 1954, AB sharply reduced its price of Budweiser in the St. Louis market. From a price of \$2.93 per case it cut its price to \$2.35, exactly matching the prices of the local beers. There were corresponding reductions on other packaged beer and draught beer marketed under the Budweiser labels. While those price cuts were made in the St. Louis market, AB did not make the same or comparable reductions in any other area in the United States.

The market disruption caused by AB's price cuts resulted in a completely new alignment in market shares for the St. Louis sellers. AB became the leading seller by a wide margin and maintained its lead in each of the eight months during which its beer was sold at the same price as the beers of its competitors. Its sales volume, each month during the period of price discrimination, was far more than double that of the comparable month of the previous year. Its price cuts were confessedly designed to take business from its competitors. As a direct result of these local price cuts, AB increased its share of sales in this area from 12.5% in 1953 to 39.3% as of February, 1955, after which it increased its prices. The increase in AB's sales came directly from the losses of its competitors, for while the over-all market remained fairly constant, AB's sales increases ranged from 163.2% to as high as 206.7%. In the latter half of 1954, AB practically tripled its share of the market, its sales being 2.58 times as great as its total sales in this area in the preceding six months.

Falstaff, GB and GW suffered direct and severe losses, as well as a decline in their market shares, because of AB's price discriminations. The huge diversion of sales prompted the examiner to comment, "I have rarely seen such a dramatic exhibition of economic power and price sensitivity in so short a time . . . the tremendous switch from other beers to Budweiser when the premium price was eliminated cannot, on this record, be otherwise accounted for." (App. 31.)

The serious effect (lightly regarded by the Court) of AB's price cuts on the sales of its local competitors as shown below cannot be disputed.

Cases ¹ sold in St. Louis market area	Latter half of 1953	Latter half of 1954
Falstaff.....	2, 071, 093	1, 940, 586
GB.....	945, 725	573, 649
GW.....	2, 509, 515	1, 548, 373

¹ These are so-called "statistical" cases, i.e., sales in containers of all sizes have been adjusted to 12-ounce bottles, 24 to a case.

It will be seen from the above that GW's individual losses in sales for the latter half of 1954 exceeded AB's total sales in this market for the last six months of 1953. These losses were suffered in a particular market which accounted for 25% of the over-all sales of one competitor as compared with AB, whose sales in the St. Louis area represented little more than 3% of its gross sales. One competitor's sales, GB, were driven to an *all-time low* by AB's price reductions and another competitor, GW, attributed a reduction in dividends, in part, to the effects of AB's price cuts.

It was found that AB's local price cuts were price discriminations having the effect of diverting substantial business to AB from its competitors; the effect of substantially lessening competition in the line of commerce in which AB and its local competitors are engaged; and the effect of tending to create a monopoly and having the potentiality to continue to do so. The Commission, therefore, issued its order to cease and desist.

The Court's decision setting aside the Commission's order rests on the grounds that AB's price cuts in the St. Louis area were "a proper restraint in its use of its competitive power" and that it was "using its competitive power fairly in the market place and respecting the rights of its competitors" (Slip Op. pp. 13-14). The Court held that the Commission failed to satisfy the statutory requirement that AB's price cuts "may have" an adverse effect on competition. No other questions raised upon AB's appeal were considered.⁶

In setting aside the order, the Court has ignored the purposes of Section 2(a) of the amended Clayton Act, and its decision is in conflict with decisions of the Supreme Court and other courts of appeals, and long-standing interpretations of the Commission. The Court has also failed to apply well-defined standards of the Supreme Court, thus thwarting the over-all purpose of the Robinson-Patman amendment of the Clayton Act to "strengthen" the provisions of the Clayton Act "so as to suppress more effectively discriminations between customers."⁷

In its evaluation of the record the Court declined to make practical application of the Supreme Court's direction that "the statute is designed to reach such discriminations 'in their incipency' before the harm to competition is effected" (our emphasis). *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 738 (1945). Whereas in its first opinion in this proceeding, the Court would not recognize the basic purpose of the Clayton Act, as amended, i.e., to prohibit discriminations adversely affecting the seller's line of commerce regardless of lack of competition between the buyers, the Court now refuses to interpret the statute to defend sellers against a price raid by a competing seller.

The Court's holding that "the Act is really referring to the effect upon competition and not merely upon competitors" (Slip Op. p. 8) is difficult to comprehend. In paying lip service to the obvious principle that in the Robinson-Patman Act Congress was seeking to protect competition, the Court refuses to concern itself with shifts of business between competitors and in effect holds that the effects of local price cuts upon particular competitors are not relevant or pertinent to a determination of the broader effect upon competition. But this controverts the obvious predicate to any determination of a lessening of or injury to competition generally, for how can over-all competitive effects be demonstrated other than by showing the adverse competitive effects upon individual competitors, inasmuch as they collectively represent the competition in the particular market? The Court is less than objective in its reliance upon the quoted portion from *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843. It is significant that the Court omits the language in the opinion immediately following its selected quote—

⁶ "It becomes unnecessary for us to consider whether AB's § 2(b) defense of good faith in meeting an equally low price of a competitor was valid or its contention that the Commission's order was unduly broad" (Slip Op. p. 14).

⁷ Sen. Rep. 1502, 74th Cong., 2d Sess. (1936), pp. 2-3; H. Rep. 2287, 74th Cong., 2d Sess. (1936), pp. 3-7.

"But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor; for, surely, there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor."

The Court's holding in this regard is also at odds with the decisions in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), and *Maryland Baking Company v. Federal Trade Commission*, 243 F.2d 716 (4th Cir. 1957) both of which involved a single competitor. In the latter case it was argued that "competition could not be affected under such circumstances since only one competitor was involved." The Court, however, held that "the contention that petitioner's actions did not affect competition . . . is so lacking in merit as not to warrant discussion." 243 F.2d 718.⁸

Moreover, the Commission and the examiner did not find injury to a single competitor but rather injury to all of AB's major St. Louis competitors and the line of commerce in which they were competing.

The Court, at some length, comments upon the Commission's reliance upon *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945). In that case, at page 738, the Court pointed out:

" . . . § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. . . . It is enough that they 'may' have the prescribed effect . . . the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition."

The Court's reference to *Corn Products* is noteworthy for its omissions. "[T]he very nature of the discriminations found against Corn Products," the Court declared, "should *ipso facto* an adverse effect upon many of its buyers, some of whose competitors received the benefits of the discriminations. . . . However, *Corn Products* is helpful . . . because it recognizes that the statutory effect on competition, present or future, must be established to support the Commission's order against AB. While a well grounded finding of substantial actual present injury might with other facts be a basis for a finding of a reasonable probability or possibility of future adverse effects . . .," etc. (Slip Op. pp. 9-10.)

This is a complete rejection of the applicable standard set forth in the *Corn Products* case. The Supreme Court has repeatedly held that "§ 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition" and that "the statute is designed to reach such discriminations 'in their incipency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products* case, 324 U.S. 738 (1945); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Standard Fashion Co. v. Margrane-Houston Co.*, 258 U.S. 346, 356-357 (1922). In its efforts to minimize the standard set by the Supreme Court in *Corn Products*, the Court fails to appreciate the significant aspects of that case. The sole criterion of competitive injury in the *Corn Products* case relates directly to the probability or possibility of the diversion of trade to the favored purchasers away from competitors by reason of Corn Products' price discriminations. The Supreme Court precisely held:

"It was stipulated, and the Commission found that the allowances in question were 'sufficient,' *if and when* reflected in whole or insubstantial part in resale prices, to attract business to the favored purchasers away from their competitors. . . . But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. 324 U.S. at 742." [Emphasis supplied.]

The Court's holding that substantial actual present injury might, with other facts, provide the basis for a finding of probability of future adverse effects evinces a complete misconception of the basic purposes of the amended Clayton Act. The Act was designed to prevent antitrust violations from coming to full

⁸ See also the Senate Report in which the Committee viewed the "injury" clause in Section 2 of the old Clayton Act as having "in practice been too restrictive, in requiring a showing of *general injury to competitive conditions* in the line of commerce concerned, whereas the more immediate important concern is an *injury to the competitor victimized by the discrimination*. Only through such injuries, in fact, can the larger, general injury result and to catch the weed in the seed will keep it from coming to flower." Senate Report 1502, 74th Cong., 2d Sess., 4 (1936); see also H.R. 2287, 74th Cong., 2d Sess., 8 (1936).

bloom: it would frustrate the Congressional purpose if the Commission could only proceed against *faits accomplis*. Indeed, the Commission would be remiss in its statutory duty if it demanded as a matter of proof that competitive injury be measurer in terms of actuality. The Court is blind to the purpose of the statute when it fails to recognize that proof of actual competitive injury is not a predicate for a further finding of a probability of injury, but, in and of itself, completely satisfies statutory requirement of injury. The statute was expressly designed to eliminate certain pricing practices which "may" have the proscribed injurious effect. It is therefore not necessary that any such requisite be tested in a setting of actual competitive injury. Of course, the Commission does not recede from the examiner's and its own finding that actual injury resulted from AB's price cuts. In view of such substantial diversion of sales, it was the only reasonable conclusion.

In an attempt to avoid the hearing examiner's and the Commission's findings of actual injury to competition the Court holds, gratuitously and without citation of any authority whatsoever, that "in order to determine the actual effect on competition, a statistical period must extend a reasonable time beyond the alleged illegal price reduction in order that all factors affecting the market may come into play" (Slip Op. p. 3, fn. 3). The significant period, of course, is the period in which the actual price discriminations are in effect. The Court seems to feel that the loss of millions of cases of sales is unimportant because one of AB's competitors (Falstaff) was not badly crippled. It ignores the obvious explanation that AB's decision to stop discriminating prevented the showing of more permanent losses. If the Commission cannot proceed until a competitor is completely swept from the field, the Congressional purpose to halt incipient harmful pricing practices will be completely nullified.

The Court's concern for factors affecting the market is hardly consistent with its appraisal of the competitive effects of AB's price cuts. For it was only the resumption of true price competition, allowing the other competitive factors of the market to come into play, which, according to the record, permitted the St. Louis competitors to regain even a semblance of their former sales standing. But this compelling fact remains—as long as AB maintained its reduced price the local competitors were forced into a precarious competitive position.

In rejecting the Commission's position that its complaint was designed to stop a predatory pricing practice—indeed, a classic territorial price discrimination—the Court refers to several of the territorial price discrimination cases,⁹ saying, "That conduct [AB's] is the antithesis of the predatory misconduct condemned in the above territorial pricing cases relied on by the Commission." The Court concludes "in each of those cases the motive for the price cut was vindictive and the effect was punitive." (Slip Op. p. 12.) While most of those decisions refer to the intention of the seller and the purpose of the price cuts, there has never been a case of territorial price discrimination in which the intention of the seller or the purpose of the price cut was held to be a necessary prerequisite to a finding of competitive injury. None of the holdings in the territorial cases is at odds with the Commission's reasoning and holding in this case. No court has held that the competitive injury prescribed by the statute can take place only if the seller openly and publicly announces his predatory intentions.¹⁰

The Court has interpolated certain criteria of competitive injury which simply are not provided in the statute. It holds that the *motive* or *intention* of the seller may be determinative of the proscribed competitive effect and assumes that there must be some notion of depredation before the statute may be violated. But the statute contains no such provision. The Supreme Court has said "the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law" *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550. To accept the Court's holding would be to add qualifications not contained in the statute. The Court "cannot supply what Congress has studiously omitted." *Federal Trade Commission v. Simplicity Pattern Co.*,

⁹ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), cert. denied, 353 U.S. 843; *Maryland Baking Co. v. Federal Trade Commission*, 243 F. 2d 716 (4th Cir. 1957); *E. B. Miller & Co. v. Federal Trade Commission*, 142 F. 2d 511 (6th Cir. 1944); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929).

¹⁰ See *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 (1958); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 484, *dissenting opinion* (1952).

360 U.S. 55, 67 (1959).¹¹ We also note the holding of the Court in *P. Lorillard Co. v. Federal Trade Commission*, 267 F.2d 439, 444 (1959), where, in connection with another section of the amended Clayton Act, the Court stated, "[T]his section of the Act does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden." Thus, the Court has, by its interpretation, done what the Supreme Court specifically condemned in this very proceeding, shifted from the specific governing provisions—injury, cost justification, etc.—to an *ad hoc* assessment of the seller's intention or motive, divorced from the statutory text. *Federal Trade Commission v. Anheuser-Busch, Inc.*, *supra* p. 551.

There has been no decided case dismissed for failure of proof of competitive injury when a causal connection was shown between the price discriminations and a loss of sales by competitors. Further, there has never been a case of territorial price discrimination in which the crux of the matter was not diversion of sales. Every order entered as a result of territorial price discrimination has been entered solely for the purpose of preventing unlawful diversion of sales.

The Court's opinion fails to give full weight to the Supreme Court's decision in the *Mead's Bread* case. There, as here, the Court was dealing with a lower price brought on or compelled by competitive activities of another seller. Mead's price cut in Santa Rosa was in response to Moore's agreement with the Santa Rosa merchants to boycott Mead, while AB's price cuts were in response to Falstaffs, GW's and GB's failure to raise prices after the settlement of the brewers strike.¹²

It is also significant that in attempting to avoid the impact of *Mead's Bread*, and the other territorial price discrimination cases, the Court remarked that "there [was] no showing that AB had aid from its other markets . . . 55 (Slip Op. p. 11). That the Court considers this factor persuasive demonstrates its failure to grasp the import of the *Mead's Bread* case as well as the *Atlas* case. In neither case was there any proof that the low price was subsidized by profits resulting from the maintenance of high prices elsewhere. After noting the size of the discriminator, the Court commented in the *Atlas* case, "It is fairly inferable that the appellant utilized its higher El Paso price to stifle competition with its lower prices in the Las Cruces area." (269 F.2d at 956.) This represents nothing more than what the hearing examiner did in this case but which the Court rejects (Slip Op. p 12).

The position of the Supreme Court in *Mead's Bread* is even more persuasive. In spite of findings by the circuit court that "there is nothing in this record to show that the interlocking corporate ownership and management or business relations were utilized or were in any way related to the local price war in Santa Rosa" (208 F.2d 777, 780-781), the Supreme Court comments at length upon the advantages accruing to an interstate industry because of its ability to "finance the warfare from an interstate treasury." The Court commented:

"But the beneficiary is an interstate business; the treasury used to finance the warfare is from interstate, as well as local sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns." [348 U.S. at 119.]

In spite of the foregoing, the Court rejected the Commission's argument that the over-all size of the interstate enterprise is significant in that it enables a

¹¹ At one time the proposed Clayton Act contained as an element of the offense (then a misdemeanor) "the purpose or intent thereby to destroy or wrongfully injure the business of a competitor." H.R. 627, 63d Cong., 2d Sess., 8-9 (1914). This language was eliminated from the statute.

¹² Testimony of Mr. Busch:

Q. May I suggest, then, sir, that the failure of Falstaff and Griesedleck Bros., and Griesedleck Western to have business sense enough, in your opinion, to increase their prices after the settlement of the Milwaukee strike was the real reason for the price reduction of Budweiser in January 1954, was it not?

A. Competitive-wise, certainly (App. 938).

seller to engage in area price discriminations without fear of severe monetary loss to itself because "there was no proof that AB had employed its size to support its price reductions."¹³ (Slip Op. p. 13.)

It is clear that the statute does not require "willful misconduct" on the part of the discriminating seller before a violation may be established particularly with regard to the existence of competitive injury. The record discloses competitive factors that make untenable the Court's conclusion that "AB exercised a proper restraint in its use of its competitive power, not a willful misuse thereof." (Slip Op. p. 14.) It should be pointed out that during the national brewers' strike AB enjoyed an unprecedented increase in sales which enabled it to become the nation's leading seller.

Its sales exceeded those of its nearest competitor by 1,461,222 barrels, sales approximately seven times greater than those of its entire St. Louis market. It was therefore a fact of competitive life that AB could expect some rather severe losses in sales when the other national shipping brewers returned to production, especially when viewed in the light of its increased price and the additional fact that for the first time in brewing history some locals and regionals (including the St. Louis competitors) failed to follow the general price rise instituted by the national shippers. It was in this setting that AB initiated its program of drastic local price cuts because its competitors did not "have business sense enough to increase their prices after the settlement of the Milwaukee strike." (App. 938.) Against this background, the hearing examiner found "these price reductions were ordered by [AB's] president for two admitted reasons: to get business away from its competitors and to punish them for refusing to increase prices when AB did so in the fall of 1953. Apparently the lesson was well taught and better learned because those three St. Louis breweries promptly followed AB up with price increases in March 1955 and were careful to keep the price difference between them and it at less than the 33 cents whose elimination had cost them so much sales volume." (App. 40.)

The foregoing analysis has not dwelt on the numerous distortions and misstatements of the facts. Illustrative, though hardly exhaustive, are the following:

1. The Court characterized as "moderate changes" sales losses of one competitor *in excess of AB's total sales in the market*.

2. Contrary to law, and this record, the Court substituted its own findings as to the causes of GB's and GW's losses.

3. In a localized area where retailers must offer all of the local products for sale, retail customers, of course, are seldom lost, but when the number of purchases from such customers drop to an all-time low, the accounts have certainly lost vitality. Someone always benefits from a lower price resulting from local price-cutting or any other type of price discrimination.

4. It is reasoning in a circle to preclude a forecast of future adverse effects on the bland assumption that a discriminator is using his "competitive power fairly." Adverse effects may flow from competitive activities whether lawful or unlawful. The statutory test here, however, is whether or not the proscribed competitive effects *flow from* the price discriminations involved.

The fact situation in this proceeding is a fairly common one, of a type which has attracted Congressional notice in recent years as calling for redress under the antitrust laws. It is the situation where a large national concern, possessing strong financial resources, lowers its prices and initiates a price war in a particular market, while maintaining its prices elsewhere, with a view to drastically increasing its share of business, eliminating one or more competitors, or "teaching" its smaller rivals to follow its price leadership. The result of the Court's decision, unless reversed, will be to render inapplicable the only one of the antitrust statutes that can be utilized to prevent such predatory practices unless the Commission meets the unrealistic and unprecedented standard of injury laid down by the Court. Stated otherwise, the effect of the decision is to immobilize the Commission in any effort to eliminate price wars initiated by those best able, through their economic power, to survive, unless and until injury has been manifested in its extreme and most severe form—the death-knell of one or more competitors. Seemingly it is only permanent, irreparable injury of that kind that would have satisfied the Court, whereas it is the purpose of the Robinson-Patman Act to prevent that kind of injury before it occurs.

¹³ It is significant that the Supreme Court's commentary in the *Mead's Bread* case is not based upon any finding. Also, see *Simplicity Pattern Co., Inc. v. Federal Trade Commission*, 360 U.S. 55, 64 fn. 7 (1959).

It is imperative that the controlling standards declared by the Supreme Court in the *Corn Products*, *Mead's Bread*, and other cases be reaffirmed in aid of the Commission's efforts to ban local price-cutting, prohibited by both the original Clayton Act and the Robinson-Patman amendment. The Commission therefore requests that a petition to the Supreme Court for a writ of certiorari be filed. Copies of the Court briefs, the appendix, and the Court's opinion are transmitted herewith.

By direction of the Commission,

PAUL RAND DIXON,
Chairman.

JUNE 5, 1961.

Hon. ARCHIBALD COX,
Solicitor General, Department of Justice,
Washington 25, D.C.

Re Anheuser-Busch, Inc. v. Federal Trade Commission, 7th Cir. No. 12284, FTC Docket 6331.

DEAR MR. SOLICITOR GENERAL: I wish to thank you for your courtesy in extending to me and the members of my staff the opportunity to participate in the recent conference on the above-entitled matter. In view of your generous offer to accept any further comments we might care to make as an outgrowth of our discussions, I wish to invite your attention to certain features of the case which I feel would be helpful to any final determination of the Commission's request for the filing of a petition for certiorari.

We feel it is vital to any effective enforcement of Section 2(a) of the Clayton Act that the holding of the court with relation to the motive or intention of the seller, as determinative of the probability of adverse competitive effects, be reviewed by the Supreme Court. And, from our discussion, I feel that we are in general agreement that the presence or absence of predatory intent should not be a controlling factor in any determination of the economic consequences which flow from a seller's local price cuts. The Court's insistence on proof of such predatory intent, it seems to me, would be a key point to be seized upon by sellers to defeat a Commission proceeding or a court action, knowing full well that such proof may be well nigh impossible. In this connection, the Seventh Circuit is in direct conflict with the opinion of the Tenth Circuit in the *Atlas* case wherein the Tenth Circuit described as "predatory" a local price cut which caused substantial diversion of sales because of the economic power of the seller and without regard to any particular intention to eliminate or cripple a competitor. We also must consider the ramifications of engraving upon present concepts of proof such a debilitating requirement as an element of the violation. For, if the Federal Government with its arsenal of compulsory investigatory weapons is often unable to establish the predatory intent of the seller as a fact, how difficult would it be, for example, for a small brewer like Griesedieck Brothers, to demonstrate to this Court at least that Anheuser-Busch was buccaneering! This problem is significant and would effectively cripple the right of injured parties to obtain redress under this statute through treble damage suits.

I would also like to comment upon your observations with relation to the broad conclusions of the Commission and the hearing examiner. Your criticism, as I understand it, was that neither of these contained findings on the impact of Anheuser-Busch's discriminations upon the competitive "structure." However, I feel that the real complaint is that the Commission or the examiner did not sufficiently detail the disadvantages flowing directly from drastic, immediate and substantial diversion of sales. This probably represents the real point of departure between the conflicting views expressed during our discussions. And it strongly points up the failure of the Court, as well as others, to appreciate the full significance of the Supreme Court's consistent holdings regarding the criteria of proof necessary to establish the statutory requirements of "may" substantially lessen competition or "tend" to injure, destroy or prevent competition. We do not recede from our position that the record supports the examiner's and the Commission's findings of actual injury to competition. In an effort to give recognition to the Congressional intent to reach discriminatory practices whose injurious effects have not come to full bloom, it must be almost axiomatic that we begin with the most convenient and persuasive test available, namely, diversion of sales. It is beyond dispute that the competitive health of a seller and its ability to effectively compete are measured by its ability to sustain a realistically competitive volume of sales. There is no decided case that has been dismissed for failure

of proof of competitive injury when it was shown that there was a causal connection between the price discriminations and a substantial loss of sales by competitors. There has never been a case of territorial price discrimination in which the crux of the matter was not diversion of sales. Every order entered as a result of territorial price discrimination has been entered solely for the purpose of preventing unlawful diversion of sales.

May I also invite your attention to those findings of the hearing examiner:

"... Undercutting, or selling below cost, furnish a clearer picture of injury and predatory intent, but no case holds it to be a *sine qua non* of injury, actual or potential, or tendency to monopoly. Similarly, no case holds complete destruction of competitor necessary before injury is found—neither death nor mayhem are essential. The facts here show a distinct probability of the one, if not the other, if A.B.'s price raid had continued longer, or indefinitely; and we are here concerned not only with actual injury but with potential injury as well, and there is nothing in this record to show that what A.B. did in the St. Louis market, could not or would not be done by it, in the future, in other markets as well." (App. 38)

It is also significant that in the recital of the facts in this matter in our previous appearance before the Supreme Court that the decision of the hearing examiner was exclusively relied upon. This represented nothing more than realistic approach to the proceeding. The Commission made no separate and individual findings of its own but adopted *in toto*, as its own, the findings of the Hearing Examiner.

We do not feel that the ill effects of the present decision can be effectively overcome by subsequent proceedings against another seller or by reopening the present case. The Court has said, "the inferences on which the findings of the Federal Trade Commission were based are so overborne by evidence calling for contrary inferences . . . that the findings of the Commission cannot, on the consideration of the whole record, be deemed to be supported by substantial evidence." If the Court is unable to accept the Commission's present findings on the basis of the instant record, surely any enlargement or attempt by the Commission to improve upon its findings would be viewed at best with jaundiced eyes. While it is a fact that the market structure has changed completely since the local price cuts of Anheuser-Busch and that this change undoubtedly resulted in large part from the local price cuts, it would be extremely difficult to establish that as a fact. Both Griesedieck Western and Griesedieck Brothers have disappeared from this market. Griesedieck Western sold out to the Carling Brewing Company. Griesedieck Brothers has recently been merged into Falstaff Brewing Company. One would suppose that neither of the surviving companies would be particularly anxious to stir up old coals and thereby offend Mr. Busch, the nation's leading seller.

In bringing any new territorial price discrimination action the Commission would immediately be confronted with the instant decision and the Court's holding with relation to the quantum of proof of competitive injury. The action, of necessity, would undoubtedly involve the sales of a seller of national standing and in all probability nationwide sales. In this event, since the Commission can in no way dictate the circuit in which a respondent seeks review, we would again be faced with a review by the same Court of Appeals, and unless that Court's interpretation of the Clayton Act drastically changes, we would again be faced with an adverse decision.

Quite frankly, I do not relish being in the position of justifying expenditure of our already limited funds under such circumstances especially when it is our view that it is extremely unlikely that we will ever again be able to demonstrate such an immediate and dramatic diversion in sales.

The decision to seek further review in this case should not be made on the basis of any criticism of the Commission's order. The Court of Appeals did not consider the appropriateness of the order in reaching the decision that the Commission had failed to prove a violation of the statute. The Commission has long recognized the inherent difficulties of drafting effective orders in cases of this nature. We feel that the appropriateness of the order should not influence the determination of the existence of a violation of the statute.

It may be that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy [will] be resolved in its favor," *United States v. E. I. du Pont de Nemours & Co.*, 29 U.S.L. Week 4434, 4439 (U.S. May 22, 1961).

Sincerely yours,

PAUL RAND DIXON,
Chairman.

SWANEE PAPER CORP.

2. *Swanee Paper Corp. v. F.T.C.*, 291 F.2d 833 (2nd Cir. 1961)

(a) *Court Action*: Order enforced as modified.

(b) *Commission Action*:

1. On October 4, 1961 directed General Counsel to request Solicitor General to petition for certiorari. *Vote*: 3-0, Mr. Kern was recorded as in favor of this action.

2. On December 21, 1961 directed that Solicitor General be again requested to file a petition for certiorari. *Vote*: 5-0.

3. On March 13, 1962 modified order to cease and desist referred to Secretary for issuance and service upon the parties. *Vote*: 5-0.

OCTOBER 5, 1961.

(2) *Swanee Paper Corp. v. Federal Trade Commission*, 2d Cir., No. 26311
(Docket 6927—Swanee Paper Corporation)

Memorandum of October 2, 1961, from the General Counsel transmitting draft of letter to the Solicitor General requesting that he petition the Supreme Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit of June 22, 1961, modifying the order in Docket 6927.

On October 4, 1961, pursuant to the recommendation of Mr. Dixon in memorandum of October 4, 1961, Messrs. Dixon, MacIntyre and Elman directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion, and approved and ordered forwarded, after signature by the Chairman, letter to the Solicitor General making such request and transmitting pertinent material.

Mr. Kern was recorded as in favor of the foregoing action.

The above action was confirmed by the Commission.

DECEMBER 21, 1961.

(2) *Swanee Paper Corp. v. Federal Trade Commission* 2d Cir., No. 26311
(Docket 6927—Swanee Paper Corporation)

Letter of December 19, 1961, from Archibald Cox, Solicitor General, with reference to the Commission's request, pursuant to the action of October 5, 1961, that a petition for certiorari be filed in the above matter. Mr. Cox concluded that no petition should be filed.

The General Counsel, Assistant General Counsel Truly, and Attorney Emerson Elkins of the Appellate Division were called in and consulted.

Mr. Elkins circulated to the several Commissioners copies of arguments against the Solicitor General's conclusion not to seek certiorari.

It was directed that the Solicitor General be again requested to petition the Supreme Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit of June 22, 1961, modifying the order in Docket 6927, and the staff was instructed to prepare an appropriate letter and to circulate copies of the letter to the several Commissioners.

MARCH 13, 1962.

(5) *Swanee Paper Corporation v. Federal Trade Commission* C.A. 2, No. 26311
(Docket 6927—Swanee Paper Corporation)

Mr. Dixon reported his consideration of memorandum of March 5, 1962, from the General Counsel advising that on August 3, 1961, the United States Court

of Appeals for the Second Circuit entered its final decree modifying, and as modified, affirming and enforcing the Commission's order in Docket 6927, and that on February 19, 1962, the Supreme Court denied Swanee's petition for certiorari.

The General Counsel recommended that the submitted modified order be issued and served.

After consideration, the modified order to cease and desist submitted by the General Counsel was referred to the Secretary for issuance and service upon the parties.

OCTOBER 4, 1961.

Re Swanee Paper Corporation v. Federal Trade Commission, 2d Cir. No. 26,311—
FTC Docket 6927.

Hon. ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On June 22, 1961, the United States Court of Appeals for the Second Circuit handed down its opinion in this case. In that opinion it upheld the Commission's determination that petitioner had violated Section 2(d) of the Clayton Act, but ruled that the Commission's order to cease and desist must be modified, and noted that its Rule 13(1) required the Commission to submit a proposed decree modifying that order. No formal judgment was entered upon the filing of the opinion. Thereafter, on August 3, 1961, after submission by the Commission and petitioner of proposed decrees, the court entered a final decree modifying the Commission's order to cease and desist. The purpose of this letter is to request the filing of a petition for certiorari to review that decree.

The case arose before this Commission, which on November 6, 1957, issued and served its complaint upon the petitioner, Swanee Paper Corporation, charging it with a series of violations, over a long period, of subsection (d) of Section 2 of the Clayton Act, as amended, 49 Stat. 1527; 15 U.S.C. 13(d).

The complaint charged and the Commission found that petitioner's violations consisted of paying substantial sums of money for the benefit of one of its customers, the Grand Union Company, as compensation or consideration for advertising petitioner's paper products on an animated "spectacular" sign leased and controlled by Grand Union, and for in-store promotion by Grand Union of petitioner's products, without making such payments or their benefits available on proportionally equal terms to petitioner's other customers competing with Grand Union in the distribution and sale of those products. In the proceeding before the Commission petitioner contested the Commission's view that the payments were illegal, and contended that even if they were found to violate the law no order to cease and desist should be entered because they had been stopped before the Commission's complaint was issued. The examiner, in his initial decision, held against petitioner on both issues and issued an order commanding petitioner to cease and desist from—

Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional displays or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale of respondent's products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

On its appeal of that decision to the Commission petitioner raised only the same issues; it did not contend that the order was in any way improper in form or scope or that the Commission should modify it in any way. The Commission rejected petitioner's appeal and adopted as its own the examiner's findings and decision, including the order to cease and desist.

Thereafter, petitioner filed in the court of appeals a timely petition for review of the Commission's order (Apdx. 49a-52a). Therein petitioner for the first time contended that the terms of the Commission's order were erroneous, asserting in paragraph 6 C that "the order of the Commission is too broad because it is couched in the general language of said statute and not in conformance of said alleged specific violations" (Apdx. 52a). The petitioner, however, did not state in what way the order was considered to be too broad, nor did it suggest that the order should be modified in any specific manner; its contention was that because of excessive breadth and for other reasons the order was "erroneous

and unlawful and should be set aside" (par. 8; Apdx. 52a), and that the Commission's findings did not, even if true, "justify or warrant the issuance of said order or any order" (par. 9; Apdx. 52.). Nor did the relief prayed include modification; petitioner asked only that the court "enter a decree (a) setting aside the order * * *, (b) that the Commission's complaint be dismissed and (c) that such other and further orders and decrees be made as to the Court may seem just and proper" (Apdx. 52a).

However, in its brief filed in the review proceeding, in addition to repeating its contentions that it had not violated the statute (pp. 27-38) and that because its use of the sign had stopped before the complaint was issued the order should be entirely set aside (pp. 22-26), petitioner introduced for the first time the contention that the Commission's order "should be modified and limited to the specific practice held to be a statutory violation" (pp. 8-22). But although petitioner argued at length the general proposition that the order should be modified and limited, it did not explain the nature of the modification or limitation it desired except in the most general terms, i.e., "the specific practice held to be a statutory violation" (p. 8), "the business practice at issue herein" and "the facts at issue" (p. 9), "the facts which are the subject of the complaint herein" (p. 11), "the particular offense or those like or related thereto" (p. 14), "the facts at issue" (p. 22), and "the specific type of practice alleged to be a violation in the complaint herein" (p. 38).

In its answering brief the Commission pointed out that petitioner had failed to raise any issue before the Commission as to the terms of the order, despite ample opportunity to do so. The Commission argued that the court therefore should not entertain the issue (pp. 38-40), but that in any event the order was entirely proper and should be affirmed (pp. 40-42).

In its reply brief petitioner was no more specific in its criticism of the order or in its request for modification, contending only that the order should be limited to "the specific practice which is the subject of the complaint as well as related practices 'in a slightly altered garb'" (p. 7), to "the specific practice involved herein" (p. 11), or to "the specific type of practice alleged to be a violation in the complaint herein" (p. 12). This was still the situation when the case was submitted, for no explanation of petitioner's desires was given in oral argument, although the lack of such explanation was urged by Commission counsel as resulting in the presentation of a merely abstract question and as preventing evaluation of the appropriateness of any particular change in the order.

The court held that the facts set out in the Commission's findings were supported by the evidence, and that petitioner had violated the Act. Strangely the court stated that petitioner's four and one-half year series of discriminatory monthly payments under two slightly different arrangements constituted only a "single violation," and, despite recognition of facts showing petitioner's awareness of the illegality of its actions and its purpose of evasion of the law and concealment of its violations (pp. 2272-73), said that the record did not show "flagrant or extensive violations" (p. 2277). The court rejected *sub silentio* petitioner's contention that its cessation of the violations before the complaint had been issued required the order to be set aside entirely, but held that the order "should be limited to the particular practice found to violate the statute." However, that ruling was as abstract as petitioner's argument had been, for it did not give any indication of what it considered the "particular practice" to be, or explain what practices, if any, it believed the existing order improperly prohibited, or prescribe any particular type of modification or limitation. The court did not remand the case to the Commission for determination of the issues which would be presented in drafting a new administrative order conformable to the court's imprecise pronouncement. Instead it stated that it would enter an order "in conformity with this opinion," pursuant to its Rule 13(1), which it stated required the Commission to submit first a proposed decree "in conformity with the opinion" and allowed petitioner, if it disagreed, thereafter to submit its proposed decree.

Being informed only in the most general way as to the court's desires, and having no information as to the nature of the limitation which petitioner wanted and apparently had won, the Commission submitted a proposed decree containing an order to cease and desist which would have prohibited discriminatory payments for advertising or promotional display services only, omitting the original order's additional prohibition against such payments for "other services or facilities" not involved in the case. That order would have been applicable whether such payments were made directly ("to") or indirectly ("for the benefit of")

the customer. The Commission submitted its proposed decree in a memorandum to the court, in order to place in the record its objections to the court's transfer of the initial litigation of the terms and coverage of the administrative order from the administrative proceeding to the summary decree-settlement stage of the review.

Petitioner thereafter submitted a proposed decree containing an order which also would have prohibited both direct or indirect discriminatory payments ("whether paid directly to Swanee's customer or to another person") but would have been limited to occasions involving the rental of an advertising sign leased and controlled by the customer. Thus as a result of the court's construction of its Rule 13(1) the Commission first learned what were petitioner's objections to the existing order and its alternative proposals only after all opportunity to comment thereon had passed, for that rule provides that after receiving the petitioner's proposed decree "the court will thereupon settle and enter the decree without further hearing or argument." This the court did.

But the court did not adopt either proposed order: it narrowed the order beyond the limitation which petitioner had requested. Its order prohibits discriminatory payments only when they are made to "any third person * * * to provide benefits" for a customer of petitioner, leaving petitioner completely free to make such discriminatory payments *directly* to its customers. This is an entirely new order, omitting a type of restraint which both petitioner and the Commission had explicitly asked the court to include, and limiting the order's coverage in a way not sought by either, never even mentioned in this case, and not suggested by anything in any reported decision cited to or by the court.

By what may not be a coincidence, however, the order imposed by the court is of the same type as that sought by The Grand Union Company in a different review proceeding pending in the same circuit (*The Grand Union Company v. Federal Trade Commission*, 2d Cir. No. 26553), in which briefs have been filed and argument is to be heard on October 10, 1961. The petitioner in that wholly separate case is the customer to which Swanee had made its series of illegal payments, and which the Commission in a separate administrative proceeding had held to have violated Section 5 of the Federal Trade Commission Act by inducing and receiving the benefit of the discriminatory payments from Swanee and other suppliers. In that case the Commission's order prohibits Grand Union's future inducement and receipt of discriminatory payments either to it or to others for its benefit, and Grand Union is contending that the order should be so modified as to prohibit only its inducement and receipt of the benefit of discriminatory payments to third parties, and to eliminate the prohibition of its inducement and receipt of discriminatory payments directly from its customers.

By thus modifying the Commission's order so that it will include a loophole which neither the petitioner nor the Commission had sought, the court not only has denied petitioner the relief it asked, it has used petitioner's prayer for relief as a pretext to carve Grand Union's proposed loophole into the order applicable to this one of Grand Union's suppliers, thereby leaving that supplier exposed, in a way which petitioner's proposed decree strongly suggests that it did not care to be exposed, to future demands from Grand Union or others that it commit for them further violations of the Act, either by open and direct payments or by some new subterfuge not dependent upon the participation of third parties.

We believe that, even if the issue had been properly before the court and the Commission's order improper in scope and coverage, the court clearly erred in formulating the terms of an administrative order, in ruling that its summary decree-settlement procedure provided an appropriate method of determining the proper remedy to be applied by such an order, and in using the petitioner's prayer for one type of modification as the basis for imposing upon petitioner and the Commission a completely new substitute order which neither had sought. In doing these things the court stepped outside its function and authority as a reviewing court—the only role given it by the Congress—and improperly assumed one of the fundamental functions of the administrative agency. "The relation of remedy to policy is peculiarly a matter for administrative competence." *Carter Products v. Federal Trade Commission*, 268 F.2d 461, 498 (9th Cir. 1959), *cert. denied*, 361 U.S. 884. "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reason for its action." *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). *Accord*, *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-45

(1940) ; *Adams v. Mills*, 286 U.S. 397, 416-17 (1932) ; *Blair v. Oesterlien Machine Co.*, 275 U.S. 220, 225 (1927). Cf. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 55 (1948).

In addition, the court also clearly was in error in its decision that the issue of the scope of the order was one that it could and should entertain in the circumstances of this case. The court's opinion shows that it reached its decision as to the scope of the order on the basis of the assumption that all facts not shown by the record were in petitioner's favor. It said (p. 2277) "the breadth of the order issued is not justified by the facts," "there must be some relation between the facts found and the breadth of the order," and "nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee." Even though these criticisms are incorrect (as we shall demonstrate below), they show that although the court recognized that an issue as to the scope of an administrative order must be decided on the basis of all relevant facts, it failed to appreciate that where, as here, findings with respect to facts relevant to a contention "are an appropriate if not indispensable basis for judicial review of the question sought to be raised," *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253, 255-56 (1943), and the lack of such findings is attributable to petitioner's failure to raise the issue in time to permit the relevant evidence to be developed and appropriate findings to be made, the reviewing court should not assume the missing facts to be in petitioner's favor and decide the matter on that basis. *National Labor Relations Board v. Cheney Lumber Co.*, 327 U.S. 385, 389 (1946). For a court of appeals to adopt such a procedure must either permit litigants to booby-trap their opponents by withholding issues until the record is closed, and then obtaining decision during the review on the basis of an incomplete and one-sided record, or require them in every case to take the precaution of loading the record with all available evidence relevant to every possible issue, whether raised or not.

To avoid those equally unacceptable alternatives the Supreme Court has "recognized in more than a few decisions * * * and Congress has recognized in more than a few statutes * * * that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over decisions unless the administrative body has not only erred but has erred against objection made at the time appropriate under its practice." *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952). With respect to a question similar to that decided by the court in this case, and like it requiring decision upon an expert appreciation of market factors, the Supreme Court has said that "if the question has not been raised before the Commission * * * a reviewing court should not in any event entertain it." *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 414-14 (1958) *Accord*, *Barclay Home Products v. Federal Trade Commission*, 241 F. 2d 451, 452 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 942 (1957) ; *DeGorter v. Federal Trade Commission*, 244 F. 2d 270, 272 (9th Cir. 1957) ; *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499-501 (1955).

The court of appeals relied upon the fact that the Supreme Court, in *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941), decided eleven years before *Tucker Truck Lines*, *supra*, had "modified an NLRB order notwithstanding the failure of the party affected thereby to object." For several reasons, however, the court's action in that case was not authority for similar action in this one. First, that decision was not rendered in a review proceeding, but in an original enforcement action brought in a court of appeals by the Board so that there the agency carried the burden of demonstrating to the court that the relief it prayed was shown to be necessary by the record it had made in the administrative proceeding. Here, however, as in the other review cases cited above, the petitioner rather than the agency was the proponent in the court action for relief from the agency's order, and therefore had the burden of establishing in the court its right to relief on the basis of the record made before the agency. Application here of the same principle as that which led to modification in *Express Publishing* would preclude modification here, for that principle was simply that a litigant's failure to carry its burden must result in the denial of the relief it seeks, and here it is petitioner, rather than the Commission, which had the burden and failed to carry it. The Supreme Court's consideration of the issue in *Express Publishing* and similar enforcement cases, even if still authoritative

precedent, thus would be entirely compatible with that Court's rulings in the review cases that such issues are not open upon such review unless raised before the agency.

Furthermore, in the *Express Publishing* case the opinion discloses no objection by the agency to the court's consideration of the issue, whereas here and in the review cases we have cited such objection was made. The absence of such objection in *Express Publishing* appears to have been crucial, for in its subsequent decision in *National Labor Relations Board v. Chency Lumber Co.*, 327 U.S. 385 (1946) in which the agency did object to consideration the Court noted the existence of a statutory command apparently overlooked in *Express Publishing* (Section 10(e) of the National Labor Relations Act), that in an enforcement proceeding "no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," and declined to entertain the issue. It limited *Express Publishing* by stating (327 U.S. at 387) that in that decision it had "merely held that whether such an inclusive provision [as the challenged portion of the order] is justified in a particular case depends upon the circumstances of the particular case before the Board." It ruled (327 U.S. at 387-88) that where "no objection was raised by the Company until after the Board sought judicial enforcement of its order" the "objection came too late," and (327 U.S. at 389) that "justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse 'the failure or neglect to urge such objection,'" because "Congress desired that all controversies of fact, and the allowable inferences from the facts, be thrashed out certainly in the first instance, before the Board." The court concluded that "it was therefore not within the power of the court below to make the deletion it made." Accord, *Marshall Field and Co. v. National Labor Relations Board*, 318 U.S. 253, 256 (1943).

The *Chency* decision makes clear that the action of the Supreme Court in *Express Publishing* is not precedent for similar action even in National Labor Relations Act enforcement proceedings. Other cases, such as those we have cited, demonstrate that it also is not precedent in other enforcement or in any review cases. Perhaps the most definitive, because based upon the Administrative Procedure Act and therefore applicable to all review and enforcement proceedings (APA Sec. 10(b), 60 Stat. 243; 5 U.S.C. 1011(b)), is *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955). In that review proceeding the court, in addition to relying upon a review-limiting provision of the Natural Gas Act, pointed out that section 10(e) of the APA (60 Stat. 243; 15 U.S.C. 1011(e)) allows reviewing courts to decide relevant questions only "where presented", and held (348 U.S. 500) that where the question had not been raised before the agency, it was not "presented" on review, within the meaning of that Act. In reaching that construction it relied upon the following excerpt from the report of the Senate Committee upon the bill which became The Administrative Procedure Act (S. Doc. 248, 79th Cong., 2d Sess. 289, n. 21) :

"A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, or resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies * * *."

The 1941 *Express Publishing* decision, therefore, to the extent that it might have stood for the proposition that the courts might entertain new issues upon review, must be regarded as legislatively overruled by the enactment in 1946 of the Administrative Procedure Act.

The court's invocation in its opinion (p. 2278) of "proper judicial administration" as authority for modifying the order (p. 2278) is entirely inappropriate since "judicial administration," which is the court's conduct of the proceedings before it, is no source of authority for the exercise of any control over the content of decisions, judgments, or orders under review, even of inferior courts. See *In re MacNeil Brothers Co.*, 259 F. 2d 386, 387 (1st Cir. 1958); *Wooten v. Bomar*, 266 F. 2d 27, 28 (6th Cir. 1959); *Lewis v. United Gas Pipe Line Co.*, 194 F. 2d 1005, 1006 (5th Cir. 1952), *cert. denied*, 343 U.S. 974. A reviewing court can have no more authority over the Commission's actions than it has over

those of district courts, since review proceedings are "appellate and revisory merely, and not an exercise of original jurisdiction by the court itself." *Federal Trade Commission v. Eastman Kodak Co.*, 274 U.S. 619, 624 (1927). The reviewing power does not include authority to assume and perform essentially administrative functions, *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

The court attempted to escape the rule requiring exhaustion of remedies before the agency, by commenting that "Swanee did object to the order, however, in its petition to review, and at the time this was filed, the Commission could have modified its order if it had so wished" (p. 2278). But the established rule, as stated in the case cited by the court (*United States v. Tucker Truck Lines*, 344 U.S. 33 (1952)), actually is that the objection must be made to the agency, rather than merely about it in some other forum, and must be made "at the time appropriate under the [agency's] practice" (344 U.S. at 37). A pleading in a court of appeals is not addressed to the agency and is not a part of the already-completed administrative proceeding under review. The fact that an agency may learn, after it has issued an order and while it has power to modify it, that the respondent is so dissatisfied with it as to petition a court of appeals to set it aside does not relieve the reviewing court of the necessity of following the exhaustion rule. That rule is not, as the court seems to believe, based upon a requirement of notice to the agency while it still has power to modify, but rather upon the necessity of conducting the initial litigation of such matters before the administrative body created and equipped to handle them, rather than in the reviewing court.

Furthermore, as we have pointed out above, the petition to review filed in the court of appeals contained no contention that the order should be modified; it prayed only that the order be set aside. It was not until after the Commission no longer had the power to modify the order that it learned, from petitioner's brief in the review proceeding, that petitioner had decided that it wanted the order modified. Even then the Commission had insufficient knowledge of what modification petitioner wanted to enable it to accede to petitioner's wishes had it desired to do so, for it was not until petitioner filed its proposed decree that it first revealed what was behind its abstract argument. That this was too late to be of any use in the case is shown by the fact that the court disregarded petitioner's proposal and composed its own substitute order, thereby revealing its previous misapprehension of petitioner's wishes. To present occasion for agency action, objections to an order must be sufficiently specific to bring into focus the precise nature of the alleged error and the relief sought. Cf. *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253, 255 (1943). The petition to review did not meet this standard, so that even if that petition is to be regarded as otherwise satisfying the exhaustion-of-remedies rule, it still would not constitute grounds for the reviewing court to entertain the issue.

We think it clear from the above that the court committed serious error by entertaining petitioner's abstract arguments about the scope of the order, but we also think it clear that even if the issue were properly before the court for decision, the court erred both in its resolution of that question and in its emission from the substitute order of any prohibition of open and direct discriminatory payments by petitioner to petitioner's customers. Although in its opinion the court paid lip-service to the rule that Commission orders are valid if their prohibitions bear a reasonable relation to the past violations, it disregarded both the facts of this case which show that the order met that test, and the many decisions of the Supreme Court, and even of the same court of appeals, holding that similar and even broader orders were valid in cases presenting factual circumstances not significantly different from those of this case.

The court held (p. 2277) that "the breadth of the order issued is not justified by the facts." It recognized that "administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future," but then implied that in this case there was no sufficient "relation between the facts found and the breadth of the order." In support of that position it stated that "nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the single violation occurred in an uncertain area of the law and was discontinued before the complaint was filed." But the court had just affirmed the Commission's findings that Swanee had engaged in a four-year series of monthly payments pursuant to contracts annually renewed, that Swanee knew it was conferring benefits upon

Grand Union, and that (p. 2275) deletion of references to the customer in one renewal, shortly after petitioner "had complained of pressures from its other customers," supports the view that "Swanee was not totally unaware of the legal significance of the arrangement." If these affirmed facts do not establish "flagrant and extensive violations of Section 2(d) by Swanee," the court must mean that a series of violations, no matter how long continued, is not "extensive" and, no matter how obvious and intentional, is not "flagrant" unless no attempt whatever is made to conceal it. Furthermore, the court does not explain why it evidently believes that a surreptitious violator may not be placed under as comprehensive an order as may a "flagrant" violator, and no logical reason therefor is apparent to us. Permissible breadth might be related to demonstrated purpose to evade the law, but subterfuge and attempted concealment surely show such a purpose as clearly, if not more so, as do open and obvious violations.

The court further stated that "the order is not even limited to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute." Both of these assertions are incorrect. The illegal activity found by the Commission and affirmed by the court was petitioner's practice of making discriminatory payments for the benefit of one customer in return for advertising and promotional services and facilities rendered to petitioner by that customer. The order forbade that, and went further only to forbid the making of such payments directly to the customers: it cannot reasonably be said that the making of such payments directly is not related to the making of them indirectly—that is, to others for the benefit of the customers. Indeed, this case itself demonstrates the relationship, for it shows an attempt to avoid the obviousness of illegality attendant upon direct payments, by making them indirectly and covertly.

The facts of this case, in which petitioner's customer had leased the entire sign and had complete use and occupancy of it (opinion, pp. 2272, 2275-76), and the sign's owner operated it for the customer's benefit and profit as well as its own, also demonstrate the fallacy of trying to distinguish between payments "to" and payments "for the benefit of" the customer for purposes of classifying a violation as exclusively one type or the other, and so limiting the order. Under the established facts it would be equally valid to describe Grand Union as the lessee-proprietor of the sign, Douglas Leigh as Grand Union's sign-operating and managing agent, and the payments by petitioner therefor as made to Grand Union through its agent, rather than to a "third party" for Grand Union's benefit. When two such equally valid descriptions may be made of a single set of transactions, equally illegal whichever view is taken, then it is sheer sophistry to adopt one view to the exclusion of the other, as the court has done, for the purpose of deleting the prohibition of the other from the order.

Furthermore, since Section 2(d), unlike such broad statutory provisions as Section 5(a) (1) of the Federal Trade Commission Act and Section 8(1) of the National Labor Relations Act (involved in *Express Publishing*) prohibits only one practice, which can occur in only two immaterially different forms (indirect or direct), it is a practical impossibility to find any action which would constitute a violation of the subsection without being indistinguishable except in inconsequential detail from every other practice which also would violate it. *P. Lorillard Company v. Federal Trade Commission*, 267 F.2d 439, 445 (3d Cir. 1959), cert. denied, 361 U.S. 923. In that case the court affirmed an order substantially identical to the Swanee order, holding that because the subsection is so narrow that orders framed in its language "would be well within the permissible ambit of the Commissions discretion." That decision is in direct and unreconcilable conflict with the one in this case.

This case also is in clear conflict with applicable decision of the Supreme Court. As the Third Circuit noted in *Lorillard*, the Supreme Court had approved an even broader order challenged in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). In that case (more recent than *Express Publishing*) the Supreme Court upheld a challenged Commission order, issued upon findings that Ruberoid had violated subsection (a) of the same Section 2 of the Clayton Act by granting discriminatory price differentials of 5% or more between its customers. The Commission order prohibited future discriminations "by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products" (343 U.S. at 472). That order thus effectively prohibited all future violations of the broader subsection (a), and its affirmance by the Supreme Court shows that it is not, as the court implied, improper to issue an order as broad as the statutory provision violated.

Despite the court's citation of the earlier *Express Publishing* case in support of its contrary views (p. 2278), that decision is not contra to *Ruberoide* and does not support the court. In *Express Publishing* the Board had found that the employer had violated subsections (1) and (5) of Section 8 of the National Labor Relations Act (49 Stat. 452, 453) by refusing to bargain and by interfering with bargaining negotiations (312 U.S. at 429). Subsection (5) declared it unlawful for an employer to refuse to bargain collectively with the representatives of his employees. Subsection (1) prohibited interference with employees' exercise of any of the several rights enumerated in Section 7 of the Act ("to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (49 Stat. 452)). The Board's order not only directed the employer to bargain and to cease and desist from its refusal to do so, but also in a separate paragraph directed it to cease and desist from "in any manner interfering with, restraining, or coercing its employees in the exercise of their rights [reciting all of them] as guaranteed in Section 7 of the Act."

The Supreme Court upheld the portion of the Board's order directing respondent to cease and desist from "refusing to bargain collectively" (the entire subsection (5) requirement (312 U.S. at 432)), and disapproved "in the circumstances of [that] case" only the Board's position that because a violation of subsection (5) was also a violation of subsection (1), and subsection (1) protected all the different rights guaranteed by Section 7, proof of a violation of subsection (5) allowed an order explicitly prohibiting the employer from any interference with each of the several Section 7 rights (312 U.S. at 432-33).

It was as though the Commission had in this case not only prohibited all future violations of subsection (d) of Section 2 of the Clayton Act, but in addition, because such violations are also violations of Section 5(a) (1) of the Federal Trade Commission Act (as are violations of the other subsections of Section 2 of the Clayton Act), prohibited Swanee from engaging in the "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" made unlawful by Section 5, or from violating subsections (a), (c), (e), and (f) of Section 2. Only if the Commission had done this would its order have corresponded to the portion of the *Express Publishing* order held to be improper. As it is, the order here corresponds to the portion of the *Express Publishing* order which was upheld.

In *Express Publishing*, furthermore, the Supreme Court explicitly limited its holding to such situations, saying (312 U.S. at 437), "we hold only that the National Labor Relations Act does not give the Board authority * * * to enjoin violations of all the provisions of the statute merely because the violation of one has been found" (emphasis supplied). Nothing in that decision even suggests disapproval of a prohibition of all violations of a single statutory provision violated, and such a prohibition was explicitly affirmed (312 U.S. at 432). *Express Publishing* is thus authority in support of the Commission's order, rather than against it, as are *Ruberoide*, *supra*; *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611 (1946); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959); *Moog Industries, Inc. v. Federal Trade Commission*, 238 F.2d 43, 52-53 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). The court's ruling thus is in conflict with those plainly applicable decisions. It is also, strangely enough, in conflict with two of the same court's own prior decisions, *Consumer Sales Corp. v. Federal Trade Commission*, 198 F.2d 404, 408 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953), and *Hoving Corp. v. Federal Trade Commission*, 290 F.2d 803, 806 (2d Cir. 1961).

As additional misconceived authority for its action, the court said that "the order as written is so broad that under the new enforcement provisions of the Clayton Act (15 U.S.C. § 21), the duty of enforcing the prohibitions of Section 2(d) as to Swanee is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issue that Congress has entrusted the Commission to determine," citing *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948). This statement is replete with errors. In the first place, the new provisions of the Clayton Act merely adopted for that statute the same type of dual enforcement methods already applicable to Federal Trade Commission Act orders, so that while violators of enforced orders may still be punished in criminal contempt actions in courts of appeals, violators of such orders and

unreviewed orders otherwise final now may be subject to civil penalty actions in district courts. In *Morton Salt* the Supreme Court had commented about the difficulty of a court of appeals deciding an issue of injury to competition in a criminal contempt case (see 334 U.S. at 54); no such difficulty arises in civil penalty trials in district courts, and then, as now, Clayton Act cases with all their issues could be tried originally in district courts. Since the amendment makes it no longer necessary for every violation of a Commission Clayton Act order to be established and punished in a contempt trial in a court of appeals, but permits that burden to be carried in a civil suit in a district court, the amendment removes, rather than introduces, the difficulty of trial as any reason for narrowing Commission orders.

Furthermore, the amendment merely conforms Clayton Act enforcement methods to those already in use to enforce orders issued under the Federal Trade Commission Act, so that if the permissible breadth of Commission orders depended upon such methods it would now be the same under both statutes. But even before that amendment the Supreme Court, in its leading decision concerning Clayton Act orders, quoted from, relied upon, and applied the identical standard it had applied in its leading decision upon the proper breadth of Federal Trade Commission Act orders. The Clayton Act decision was *Ruberoide*, 343 U.S. at 472; the prior Federal Trade Commission Act case was *Jacob Siegel*, 327 U.S. at 611. Subsequently, in another Federal Trade Commission Act case, *National Lead*, 352 U.S. at 428-29, it cited and applied the rule of the prior two decisions. The interrelationship of these decisions shows that the change in Clayton Act enforcement methods provided no cause for change in the standards applicable to Clayton Act orders.

Nor are the issues in this case, which the court held the Commission's order would shift to the district court in a penalty suit, of the character of those which disturbed the Court in *Morton Salt*. The order in that case, after a clause prohibiting certain price discriminations, provided that "this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers" (344 U.S. at 53). *Morton Salt's* objection was to the "which do not," etc., qualification, and it was on the grounds that (1) the Commission cannot prohibit a differential unless it is illegal, (2) it is not illegal unless it has such an effect, (3) the Commission had not found that price differences of less than five cents per case had such an effect, (4) therefore there was no factual basis for that part of the order (334 U.S. at 53-54). The Court did not rule that courts could not decide such issues, but held only that the challenged portion of the order was not supported by appropriate findings, which the Court could not supply. It said (344 U.S. at 54):

"The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease-and-desist orders did not more than shift to the court in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval * * *, is to adjudicate questions of fact which support that valid order."

What the Court obviously was discussing was not the nature of issues which courts may entertain, but the time and place for determining whether something prohibited by a Commission order is illegal and therefore properly to be prohibited by that order: its decision was that the determination had to be made before the order issued rather than after, and is only an application of the familiar rule that if the Commission wishes to prohibit a practice it must first find that that practice is illegal. The Court was not suggesting that it would be improper for the Commission to prohibit illegal practices because to do so would require the courts in subsequent enforcement proceedings to determine issues identical to those which the Commission must decide in its proceedings, as the court of appeals in this case incorrectly has assumed. In this case the court has recognized that the Commission's order prohibits only what is illegal for it said (p. 2278) that the order "enjoins Swanee from violating Section 2(d) in the very words of the statute." Thus, the Commission's order does not contain the deficiency implicit in the order in *Morton Salt*, and that decision provides no authority for modifying the Commission's order in this case.

The court of appeals' misconstruction of *Morton Salt* is at variance with the Supreme Court's decision in *Ruberoide*, which clearly shows that there is no rule that Commission orders must be so drafted as to avoid the necessity for an enforcing court, in order to determine whether the order has been violated, to

decide the same issues which would be presented by an original charge of a violation of the statute. In that case the Court not only affirmed a Commission order as broad in its coverage as the statute (343 U.S. at 472), but also explicitly held that statutory defenses omitted from the terms of the order "are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*" (343 U.S. at 476).

The Supreme Court thus, instead of viewing as improper the practice of conforming the breadth and terms of the order to those of the statute (which the court of appeals criticized in this case), regarded it not only as proper but as so necessary that it would be regarded as done even though the Commission had not done so. The reason, of course, is clear; variance between order and statute would deprive both petitioner and any enforcing court of the benefit of the gloss of legislative history and court and Commission construction which surrounds the statutory language and helps to elucidate its meaning.

The court in a footnote (p. 2277), referred to a House Report on the amending statute, Public Law 86-107, as authority for holding that the order's breadth was excessive. But the report quoted has nothing to do with the breadth of Commission orders; only with their clarity of expression. The court quoted a statement in that report to the effect that the Commission should "make a continuous effort to issue orders that are as definitive as possible," and that deficiencies in his regard may be corrected by judicial review. The court obviously has erroneously regarded the word "definitive" as meaning "limited" or "narrow," whereas it means serving to decide or settle something finally, "determinative," "conclusive," "serving to define or specify precisely," "clearly defined; exact." See Webster's New International Dictionary. The report shows, in the first sentence of the paragraph from which the court quoted, that the Committee was not guilty of the court's semantic error, but was using the word in its correct meaning, for the subject under discussion was stated to be "an asserted vagueness and uncertainty in the provisions" of Commission orders. H.R. Rep. 530, 86th Cong., 1st Sess.; 11 U.S. Cong. and Ad. News advance sheets, 2030, 2033 (1959).

Finally, we think it is clear that the substitute order imposed by the court is inadequate to insure protection of the public interest; it does not even purport to prevent repetition by petitioner of violations of the subsection indistinguishable in all save immaterial details from the series of violations shown by this case.

In *Express Publishing* the Court said that "to justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past" (312 U.S. at 437). Therefore, even if the court were to correct in its view in this case that the Commission's order, prohibiting direct as well as indirect payments, was a prohibition against two different kinds of violations rather than one, it still would be proper, for the making of discriminatory payments directly to the customer clearly bears a resemblance to the making of them to another for the customer's benefit. It is fairly to be anticipated that one who makes consciously concealed indirect discriminatory payments may make such payments directly if left free to do so. In *Express Publishing* the Court held that "an appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any further acts *in any manner* interfering with the Guild's efforts to negotiate" (312 U.S. at 438; emphasis supplied), and included in the order as modified by it a prohibition against the employer's "*in any manner* interfering with the efforts of the Guild to bargain collectively . . ." (312 U.S. at 439; emphasis supplied). The Court's ruling and action in *Express Publishing* completely supports the Commission's view that a proper order in this case must, as the Commission's order in effect did, prohibit Swanee from *in any manner* conferring upon its customers the benefits of discriminatory payments, and that the court of appeals' substitute order is inadequate because it leaves Swanee free to do so by paying such benefits directly to the customer.

It is requested that a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be filed in the Supreme Court of the United States. There are transmitted herewith copies of the pertinent briefs, the appendix (printed by petitioner), the opinion of the court of appeals, the memorandum from the Commission to the court transmitting the Commission's proposed decree, petitioner's proposed decree, and the decree entered by the court of appeals.

By direction of the Commission,

PAUL RAND DIXON,
Chairman.

DECEMBER 22, 1961.

Re Swanee Paper Company v. Federal Trade Commission, 2d Cir. No. 26311,
FTC Docket 6927.

HON. ARCHIBALD COX.

*Solicitor General, Department of Justice,
Washington, D.C.*

DEAR MR. SOLICITOR GENERAL: The Commission has received and studied your letter of December 19, 1961, stating your conclusion that no petition for certiorari should be filed in this case, and explaining your thinking about it. This letter is to request that you reconsider that conclusion.

The views expressed in your letter relate only to the scope of the Commission's order, which in our view is of least importance of the several errors of the court of appeals. It appears that you have not given consideration to the aspects of the decision which the Commission regards as of importance transcending this case and all other issues involved in it: that of the propriety of the court of appeals entertaining and deciding, on the record before it, any issue as to the proper scope of the Commission's order.

As we pointed out in our letter of October 4, 1961, requesting that you file a petition, the order to cease and desist was entered by the hearing examiner at the conclusion of the hearings before him. Swanee appealed the examiner's decision to the Commission but made no contest whatever as to the propriety of the scope or terms of that order. The Commission adopted the examiner's decision and order; no further submissions of any kind were made to the Commission by Swanee and Swanee's petition for review filed in the court of appeals contained no prayer for modification of the Commission's order despite one sentence criticizing it as excessively broad in scope. The Commission objected in the court of appeals to that court's consideration of the issue. The court of appeals ruled, however, that it could entertain and decide the issue because Swanee had objected to the scope of the order in the petition to review, and it decided that issue by assuming *inter alia* that the absence from the record of any evidence of other violations by Swanee established that there had been none.

As we pointed out in our prior letter, if that ruling is correct, the doctrine that exhaustion of administrative remedies is a prerequisite to raising an issue on review has been abandoned. If that ruling is allowing to stand, it will mean that any issue stated for the first time in a petition to review may be entertained by the court and decided upon the existing record, with presumptions as to missing evidence indulged against the agency and in favor of the petitioner whose failure to raise the issue at the proper time caused the absence of the evidence.

The consequences of such a rule, if allowed to stand, is that the Commission and other agencies will have to crowd all of their litigated records with all evidence available on all possible issues, whether raised before them or not, or face the possibility of reversal of their decisions or modification of their orders by the courts of appeals. This is an impossible burden. To attempt to carry it would aggravate serious the already mountainous problem of handling the big antitrust cases, as well as increase materially the total workload involved in the large number of smaller cases. The Commission and other agencies are already subject to much criticism for the amount of evidence which they introduce into their records and the length of time taken to litigate their cases. The proper rule, which should be protected by the filing of a petition in this case, is that matters not contested before the agency should not be made the subject of superfluous evidence and that records should not be burdened with evidence which pertains to issues not raised or which is merely cumulative.

In the *Swanee* case, for example, in the posture it had before the Commission, evidence that Swanee had committed other and similar violations of Section 2(d) of the Clayton Act would have been merely cumulative and properly objectionable by Swanee had it been offered by counsel supporting the complaint. Had Swanee sought before the Commission an order of the type entered by the court, forbidding only violations committed indirectly through third parties, and not forbidding any violations involving payments by Swanee directly to its customers, it would have been possible for counsel in support of the complaint to present evidence tending to show that, on at least one other occasion, Swanee made a direct discriminatory payment to another customer, and this would have precluded the contention Swanee made to the court of appeals, which the court accepted as true, that the violations revealed by the record were its only ones.

The Commission disagrees with your expressed views that it is wrong for it to issue broad orders as the usual thing in cases before it where there is no contest as to the breadth of those orders. That view overlooks the fact that, unlike a court deciding private litigation, the Commission acts to protect the public interest and therefore should in every case issue orders giving as much protection as is broadly necessary to the public, and should issue orders narrowed from such full scope only when lesser protection is shown to be adequate by special considerations raised in particular cases. Where an examiner, as in this case, enters an order designed to give adequate protection to the public, and the respondent makes no objection to its scope, the Commission would be derelict in its statutory duty to protect the public interest if it were to modify that order to make it less effective. It is, in short, the respondent's burden of raising as an issue before the Commission a contention that the order against it is excessive or need not be fully protective of the public interest; it is not the Commission's burden to make a showing of need for full protection when there is no contest. To impose the burden in reverse would enlarge records, prolong litigation, and cause unnecessary expense to respondents. We believe that the proper rule is the same as that announced by the Supreme Court in *Labor Board v. Ochoa Fertilizer Corp.*, December 18, 1961, 30 L.W. 4090, 4091, with respect to consent explicitly given by respondents, that "it relieves the [agency] of the necessity of making a supporting record."

Nor does the Commission agree with your letter's criticism of it for not explaining in its opinions its reasons for issuing full-coverage orders in this and other cases where no such issue is raised, for that criticism overlooks the fact that the lack of discussion in this case was occasioned by Swancee's acquiescence in that order, when appealing the examiner's decision to the Commission. Where no issue as to the scope of the order is presented, no explanation of its terms is required and to include an explanation would be superfluous. Contrary to your stated impression, it is the Commission's practice to explain its decisions on this and other matters involved in cases before it whenever occasion therefor is presented by the submission of issues to it.

The Commission does not agree with your views that filing a petition in *Swancee* would lessen the chances of victory in *Broch*, and that such a possible result provides reason for acquiescing in the *Swancee* decision. It is our view that, since both cases are reviews of Commission decisions, the question of whether such a risk is to be assumed is one for the Commission, and the Commission is willing to assume it. It is further our view that the errors committed in the *Swancee* decision, in which the court relied upon *Broch*, make it such an example of the consequences of the error *sub judice* in *Broch* that the filing of a petition in *Swancee* would strengthen rather than weaken the chances of success in *Broch*. Finally, on this point, it is our view that whether the filing of a petition in *Swancee* would lessen the chances of success in *Broch* is not a valid consideration upon which to base a decision as to whether the *Swancee* petition should be filed. We believe that decision should be based upon the considerations that the court's rulings are clearly wrong, that they are upon matters of great importance to the Commission (and, we believe, to other agencies), and that they are not presented to the Supreme Court by the *Broch* case and cannot be expected to be decided in that case no matter which way it is decided.

There is a point valid for consideration, however, as to the effect which a failure to file a petition in *Swancee* probably would have upon a different Commission case now undergoing review. As we pointed out in our earlier letter, the *Swanec* case involved one supplier of the Grand Union Company. The Commission proceeded against Grand Union for its inducement of those and other violations, and held that Grand Union had violated Section 5 of the Federal Trade Commission Act and issued an order to cease and desist. That order was also appealed to the Second Circuit and has there been briefed and argued. One of the issues in that case is whether or not the court should modify the Commission's order in the same manner as it modified the *Swancee* order. The modification in *Swancee* was taken by the court from the Grand Union briefs inasmuch as neither *Swancee* nor the Commission had suggested to the court in the *Swancee* case that that order be modified in the fashion the court chose to do. If the Commission now acquiesces in the modification made by the court in *Swanec*, the panel of that court which has the Grand Union matter *sub judice* (and which includes two of the same judges who sat in *Swanec*), inevitably will regard that acquiescence as an acknowledgement of the propriety of what Grand Union seeks in its case. Failure to file a petition in *Swancee* probably will result in the loss of the *Grand*

Union case in the court of appeals. In that event, the Commission is unable to see how certiorari could be justified in *Grand Union* if it is not now asked in *Swanec*.

For these reasons, the Commission believes that the issues in *Swanec* which you apparently have not considered make imperative the filing of a petition for certiorari, and therefore repeat its request that a petition be filed.

By direction of the Commission, Commissioner Elman not concurring.

PAUL RAND DIXON,
Chairman.

SUN OIL CO.

3. *Sun Oil Co. v. F.T.C.*, 294 F.2d 465 (5th Cir, 1961), *rev'd*, 371 U.S. 505 (1962).

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. On October 5, 1961 approved letter to Solicitor General requesting him to file petition for certiorari. *Vote*: 5-0, Mr. Elman requesting that statement be added to letter.

2. On November 13, 1962 Mr. Friedman of Solicitor General's office authorized to state in argument before Supreme Court that Commission would entertain application for modification of order at circuit court level. *Vote*: 5-0.

3. On November 15, 1962 accepted consent settlement. *Vote*: 5-0.

MEETING OF THE FEDERAL TRADE COMMISSION

OCTOBER 5, 1961.

(1) *Sun Oil Company v. Federal Trade Commission*, 5th Cir., No. 17658
(Docket 6641—Sun Oil Company)

Memorandum of September 29, 1961, from the General Counsel transmitting draft of letter to the Solicitor General requesting that he seek from the Supreme Court a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for the purpose of obtaining review of the latter court's opinion and judgment of July 24, 1961, setting aside the order in Docket 6641.

By memorandum of October 4, 1961, to Mr. MacIntyre, Mr. Elman requested that the statement indicated be added to the letter to the Solicitor General.

NOVEMBER 13, 1962.

Sun Oil Company v. Federal Trade Commission, 5th Cir., No. 17658
(Docket 6641—Sun Oil Company)

At his request, Francis G. Mayer, Chief of the Division of Discriminatory Practices, Bureau of Restraint of Trade, appeared before the Commission and presented to it the request of Daniel Friedman, Assistant to the Solicitor General, Department of Justice, in connection with the argument before the Supreme Court in the above matter, that he advise the Court that the Commission would accept a modification of the scope of the order in the event the question is raised by the Court.

After discussion, at the suggestion of Mr. Elman, Mr. Mayer was instructed to advise Mr. Friedman that if he feels that the instructions are inadequate, he is authorized to say that the Commission is aware of the problem that is presented by possible conflict of the scope of the order in this case and the American Oil case, and if the Commission's order should be enforced, the Commission would entertain an application for modification at the circuit court level.

Mr. Mayer was excused.

NOVEMBER 15, 1962.

(1) *Federal Trade Commission v. Sun Oil Company* Sup. Ct., No. 56
(Docket 6641—Sun Oil Company)

Mr. Dixon (1) presented letter of November 14, 1962, from Archibald Cox, Solicitor General, Department of Justice, with reference to information furnished the Department pursuant to the 1961, was waived in this case; (2) the initial decision of the hearing examiner, accepting the consent agreement executed by the parties, was adopted as the decision of the Commission; and (3) order to that effect was approved and referred to the Secretary for issuance and service upon the parties.

OCTOBER 4, 1961.

Re Sun Oil Company v. Federal Trade Commission, 5th Cir. No. 17658—F.T.C. Docket 6641.

HON. ARCHIBALD COX,
Solicitor General, Department of Justice, Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On July 24, 1961, the United States Court of Appeals for the Fifth Circuit issued its opinion and judgment in this matter setting aside an order of the Federal Trade Commission. The Court held that the good faith meeting of competition proviso of Section 2(b) of the amended Clayton Act was available to a seller as a defense to a charge of violation of Section 2(a), where the price discrimination was granted for the purpose of enabling the seller's customer to meet the competition of a competing retailer. Expressed differently, the Court held that where a seller discriminates in price, with resulting injury to other customers of the seller competing with the favored customer, the seller can do so with impunity if the lower price was granted to enable one of its customers to meet the competition of the customer's competitor.

The Fifth Circuit thus has decided an important question of federal law which has not been, but should be, settled by the Supreme Court. The effect of the decision will be to hamper the Commission in its administration of the Clayton Act. We therefore request that a petition for a writ of certiorari be filed in the Supreme Court. The reasons for this request are set forth in detail below.

The case arose under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13(a)) and Section 5 of the Federal Trade Commission Act (38 Stat. 719 as amended by 52 Stat. 111, 15 U.S.C. 45). Section 2(a) of the amended Clayton Act prohibits any person engaged in commerce from discriminating in price between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ."

The basic facts are not in dispute. Sun Oil Company, a New Jersey corporation, is engaged in the refining, sale and distribution of gasoline in commerce in various states of the United States, including the city of Jacksonville, Florida, and adjacent territories. In 1955, Sun marketed its branded gasoline (Sunoco) to 38 retail dealers in Duval County, Florida, which includes the city of Jacksonville. These dealers were independent retailers who operated service stations, selling Sun's branded gasoline and oil products exclusively. One of these independent retailers was Gilbert V. McLean, who operated a Sun filling station at the intersection of 19th and Pearl Streets in Jacksonville. In June, 1955, Super Test Oil Company opened a competing station at the same intersection, diagonally across the street from McLean's station. Super Test gasoline is a so-called "non-major" or "independent" brand of gasoline, as compared with the so-called "major" or "name" brands of gasoline, such as Sun's brand.

During most of the period between June and December, 1955, the Super Test Station priced its regular gasoline (as opposed to its premium gasoline) at 26.9 cents per gallon while McLean priced Sun's regular (and then only) brand of gasoline at 28.9 cents per gallon. These prices were the prevailing prices in the Jacksonville area for gasoline sold under a major supplier's brand and for gasoline sold under a non-major supplier's brand. On several occasions (generally on week-ends) beginning in August, the Super Test station cut its prices to as low as 21.9 cents per gallon. McLean's gasoline sales declined on each of these occasions. McLean complained to Sun about the Super Test pricing policy, but no action was taken until late in December. During December, McLean was informed by a representative of Sun that if the Super Test station reduced its price again, Sun would try to do something about it. After these sporadic price reductions, the Super Test station always re-established the customary 2-cent price differential between its gasoline and that of Sun.

On December 27, 1955, when McLean was selling his gasoline for 28.9 cents per gallon, the Super Test station dropped its price from 26.9 cents per gallon to 24.9 cents per gallon. On the same day Sun gave McLean a price allowance or discount of 1.7 cents per gallon, and McLean dropped his retail price to 25.9 cents per gallon. The new retail price represented a reduction in McLean's gross margin

of profit of 1.3 cents per gallon, the difference between the discount and the 3-cent price reduction in the retail price of his gasoline. Sun did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. This discrimination in price between McLean and Sun's other dealers continued until the middle of February 1956, when a price war broke out in the entire area and Sun reduced its wholesale or tank-wagon price to all of its dealers in the area.

McLean's gasoline sales increased substantially during the period in which he enjoyed the discriminatory price allowance granted by Sun. In January 1956, the first full month in which McLean received the discriminatory lower price, his sales skyrocketed to 32,100 gallons. His sales, on a daily basis, during February, were approximately the same as January. This large sales volume was in contrast to his average sales of approximately 6,000 gallons per month prior to his receipt of Sun's discriminatory price. During this same period, the Super Test station also enjoyed a substantial increase in sales.

In contrast to the above picture of increasing sales, at least four of Sun's dealers competing with McLean in the same territory suffered substantial losses. All lost customers, and not one recovered its sales position significantly until Sun cut its price to all its dealers during the general price war. The examiner and the Commission found that these Sun dealers were in substantial competition with McLean and that they were competitively injured by the discriminatory price allowance granted to McLean.¹ The examiner and the Commission also found that the loss of customers for the sale of gasoline to McLean had an adverse effect on other products offered by the competing Sun dealers, such as oil, tires, batteries and accessories.

With relation to the existence of a price-fixing agreement, the record discloses the following pertinent facts. McLean complained several times to Sun about the adverse effect upon his sales caused by the lower prices of the Super Test station. He made it clear that unless Sun gave him some assistance, he would be forced out of business. Sun's officials agreed that some help would have to be given McLean if the Super Test station continued its policy of sporadic price cuts. As a result of Super Test's price cut of December 27, Sun informed McLean that he would be given a price allowance if he lowered his retail price 3 cents. The examiner found that "Harper . . . advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his price to 25.9."

McLean's retail price of 28.9 was the prevailing price for "major" brands of gasoline in the Jacksonville area. At this price, his gross margin of profit was 4.8 cents per gallon. When McLean's price dropped 3 cents to 25.9, his absorption of 1.3 cents of the reduction reduced his gross margin of profit to 3.5 cents per gallon. This was in strict conformity with Sun's established policy.

From experience, McLean knew that he could successfully compete with the Super Test station as long as his higher price did not exceed the Super Test price by more than 2 cents per gallon. Yet the competitive price established by Sun and McLean was only one cent above Super Test; a price which, the record shows, would attract patronage from Super Test. McLean was very much dissatisfied with the arrangement with Sun because, even though he was selling a large volume of gasoline, he was working hard and not making much profit. In spite of the substantial increase in sales in December of 1955 and January and February of 1956, he was forced to give up his business about the middle of February. The examiner and the Commission found that Sun and McLean entered into a planned common course of action, agreement, combination or understanding to fix the retail price at which McLean sold gasoline at the time he received his price allowance from Sun.

In defense, Sun urged that there was no agreement with relation to the retail price to be established and also contended that it was within the Section 2(b) defense of the statute permitting a lower price when made in good faith to meet an equally low price of a competitor.²

¹ The record contains the convincing and unique evidence of a competing Sun dealer, while visiting McLean's station to complain about McLean's lower price, helping McLean to service his increase in trade and actually pumping gasoline for some of his own regular customers who told him that they were buying at McLean's station because of the lower price.

² The proviso is as follows: "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . ." 15 U.S.C. 13(b).

The hearing examiner and the Commission held that the defense afforded by the Section 2(b) proviso was not available to Sun and that, in any event, Sun was unable to establish that its lower price constituted a *good-faith meeting* of a competitor's lower price. The Commission, therefore, issued its order to cease and desist.

The Court's decision setting aside the Commission's order rests on the grounds that Sun's discriminatory and injurious price to McLean was excused by the Section 2(b) proviso and that the record does not contain "substantial evidence to support the Commission's finding of a price-fixing agreement" (Slip Op. 34). The Court considered "the Commission's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (Slip Op. 10). In setting aside the order the Court has ignored the language of the statute (which at least in this instance is precise and unambiguous) as well as its history and purpose, and was unable to support its conclusion with any applicable precedent.

In order to bring Sun within the literal language of Section 2(b), as a competitor of Super Test, it was necessary for the Court to adopt a theory of competition which ignored the status of McLean as an independent business man and which recognized him only as a conduit between the supplier and the motoring public (Slip Op. 23). By the adoption of such a theory, the Court has effectively reduced the protection afforded by the Robinson-Patman amendment to a mere platitude, and Section 2(a), for all intents and purposes, will no longer protect competing buyers from their discriminating sellers in any industry whose system of distribution would permit the Court to ignore the independent competitive status of the buyer.

The Price Discrimination and Section 2(b)

The examiner and the Commission specifically found that Sun's price discrimination caused *actual* competitive injury to at least four other Sun dealers paying a higher tank-wagon price than McLean. It is significant that these findings were not challenged before the Court and that Sun bottomed its appeal upon the contention that its price discrimination, otherwise unlawful, was excused by the proviso of Section 2(b). Even though this was conceded by Sun, in that it was not raised upon its appeal, the Court apparently failed to appreciate the exact situation in which the defense was being urged. Indeed, the Court was reluctant to admit that the "diversion of business" suffered by the competing Sun dealers was "substantial" (Slip Op. 16-17). Upon the premise of recognizing that "[n]ational policy favors consumers in the competitive process" the Court stated that, "regardless of some injury to certain Sun dealers, Super Test's price-cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an *opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry*" (emphasis ours; Slip Op. 17-18).

The proviso to Section 2(b) unambiguously limits the good-faith defense to a seller who endeavors to meet its own competition. This was admitted by Sun, and accepted by the Court. The Section 2(b) defense operates to excuse a price discrimination otherwise unlawful. The possibilities for evasion inherent in a statutory excuse for conduct sought to be prohibited had become all too evident during the enforcement of the original Clayton Act. The good-faith meeting of competition excuse rendered Section 2 of the Act virtually unenforceable as a means of preventing injurious price discriminations. See H.R. Rep. 2951, 74th Cong., 2d Sess. (1936). In 1936, when Congress was considering the amendment of the Clayton Act, both the original Patman Bill and the Robinson Bill would have deleted the old "good-faith" proviso without providing a substitute.³ Congress clearly recognized that an unrestricted good-faith defense would frus-

³ "The weakness of Section 2 [of the old Clayton Act] lies principally in the fact that . . . it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them the more securely against the inundations of more power and size" (S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)).

trate any effort to prevent price discrimination causing injury to competition; it sought to obviate just such an eventuality. H.R. Rep. 2287, 74th Cong., 2d Sess. 16 (1936).⁴

A primary remedial objective of the amended Clayton Act was to suppress price discrimination between customers of the same seller not supported by sound economical differences in their business positions or in the cost of serving them. H.R. Rep. 2951, 74th Cong., 2d Sess. (1936). Since the Section 2(b) proviso, even as it is restricted by the Robinson-Patman amendment, excuses in some circumstances price discrimination which causes competitive injury, the Commission and the courts must exercise great care in its application, lest the legislative purpose be thwarted. The Court, in accepting Sun's proffered 2(b) defense, has reverted to the open invitation to price discrimination of the good-faith proviso of the old Clayton Act. Uniformly, other courts have refused to do so. The consistent result of judicial efforts in defining the availability of the protection afforded discriminators has been to establish definite limits to the application of the proviso.⁵

The effect of the Court's decision is to extend the intended coverage of Section 2(b), in order to allow a seller to protect its customer when that customer is confronted with the lower price of a competing product. The Court was unable to cite any precedent for its holding, nor could it rely upon the legislative history to support its novel interpretation. For precedent, the Commission and the examiner relied upon the decision in *Enterprise Industries, Inc. v. The Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *reversed on other grounds*, 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965. In that case, the District Court refused to accept the conduit theory of competition, holding that a seller cannot justify his price discriminations on the ground that they were made to meet an equally low price made available to other stations by a competing oil company. The Court stated: "The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor" (136 F. Supp. at 421. Court's emphasis). There also is pertinent language in the Supreme Court's opinion in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), which supports the Commission's position in this case.⁶ There are many ways for a seller to be confronted with the possible loss of a customer, but the statute requires that the seller must be confronted with a lower price of one of the seller's competitors, offered to the seller's customer, before it may in good faith meet the lower price.

In obliterating the independent status of McLean, the Court misconceived the status of Super Test. The record shows Super Test to be a large retailer—nothing more. It is silent with regard to any wholesaling operations of Super Test. Any vertical integration of Super Test is confined to its purchasing and resale as a retailer, the precise status of McLean. It was singularly inappropriate for the Court to comment:

"The Commission's construction gives the vertically-integrated company a competitive advantage based on the legal effect the Commission attaches to integration of retailing operations rather than on such economic factors as efficiency of merchandising, of distribution or of performance. This is not the case of an aggressive retailer, such as a supermarket, having an established policy of doing a high volume business on a low margin, consistently emphasizing price over service. As the Commission sees it, without regard to the economics of merchandising gasoline, a supplier-retailer, large or small, may with impunity undercut the retail outlet of a competing supplier" [Slip Op. 26.]

⁴ See also the remarks of Senator Logan at 80 Cong. Rec. 3113, 3119.

⁵ *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951); *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 725 (1948). And see *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826; *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957).

⁶ There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to *that customer*, without necessarily changing the seller's price to its other customers." (340 U.S. at 250. Emphasis supplied.)

" . . . if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a *counteroffer* provided the seller proves that its *counteroffer* is made to meet in good faith its competitor's equally low price." (340 U.S. at 244. Emphasis supplied.)

But this is "the case of the aggressive retailer, such as a supermarket, undercutting the posted price of a competing retailer. The Commission does not attach any competitive significance to integrated retailing operations as such. Unlike the Court's construction and that urged by Sun, the Commission's construction of Section 2(b) provides for the free play of "such economic factors as efficiency of merchandising, of distribution or of performance."

The core of the Court's decision is its determination that its broad interpretation of the Section 2(b) proviso is more in keeping with over-all antitrust policy than the interpretation urged by the Commission. But there can be no doubt that Congress, in the Clayton Act, as amended, did not intend that the protection of the Section 2(b) proviso be applied in the manner approved by the Court in its adoption of the "conduit" theory. It is not for the courts to extend the defense permitted by the proviso beyond its history and precedent, merely because a seller has chosen a particular form of marketing that renders the defense unavailable to it. To excuse otherwise unlawful price discriminations on the basis of a conduit theory of marketing, i.e., whereby sellers are said to be competing at the resale level because there is no effective competition among sellers for a particular buyer's business, will completely frustrate the intent and purpose of the Robinson-Patman Act.

The theory, as applied by the Court, permits a seller to subsidize its buyer without regard to the nature of the buyer's or seller's competition. It is ironic that under the Court's theory of competition every brand gasoline dealer is a "sitting duck" when challenged pricewise by a competitor (Slip Op. 4-5).⁷ This is a frank criticism by the Court of the pricing policies of the majors. The comment demonstrates the majors' complete disdain for the efforts of the independents to "tamper" with "their" price structure. This price structure was conceived by the majors; it is now being protected by the Court. And it is not likely, despite the Court's finding, that the limitation of the application of the 2(b) defense will drive the majors back to the company-owned station.⁸

Under the Court's theory of the case, no independent retailer can successfully challenge price-wise an independently operated major station because, if the lower price is successful in substantially diverting business, the major station operator can call upon his nationally established supplier and make use of its power and size to wage a price war, however detrimental to the independent and competing purchaser-resellers from the same major supplier. The Court's decision gives the majors a complete and unrestricted police power over the prices of the independents. For the majors, on a selective basis, may throttle the competitive lower price wherever it may arise. This is so regardless of the organizational structure of the aggressive, lower-price retailer. In spite of the Court's concern with the promotion of efficiency, the result in this case gives a major supplier the opportunity to subsidize an inefficient retailer to the detriment of other efficient retailers, and inhibits the use of a lower price which reflects imaginative, lower-cost methods of merchandising.

The Court's decision operates to protect the marketing practices in the gasoline industry where the oligopolist presently thrives. It permits the large but only partially integrated supplier to extend its power forward into retailing where it has deliberately chosen to use "independent" dealers. By permitting such a supplier to discriminate at its dealer's level merely because there is no competition among suppliers for the dealer's business, the Court allows the oligopolist to check completely, and in its incipency, the growth and health of independent non-affiliated retailers who threaten the status quo. And this is without relation to the serious economic effect imposed upon the seller's other "independent" dealers; for the Court's holding also recognizes them as conduits only, and decides in effect that their interests are second in importance to the seller's interests. Under the guise of "meeting competition," the oligopolist effectively "beats" the only competition it need fear—price competition. Price discrimination in this fashion is "a cheap way of protecting a dominant position without seriously upsetting the market [and] a source of competitive advantage unrelated to efficiency" (Dierham & Kahn, *Fair Competition* (1954) at 226.)

⁷ It is significant that the Court recognized as an inequity of the competition in this case that the independent could fix any retail price it pleased whereas McLean was handicapped by the price offered by Sun.

⁸ Even the Court recognized that retail price-cutting revealed the weaknesses in the former policy of the majors to operate directly their own stations. It noted one authority which stated that less than 2 per cent of the service stations in 1956 were company operated, and gave as one reason for even this small number the profit of their concentrated, high-volume sales (Slip Op. 5, fn. 6).

The peculiar distribution problems of the gasoline industry point up the inherent weakness of the Court's acceptance of the conduit theory of competition. In this industry, in which many of the majors engage in a dual system of distribution, it is only accidental that the product competition in this proceeding is between Sunoco gasoline and the gasoline of an unidentified refiner. It is the practice of many of the majors to distribute their product both through their branded stations and through independent non-branded stations. DeChazeau and Kahn, *Integration and Competition in the Petroleum Industry* (1959) at 451-461. The Court's reasoning would apply to a competitive situation where Brand "X" gasoline, refined and distributed by a major, is in fact in competition with Brand "X" gasoline (under a different name) distributed through an independent.⁹ The effect of the decision in these circumstances would be to allow a major to invoke the 2(b) defense, to the competitive injury of its other dealers, and to justify the meeting of a lower price on its own product. Surely it was not intended that Section 2(b) could be extended to allow such injurious pricing in response to a competitive circumstance which the major, by its system of distribution, created. In such circumstances, it must be concluded that the majors are not, despite the Court's finding, protecting a dealer but in reality are protecting a price. Under a theory of preventing a potential price war,¹⁰ the Court has added to the majors' imposing arsenal of competitive weapons the right to make selective price cuts which only serve to reinforce a rigidly adhered-to pricing system. The application of Section 2(b) in these promises will affectively dissuade majors from making any downward revision in their tank-wagon prices. And the competing non-major is dissuaded from breaking away from the status quo, since it knows the "major" will come to the aid of its own dealer immediately. Moreover, such "meeting competition" does *not* initiate lower prices or extend a price offer to any consumer who is not already faced with a competing lower price. And it is apparent that the brand dealer receives no real "assistance" since the passes the full extent of the lower tank-wagon price to the consumer and often takes a cut in his own profit margin, as did McLean.

While the Court showed a particular awareness of the problems created by the major's distribution practices in the petroleum industry, it is obvious that the application of the decision extends further than this particular industry. The decision will apply, if allowed to stand, with equal force to any industry in which distribution methods prevent effective competition among sellers for a particular buyer's business. It will apply in any field where the retailer restricts his merchandise to a single brand, or where, because of economic circumstances, the retailer is in fact a captive customer of its supplier. This would be true in the merchandising of many nationally known products which rely for their consumer acceptance mainly upon the advertising expenditures and prestige of the manufacturers. Thus it would extend the application of the conduit theory of competition into the distribution system of such products as milk, ice cream, automobiles, luggage, shoes and many others.¹¹

If "X" Ice Cream Company, a supplier, places freezer fixtures in a retail store, the retailer often becomes a captive customer of such supplier. But the decision of the Court operates to permit "X" Ice Cream Company to meet the dealer's competition at the retail level, thus permitting the Company to determine the outcome of a price contest between retailers. The Court's decision will also permit a major supplier of milk to discriminate in favor of a large retail chain where a single chain store is faced with the competition of a lower-priced, gallon-jug operator. This incongruous result may mean that the purchasing public will be deprived of lower prices (for, how long can the gallon-jug operator last?), and the large chain stores selling higher priced products will be protected from any competition. The Court's decision permits a supplier to give a discriminatory subsidy to a retailer, *not* where the retailer was offered a lower price by another supplier, but where the retailer was forced to compete with a lower-priced, volume-competing retailer. It is submitted that the result reached by the Court is not in accord with sound antitrust policy. The Court, in extending the defense contained in the proviso to Section 2(b), has carved an exception into the application of the antitrust laws for any industry which, by its method of distribution, has effectively eliminated price competition for the retailer's business. The ac-

⁹ Price cutting by the independent triggered the now famous New Jersey price war.

¹⁰ In spite of Sun's selective price cut, a major price war ultimately broke out in Jacksonville.

¹¹ See BNA's Antitrust and Trade Regulation Report, No. 7, August 29, 1961, A-3.

ceptance of a conduit theory of distribution makes a mockery of the classification of McLean as an "independent" retailer.¹²

The Court rejected the Commission's position (that Sun's allowance to McLean was not to meet competition but to undercut Super Test's price), holding that the "choice of 25.9 cents [was] about as fair and reasonable a meeting of competition as anyone could expect" (Slip Op. 33). It noted the examiner's failure to find a "usual and customary difference between major and non-major regular brands of gasoline," and stated that in connection with Super Test's "bouncing ball pricing policy" McLean made no attempt "to maintain a one-cent differential or to ask Sun for any further allowance" (Slip Op. 32-33). But this ignores the fact that as of December 27, 1955, the only price McLean had to meet was the Super Test price of 24.9, and that both McLean and Sun knew that McLean was not hurt competitively by a two-cent spread. It is significant that it was not McLean who re-established the two-cent differential, but the Super Test station, which well knew the "facts of life." Further, when it is considered that in pegging the price within one cent of Super Test McLean was operating against his own best interests in that he was accepting an unnecessary cut in his profit margin, the Commission was compelled to question Sun's good faith. In determining whether Sun enabled McLean to beat competition, it was only necessary to determine at what price (including price differential) McLean could successfully compete with Super Test.

It was incumbent upon Sun (which it failed to do) to demonstrate that its lower price was a realistically competitive price, and one designed to do no more than effectively protect McLean. *Puerto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929), *cert. denied*, 279 U.S. 858; *Federal Trade Commission v. Standard Brands, Inc.*, 189 F. 2d 510, 515 (2d Cir. 1951).

The Court failed to recognize that, under the pretext of meeting competition, a seller can seriously undermine the competitive position of its other customers. The good-faith proviso was never intended to aid a seller to inflict the very competitive injury the statute was designed to prevent. And it is no anomaly (see Slip Op. 31) that the Section 2(b) defense is restricted to meeting a competitor's lower price, for beating a price carries overtones of predatory price cutting inimical to the purposes of the statute.

THE PRICE-FIXING AGREEMENT

The hearing examiner and the Commission found that Sun and McLean "entered into, maintained and carried out a planned, common course of action, agreement and combination or understanding to fix and maintain the retail price at which McLean was to sell gasoline . . ." The Court concluded "there is no substantial evidence to support the Commission's finding of a price-fixing agreement" (Slip Op. 34).

Upon review the Court, from a voluminous record, has picked and chosen¹³ random facts, ignoring substantial and convincing evidence that McLean and Sun entered into a price-fixing agreement. It is axiomatic that the weight be given established facts as well as the inferences reasonably to be drawn therefrom are for the Commission. *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U.S. 52, 63 (1927). The Court is not at liberty to substitute its judgment for that of the Commission. Its scope of review is limited to the examination of the record in an effort to make an informed determination as to whether the Commission's findings are supported by substantial evidence. And the reviewing court may not displace the reasonable inferences drawn by the Commission, even though the court may have drawn different inferences had it considered the facts *de novo*. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-88 (1951).

It should be noted that once the Court determined that the defense of meeting competition was established by Sun it was necessary, in order to vacate the Commission's order, to find that a price-fixing agreement had not been proved. For it cannot be doubted that a seller who gives a discriminatory price allowance to its retail dealer as consideration for an agreement to fix the resale price of the seller's product does not act in good faith within the meaning of the 2(b) proviso.

¹² It is significant that Sun proclaims the "Independent" status of McLean when it sues its purpose—in resisting a price-fixing charge—but attempts to eliminate McLean's "independent" status when confronted with a charge of unlawful price discrimination.

¹³ See *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 117 (1937).

Since the Court's opinion is predicated upon its view that the record does not contain substantial evidence to support the Commission's finding of agreement to fix resale prices, recital of some of the pertinent facts is necessary. From August through December 1955, Super Test periodically dropped its price below the usual 2-cent differential between its price and McLean's price. Each time Super Test cut its price McLean's sales declined, and he complained about it to Sun. McLean made it clear that unless Sun gave him assistance he would be in serious straits. Despite the sales losses caused by the Super Test price reductions, McLean, an independent dealer who in his sole discretion could set the price at which he sold gasoline, never contemplated or made a price reduction (which would have reduced his gross margin of profit), prior to Sun's grant of the 1.7 cents per gallon allowance to him on December 27. The examiner and the Commission inferred that McLean absorbed 1.3 cents of the 3-cent resale price reduction because he had to do so to obtain the 1.7-cent allowance from Sun.

During the August-December period McLean was selling gasoline at 28.9 cents per gallon, the then prevailing price for "major" brands of gasoline in the Jacksonville area. At this price, his gross margin of profit was 4.8 cents per gallon. When McLean's price dropped by 3 cents to 25.9 cents, his gross margin of profit was reduced to 3.5 cents per gallon. At that time it was Sun's policy to insure that a dealer, faced with vigorous price competition and receiving a price allowance, would have a minimum gross margin of profit of 3.5 cents per gallon. The Commission and the examiner considered this circumstance as indicating that the determination of the retail price was the result of Sun's calculations and not the independent judgment of McLean.

From experience, McLean knew that he could compete successfully as long as his price was only 2 cents higher than the Super Test price. This experience was confirmed by the fact that McLean enjoyed substantial increases in sales in January 1956, when Super Test further lowered its price, thus restoring the 2-cent price differential. In order to reduce his price to 25.9 cents per gallon, McLean had to absorb a 1.3-cent per gallon cut in his gross margin of profit. Yet McLean knew that a retail price reduction of only 2 cents per gallon would have restored the 2-cent differential, and would have eliminated his competitive disadvantage. It seems obvious that if the price allowance from Sun had been tendered unconditionally, McLean would have followed his own best interest by restoring his successful competitive price, which would have reduced his gross margin of profit by only 0.3 cents per gallon. Further, McLean advised the other Sun dealers that he was very much dissatisfied with his arrangement with Sun because, while he was increasing his volume, he was doing a great deal of work and not getting anything for it. These facts warrant the inference that McLean did not act as a free agent in the selection of such a penalizing solution to his problem.

In addition to McLean's testimony and the surrounding circumstances, the Commission also considered the testimony of the witness Gravatte, an Attorney-Examiner for the Federal Trade Commission. Describing a conversation he had with McLean on March 8, 1956, Gravatte testified that McLean told him of a telephone conversation on December 27, 1955, with a representative of Sun, who said: "If you will lower the price of gasoline in your station by three cents a gallon, we will give you a promotional allowance of 1.7 cents a gallon."

Both McLean and Sun denied the existence of any agreement or understanding concerning the fixing of resale prices. But McLean's testimony contains several statements showing that his price was set by agreement with Sun.

"It was *made* that I wanted [sic] and *they stated* that I drop my gas to that price. . . .

* * * * *

"Q. Now is that all—what were you required to do if anything to get the adjustment?

"A. To take a cut.

* * * * *

"Q. Was there anything said to you about reducing your margin of profit?

"A. Yes, my margin of profit was reduced.

"Q. Did they say that to you?

"A. Yes, sir."

The basic error, we think, in the Court's view that no price-fixing agreement was established is found in its statement: "The record shows however, that the arithmetic of the situation, not Sun, required a discount of 1.7 cents and compelled McLean to take a cut of 1.3 cents, if he wished to post a price of 25.9 cents

and still keep a bare subsistence margin of 3.5 cents above the tank-wagon price" (Slip Op. 35-36). But this begs the very question involved in the proceeding. When the Court speaks of McLean wishing to post a price of 25.9 cents and "still keep a bare subsistence margin of 3.5 cents," it is recognizing the established policy of Sun to offer an allowance which, when compared with the resale price, would guarantee a 3.5-cent per gallon gross profit margin. The Court has failed to recognize that McLean in setting the price of 25.9 cents was operating against his own best interest. He knew that he could not only survive competitively but *prosper* if he posted a price of 26.9 cents, and thus take a cut of only 0.3 cents in his gross margin of profit. This "is what McLean was trying to say when he talked about being 'required' to take a cut and having his margin of profit 'reduced'" (Slip Op. 36).

Once McLean and Sun cut the retail price, Super Test recognized that the major supplier had entered the pricing picture and re-established the 2-cent differential normally maintained between the retail prices. McLean's error in agreeing to give up a substantial portion of his normal markup was harshly demonstrated when he went out of business in spite of a fivefold increase in his retail sales. The record amply shows that the pattern established by the facts, when the whole record is considered, constitutes substantial evidence within the meaning of *Universal Camera Corp. v. National Labor Relations Board*, *supra*, and fully supports the Commission's conclusion that there was an agreement or understanding to fix prices.

The factual situation in this proceeding is a fairly common one. It is of a type which has attracted Congressional notice in recent years as calling for redress under the antitrust laws. The effect of the decision is to immobilize the Commission in any effort to protect buyers from the injurious effects of their sellers' price discriminations in all situations where the "conduit" theory of competition could obtain. The proceeding involves the interpretation of a statutory defense which excuses injury to competition resulting from price discriminations—the injury the statute was intended to prevent. It is most important to the Commission's continuing efforts to enforce the amended Clayton Act that the propositions of law enunciated by the Court of Appeals be reviewed by the Supreme Court.

Commissioner Elman, who was not a member of the Commission when it rendered its decision of January 5, 1959, thinks it would be inappropriate for him, without making an independent examination of the record and the questions of fact and law involved, to express an opinion on the merits of the case. He believes, however, that the difference between the views expressed in the Commission's opinion and those of the Fifth Circuit as to the scope and application of the Section 2(b) "meeting competition in good faith" defense, in the factual context here presented, raises questions of such general importance in the administration of the Robinson-Patman Act as to justify submission of the case to the Solicitor General for determination whether Supreme Court review is warranted.

Transmitted herewith are copies of the briefs filed in the Court of Appeals and copies of the Court's opinion and judgment. Copies of these documents (except the judgment) and a copy of the printed record were delivered on September 20, 1961, pursuant to request, to the Appellate Section of the Antitrust Division.

By direction of the Commission.

PAUL RAND DIXON,
Chairman.

EXQUISITE FORM BRASSIERE, INC.

4. *Exquisite Form Brassiere, Inc. v. F.T.C.*, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962)

(a) *Court Action*: Remanded to afford petitioner opportunity to present 2(b) defense.

(b) *Commission Action*:

1. On January 16, 1962, directed that Solicitor General be requested to file petition for certiorari. *Vote*: 5-0, Commissioners Kern and Elman voting in the affirmative for different reasons than the majority directing that letter bear a statement giving reasons therefor.

2. On February 13, 1962 directed that letter urging him to present this case to the Supreme Court be sent to Mr. Cox, Solicitor General. *Vote*: 5-0.

3. On February 27, 1962, after discussing letter from Solicitor General advising he would not seek certiorari, ordered Solicitor General be advised that General Counsel would prepare a petition for certiorari and present it to the Commission for its consideration. *Vote*: 5-0.

4. On June 5, 1962 case reopened and remanded to hearing examiner. *Vote*: 5-0.

JANUARY 16, 1962.

- (1) *Exquisite Form Brassiere, Inc., v. Federal Trade Commission*, D.C. Cir. No. 16123 (Docket 6966—Exquisite Form Brassiere, Inc.)

Mr. Kern presented memorandum of January 15, 1962, in which he reported his consideration of the recommendation of the General Counsel in memorandum of January 15, 1962, that the Solicitor General be requested to file a petition for writ of certiorari to review the decision of November 22, 1961, by the United States Court of Appeals for the District of Columbia in the above matter. The Court remanded the case to the Commission for the purpose of affording the respondent an opportunity to present a defense under the good faith meeting of competition proviso of Section 2(b) of the amended Clayton Act. Mr. Kern set forth the problem presented by this matter, as indicated, and suggested that the matter be resolved at the table at an early date.

In his memorandum of December 5, 1961, Mr. Elman recommended, for the reasons recited, that the General Counsel be instructed to appear before the Commission and make a full presentation of the legal considerations bearing on the correctness of the decision of the Court of Appeals.

After consideration, on motion of Mr. Kern, the Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the decision in question.

As to the foregoing action, Messrs. Dixon, Anderson and MacIntyre voted in the affirmative, and Messrs. Kern and Elman also voted in the affirmative but for reasons different than those of the majority, and it was directed that the letter to the Solicitor General, making the request and transmitting pertinent material, bear a statement of the reasons of Messrs. Kern and Elman for recommending certification, and that the amended letter be forwarded to the Solicitor General after signature by the Chairman.

FEBRUARY 13, 1962.

- (1) *Exquisite Form Brassiere, Inc. v. Federal Trade Commission* D.C. Cir. No. 16123
(Docket 6966—Exquisite Form Brassiere, Inc.)

Draft of letter prepared by the Office of the General Counsel to Hon. Archibald Cox, Solicitor General, Department of Justice, in response to telephonic advice

from Mr. Cox's office that the Department had tentatively concluded that petition to the Supreme Court for certiorari in the above matter, which the Commission requested of the Department under the action of January 16, 1962, should not be filed, and inviting the Commission to discuss the matter with Mr. Cox.

Messrs. Dixon, MacIntyre and Elman amended, and thereafter approved and ordered forwarded after signature of the Chairman the reply to Mr. Cox, advising that it is not possible for the Commission to meet with the latter, and again urging Mr. Cox to present this case to the Supreme Court.

The above action was confirmed by the Commission.

FEBRUARY 27, 1962.

- (1) *Esquisite Form Brassiere, Inc. v. Federal Trade Commission*, D.C. Cir. No. 16123 (D. 6966—*Esquisite Form Brassiere, Inc.*)

Mr. Dixon referred to letter of February 23, 1962, from the Solicitor General advising that he would not petition the Supreme Court for certiorari in the above case but that he would raise no obstacle to the Commission's filing the petition if it feels it is necessary.

After discussion, it was directed that the Solicitor General be advised that the Commission has determined to file the petition requesting certiorari, and the General Counsel was instructed to prepare an appropriate petition and to submit the same to the Commission for its consideration.

JUNE 5, 1962.

- (2) *Esquisite Form Brassiere, Inc. v. Federal Trade Commission*, D.C. Cir. No. 16123 (Docket 6966—*Esquisite Form Brassiere, Inc.*)

Mr. Dixon referred to the denial on May 21, 1962, by the Supreme Court of the Commission's petition for a writ of certiorari and recommended that the case be reopened and remanded to the hearing examiner for the consideration of respondent's 2(b) defense in conformity with the court of appeal's mandate.

After consideration, on motion of Mr. Dixon, in conformity with the mandate of the United States Court of Appeals for the District of Columbia Circuit, this case was reopened and remanded to the hearing examiner for the purpose of taking evidence with regard to the respondent's 2(b) defense; and it was directed that an appropriate order to that effect be prepared and referred to the Secretary for issuance and service upon the parties.

JANUARY 17, 1962.

Re *Esquisite Form Brassiere, Inc. v. Federal Trade Commission*, D.C. Cir. No. 16123, F.T.C. Docket 6966.

Hon. ARCHIBALD COX,
Solicitor General,
U.S. Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On November 22, 1961, the United States Court of Appeals for the District of Columbia Circuit remanded the above case to the Commission for the single purpose of affording the respondent an opportunity to present a defense under the good faith meeting of competition proviso of Section 2(b) of the amended Clayton Act. This action resulted from a Commission complaint which had alleged in Count I the disproportionate issuance of credit memoranda as payment for advertisements placed by respondent's customers in violation of Section 2(d) of the amended Clayton Act, and in Count II the furnishing of the services of stylists to some of respondent's purchasers without making the same proportionally available to competing customers in violation of Section 2(e).

The hearing examiner and the Commission permitted the interposition of the 2(b) defense under the count of the complaint alleging violation of Section 2(e), but held that the defense was not available to respondent under the count alleging violation of Section 2(d). The Circuit Court upheld the Commission on all other issues, but has remanded the case to the Commission "to afford our petitioner an opportunity to present, if it be so advised, a defense under Section 2(b) of the statute to the charges contained in Count I of the

complaint. . . ." The Court, by its remand, has made the good faith meeting of competition defense available, dehors the language of the statute,¹ to a charged violation of Section 2(d).² The Commission, over a five-year period, has continuously held that the 2(b) defense cannot be interposed to defensively to a charged violation of subsection (d),³ and since the court's decision involves interpretations of the Robinson-Patman Act that will directly affect future administration and enforcement of that Act by the Commission, we are herewith requesting that a petition for a writ of certiorari be filed in the Supreme Court.

The initial complaint against Exquisite Form Brassiere, Inc., charged a violation of subsection (d) in connection with Exquisite's operation of a cooperative advertising plan. In this plan Exquisite offered allowances against future purchases for amounts spent by customers for advertising in which the name of an Exquisite product was prominently displayed. The minimum space to be devoted to this product in order to receive an allowance was specified. The Court upheld the Commission's findings that Exquisite had not made its advertising allowances available to all competing customers on proportionally equal terms.

During the course of hearings, evidence was developed with reference to a practice of Exquisite with respect to so-called "stylists". These "stylists" were female employees who aided the personnel of retail merchants in displaying, fitting and selling Exquisite products. These stylists were paid by Exquisite and worked at the retail places of business on assignment. Since the complaint alleged only violation of Section 2(d), a motion was made to amend the complaint, which motion was granted by the Commission, and a second count was added to the complaint which charged that Exquisite had violated subsection (e) of the statute in furnishing the services of stylists to some purchasers without offering the same services on proportionally equal terms to competing purchasers. The hearing examiner and the Commission permitted respondent to interpose the defense of meeting competition in good faith as provided in the 2(b) proviso to the added 2(e) count, but found that such defense was not legally available under Count I of the complaint relating to violation of subsection (d). This is the issue of contention.

The Court, in its opinion, recognizes that "if subsection (b) is read quite literally, the language of the statute appears to support the view of the Commission."⁴ The Court goes on to state, however, that:

"The economic evil sought to be outlawed by [the statute] is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as *discrimination* is practiced. Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging a fine semantical shadings. It is impossible to believe it meant to treat one process of *discrimination* one way and to treat in another way another process *equally effective as discrimination*."⁵

(Emphasis provided.)

¹ The statutory language refers only to a seller's furnishing the service or facility and not to his reimbursing a buyer for providing a service or facility. The 2(b) proviso reads:

"(b) Upon proof being made, at any hearings on a complaint under this section, that there has been *discrimination in price or facilities furnished*, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the *furnishing of services or facilities* to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the *services or facilities furnished* by a competitor." 13 U.S.C.A. § 13(b). (Emphasis provided.)

² This same court erred previously in interpreting this proviso in *Simplicity Pattern Co. v. Federal Trade Commission*, 103 U.S. App. D.C. 373, 258 F. 2d 673 (1958), when it permitted a showing of "cost-justification" under Section 2(b) to a charged violation of Section 2(e). In reversing, the Supreme Court confined the defense to its statutory language and held that:

"the key word 'justification' can be read no more broadly than to allow rebuttal of the respective offenses in one of the ways expressly made available by Congress. Thus, a discrimination in prices may be rebutted by a showing under any of the § 2(a) provisos, or under the § 2(b) proviso—all of which by their terms apply to price discriminations. On the other hand, the only escape Congress has provided for discriminations in services and facilities is the permission to meet competition as found in the § 2(b) proviso. We cannot supply what Congress has studiously omitted." 360 U.S. at 66-67.

³ *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956); *J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957); *Admiral Corporation*, 55 F.T.C. 2078 (1959); *Shulton, Inc.*, 3 Trade Reg. Rep. § 15,323 (1961), (*infra*).

⁴ *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, — F. 2d — (D.C. Cir. Nov. 22, 1961), p. 6.

⁵ *Id.* at p. 7.

The Court couches its argument in terms of "discrimination" and reasons that since (d) and (e) both deal with similar types of discrimination, the defenses available under one subsection must therefore be available under the other. This argument ignores the fact that the entire Robinson-Patman Act⁶ is directed against *discrimination* and each subsection has its own office and deals with specific forms of discriminatory concessions to favored buyers. The Commission's Chain Store Investigation Report found that buyers were securing price advantages concealed in various forms and Congress in enacting the several subsections directed specific provisions against discriminatory practices in various guises. Subsection (a), then, deals with discriminations in the form of price; (c) brokerage; (d) promotional allowances; and (e) demonstrators and other facilities furnished by the seller to the buyer. Subsection (a) is hedged with qualifications, but subsections (c), (d) and (e) unqualifiedly make unlawful certain business practices⁷ and judicial interpretations of these subsequent subsections have failed to integrate violations thereof with the price discrimination provision of the Act.⁸ In *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*⁹ the court observed that each of the subsections of the Act were to be read severally, stating, in part, that:

"In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent. *For example the language of paragraph (b) relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are [sic] not applicable to proceedings instituted under paragraphs (c) or (d). Thus viewed, the provisions of all the paragraphs of Section 2 are consistent and deal logically with their respective subjects.* The respective paragraphs must be read with due regard for the provisions of each." 166 F. 2d at 677. (Emphasis provided.)

Subsections (a) and (c), therefore, deal with forms of seller discrimination which are amenable to the defensive good faith meeting of competition proviso, since it relates to "a seller rebutting the prima-facie case thus made by showing that *his lower price or the furnishing of services or facilities* to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the *service or facilities furnished* by a competitor." The 2(b) defense is not available, however, in situations involving brokerage or where the seller pays a buyer for performing promotional services. Congress could easily have made the defense available under 2(d) by adding "or payments in lieu thereof" to the amendatory statutory language, but, as in the case of brokerage, Congress did not amend the Act to make the defense available in situations involving the payment for promotional services. Subsection (e), then, contemplates a practice where a seller provides personnel or facilities for the use of a customer, while subsection (d) makes the customer a party to the transaction and it is the buyer who is the protagonist under the latter subsection, rather than the seller, since he ultimately effluates the promotional activity. That these subsections involve distinct and severable practices can readily be seen by referring to the diverse types of practices challenged under Section 2(d) which are not controvertible under the provisions of subsection (e)¹⁰ and even reference to the practices covered by this proceeding will point up the differences in the purposes and effects of these subsections.

In its opinion, the Court states that "both Exquisite and the Commission refer to the legislative history of the statute,"¹¹ but then concludes that it is "unable to discern any dispositive matter." We agree with the Court's conclusion that there is nothing in the legislative debates or Congressional reports on the amendment which would lend any support to the Court's contention that the good faith meeting of competition proviso is available defensively to a charged violation of Section 2(d). To the contrary, Congressional utterances relating to the amendatory language confines its application to situations involving "services and facilities furnished" by the "seller"; no reference is made to joint buyer-seller activity or to situations involving a seller reimbursing a buyer for providing a promotional service.

⁶ 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952).

⁷ *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1958).

⁸ *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 364; *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 152 (2d Cir. 1946), *cert. denied*, 331 U.S. 806.

⁹ 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 208 U.S. 625, *reh. denied*, 309 U.S. 694.

¹⁰ *E.g., P. Lorillard Co. v. Federal Trade Commission*, 267 F. 2d 439 (3d Cir. 1959), *cert. denied*, 80 S. Ct. 293 (1960); *Swanee Paper Corp.*, CCH Trade Reg. Rep. § 28,256, D. 6927 (1959), 291 F.2d 833 (2d Cir. 1961); *Liggett & Myers Tobacco Co.*, CCH Trade Reg. Rep. § 28,256, D. 6642 (1959) *reh. granted*, Aug. 4, 1961.

¹¹ Footnote 4, at p. 10.

Congressman McLaughlin, in reciting the purpose of the amendment in the House, stated that "it simply allows a seller to meet not only competition in price of other competitors, but also competition in services and facilities furnished." (80 Cong. Rec. 8225.) Senator Moore, in offering the services and facilities amendment to 2(b) in the Senate, stated only that "The amendment merely provides that if they charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification." (80 Cong. Rec. 6435). Aside from these two cited instances, there is nothing further in the hearings, debates or committee reports to explicate the meaning of the amendatory language. In fact, the discussions of the proviso in both the House and Senate are limited to situations involving price discrimination and this is to be expected since the original House bill, the forerunner of Section 2(b), was directed exclusively to discrimination in price in violation of subsection (a). The addition of the language relating the defense to services and facilities was apparently considered of little significance, and, for that matter, the defense itself was so considered, as it was interpreted by the Congress as providing only a procedural, as distinguished from a substantive defense.¹² In any event, we agree with the Court's conclusion that the exiguous legislative history is not "dispositive" of the issue. This leads us to the "bare-bones" language of the statute which makes the proviso available only where the seller furnishes the service or facility. Any other result would frustrate the intent of Congress¹³ and is obnoxious to the rules of statutory construction, since exceptions contained in statutes are to be strictly construed.¹⁴

The ratio decidendi of the opinion is the Court's observance of and adherence to the proposition that since subsections (d) and (e) relate to similar practices, it is not logical for the good faith meeting of competition defense to be available under a charged violation of one subsection and not the other. The Court questions why the defensive proviso should apply in situations where the services or facilities are furnished directly, but not where they are furnished indirectly through the buyer,¹⁵ and reasons that the phrase "furnishing . . . to any purchaser" should relate to the furnishing of a service or facility, whether it is by reimbursement to a buyer or furnished directly by the seller.¹⁶ This argument ignores the plain language of the statute which provides that the defense is available only in those instances where the seller furnishes the service or facility. It is also elementary that the Court cannot concern itself with determination of the wisdom of legislative policies. It is not the court's function to decide or declare what is wise or unwise, logical or illogical, in statutory, economic or political tenets, or to determine that because this defense is available under one subsection, it should logically or reasonably be available under the other. Congress is charged with the obligation of determining all such questions and with setting the standard by legislative enactment. The only function of the judiciary, as a coordinate branch of government, is to interpret the statute so as to promote and effectuate the disclosed intent of Congress. If the Court disagrees with the statutory language, or the lack thereof, relief can only emanate from Congress.¹⁷ Whether it is logical or wise to have subsection (b) also apply defensively to subsection (d) is not a matter the Court can address, nor should it attempt to "supply what Congress has studiously omitted."¹⁸

Finally, we believe that the Court erred in failing to accord proper weight to the Commission's interpretation of the statute entrusted to it for enforcement. As found by the Court, the Commission first reached its view that the good faith meeting of competition proviso was not available defensively to a charged violation of Section 2(d) in 1956 in *Henry Roscnfeld, Inc.*¹⁹ The Commission reaffirmed

¹² H.R. Conf. Rep. 2951, p. 7, 74th Cong. 2d Sess. (1936). Also, the Supreme Court's reference to Congressman Utterbach's, Chairman of the House Managers, statement that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. . . . It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. . . ." *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 241, 260-61 (1951).

¹³ *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 674 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940), reh. denied, 309 U.S. 694.

¹⁴ *United States v. Scharton*, 285 U.S. 518, 521, 52 S. Ct. 416, 76 L. Ed. 917; *Spokane & Inland Empire P. Co. v. United States*, 241 U.S. 344, 36 S. Ct. 668, 60 L. Ed. 1037; *Rochester Telephone Corp. v. United States*, D.C., 23 F. Supp. 634, *aff'd.*, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, (supra.).

¹⁵ Footnote 4, at p. 8.

¹⁶ Footnote 4, at p. 10.

¹⁷ *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 215-16 (7th Cir. 1944).

¹⁸ *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1958).

¹⁹ 52 F.T.C. 1535.

this holding in 1957 in *J. H. Filbert, Inc.*,²⁰ and again in 1959 in *Admiral Corporation*.²¹ The Commission, as late as July, 1961, in *Shulton, Inc.*²² again held that the 2(b) defense was not available where the charged offense was violation of Section 2(d). Despite Commission findings over a five-year period that the defense was not available, the Court deigned not to accept the Commission's views, and, in effect, has ignored the Commission's expertise in such matters. The Court, instead, has indicated that it is "in agreement with" the district court's holding in *Delmar Construction Co. v. Westinghouse Electric Corp.*²³ There, the court had held that "because of the close interrelationship of subsections 2(d) and 2(e), it is both *logical* and *reasonable* to likewise recognize such defense in cases arising under Section 2(d)." As indicated in the discussion above, it is not the province of the court to determine what is reasonable or logical, but rather to interpret the statute in the light of its plain language. "Any doubts as to the economic theory embodied in the statute are questions for Congress to resolve."²⁴

Administrative interpretations of statutes by the agency charged by Congress with their execution are recognized as having peculiar persuasiveness and weight,²⁵ and such interpretations should be accepted by the courts unless they could not be reasonably or soundly made under the terms of the statute.²⁶ Such interpretations, therefore, should be accepted by the courts unless they are clearly erroneous.²⁷ We believe that the Commission's decisions, based on an *in hunc verba* reading of the statute, which conforms to similar interpretations of the same proviso by the Supreme Court,²⁸ should have been followed by this Court and that its failure to do so is reversible error.

The issue involved in this proceeding affects a substantial segment of the Commission's work and will, to the extent it protracts litigation, substantially affect the administration and enforcement of the Robinson-Patman Act. The Commission believes that this issue merits the consideration of the highest court and that it is one which should be *finally* decided. Accordingly, the Commission is requesting that a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be filed in the Supreme Court of the United States. Transmitted herewith are copies of the briefs filed in the Court of Appeals and copies of the Court's opinion.

Commissioners Kern and Elman, who dissented from the Commission's decision in the *Shulton* case and who therefore agree with the decision of the Court of Appeals here, concur in the request that a petition for certiorari be filed, for the following reasons: The question of statutory construction presented is important; it is a constantly recurring one which should be authoritatively settled; and, since a majority of the Commission as now constituted does not accept the decision of the Court of Appeals, Supreme Court review is the only way of securing a definitive resolution of the question.

By direction of the Commission.

PAUL RAND DIXON,
Chairman.

²⁰ 54 F.T.C. 359.

²¹ 55 F.T.C. 2078.

²² 3 Trade Reg. Rep. § 15,323, pet. for review pending, 7th Cir. No. 13,508, Sept. 11, 1961.

²³ Trade Reg. Rep. § 69,947 (S.D. Fla. 1961).

²⁴ *Federal Trade Commission v. Broch & Company*, 363 U.S. 166, 177 (1960).

²⁵ *P. Lorillard Co. v. Federal Trade Commission*, 267 F. 2d 439 (3d Cir. 1959).

²⁶ *St. Marys Sewer Pipe Co. v. Director of United States Bureau of Mines*, 262 F. 2d 378, 381 (3d Cir. 1959).

²⁷ *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 391 (1959); *Davis v. Manry*, 266 U.S. 401, 405 (1925); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

²⁸ *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 241 (1951); *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1958).

GRAND UNION CO.

5. *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2nd Cir. 1962)

(a) *Court Action*: Order affirmed as modified.

(b) *Commission Action*:

1. On July 10, 1962, Commissioners Dixon, Kern and MacIntyre directed that Solicitor General be requested to petition for certiorari. Commissioner Elam did not participate. *Vote*: 3-0.

JULY 12, 1962.

(1) *The Grand Union Company v. Federal Trade Commission*, 2d Cir. No. 26,553 (Docket 6973—Grand Union Company)

Memorandum of July 9, 1962, from the General Counsel recommending that the Solicitor General be requested to file a petition for a writ of certiorari to review the opinion of February 7, 1962, of the United States Court of Appeals for the Second Circuit modifying the Commission's order in Docket 6973 in material respects.

On July 10, 1962, Messrs. Dixon, Kern and MacIntyre directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion in question, and the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by the General Counsel, was approved and ordered forwarded after signature by the Chairman.

Mr. Elman did not participate in the foregoing action.

The action herein was confirmed by the Commission.

JULY 10, 1962.

Re *The Grand Union Company v. Federal Trade Commission*, 2d Cir. No. 26,553—FTC Docket 6973.

HON. ARCHIBALD COX,
Solicitor General, Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On February 7, 1962, the United States Court of Appeals for the Second Circuit handed down an opinion (reported at 300 F.2d 92) in which, with one judge dissenting, it upheld the Commission's determination that Grand Union has violated Section 5 of the Federal Trade Commission Act, but ruled that the Commission's order to cease and desist must be modified. No formal judgment was entered upon the filing of the opinion. Thereafter, on April 27, 1962, after submission by the Commission and Grand Union of proposed decrees, the court entered a final decree modifying the Commission's order to cease and desist. The purpose of this letter is to request the filing of a petition for certiorari to review that decree.

The Commission's complaint charged Grand Union with having committed, over a four-year period, a series of violations of Section 5(a)(1) of the Federal Trade Commission Act (66 Stat. 632; 15 U.S.C. 45(a)(1)), by inducing, contracting for, and receiving the benefit of, payments made by many of its suppliers to an advertising firm as compensation or consideration for services rendered to them in connection with respondent's resale of their products, when, to respondent's knowledge, neither such payments nor their benefit were made available by those suppliers on proportionally equal terms to their other customers competing with respondent in the resale of the products (Apdx 5a). The Commission ruled (Apdx 182-183a) and the court agreed (300 F.2d at 94) that those actions of the suppliers constituted violations of Section 2(d) of the Clayton Act (Apdx 188a, 191a, 195a-196a, 205a-207a). (In an earlier decision the court had affirmed a Commission decision holding that one of the suppliers had violated Section 2(d) by contracting to make and making its payments to

the advertising firm for Grand Union's benefit. *Swanee Paper Corporation v. Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961); *cert. denied*, 368 U.S. 987 (1962).

The Commission issued an order to cease and desist which forbade all three types of violations. The modification directed by the court of appeals consisted in substance of deleting the prohibitions against "inducing" discriminatory payments and "contracting for the receipt of" benefits thereof, and of substituting for the prohibition against the direct or indirect receipt of such payments a prohibition only against receiving the benefits of such payments made to third persons. Under the court's modified order Grand Union is free to receive any discriminatory payments made directly to it, and to induce and to contract for both direct and indirect discriminatory payments. In the Commission's view the order as entered was entirely proper, the circumstances of this case presented no occasion for such restrictive modifications, and the modified order is not only inadequate to prevent variations upon the illegal practices used in the past, but would allow resumption of a practically identical illegal arrangement.

In addition, the action of the court has an importance far beyond its effect upon the order in this case. This is because the court, in attempting to justify its departure from the legal standards established by the Supreme Court for determining the validity of Commission orders in cases such as this, has announced, as a new rule of law, the existence of an exception to those standards, to the effect that in the absence of three enumerated aggravating circumstances the Commission's order may not prohibit like or related unlawful acts, or variations upon the illegal practices, but can prohibit only the "particular" illegal practice used. If this exception becomes established then the Commission must either demonstrate the existence of those aggravating circumstances in every case, or must issue orders so narrow as to allow evasion by minor variations of the basic schemes.

The circumstances which gave rise to the Commission's decision and order are clear, and the court did not disapprove in any way the Commission's findings. The violations found and prohibited by the Commission occurred in the making and carrying out of a set of interrelated arrangements, formalized by written contracts, between (1) respondent, (2) the owner of a "spectacular" sign located on Broadway in New York City, and (3) thirty of respondent's suppliers. Respondent leased the entire sign from the owner for a nominal sum plus the promise to get suppliers to join in its use and to pay the owner for the privilege, and the owner contracted to maintain and operate the entire sign and to let respondent choose and other advertisers and approve their "copy." The thirty suppliers were obtained as participants by respondent, and they contracted with the owner to pay for their use of the sign, received such use, and, pursuant to unwritten agreements directly with respondent, at least some of them (including Swanee Paper Corporation) also received promotions of their products in its stores. Grand Union received and used all the permanent advertising space on the sign, and a portion of the temporary space, the use of which it sold to other (non-supplier) advertisers in return for payments directly to it, and also received (passed on by the sign's owner) portions of the payments made by some of the advertisers and all of the payments made by some others. Thus each of the parties (considering the suppliers collectively as one party) dealt directly with each of the others, with respect to the discriminatory payments indirectly to and for respondent's benefit, the various written and oral contracts and agreements, and the services furnished to the suppliers.

With respect to Grand Union's responsibility for and knowledge of the discriminatory character of the contracts and the payments, the Commission in its opinion summarized the facts as follows (Apdx 206a-208a):

"The record shows, first of all, that payments made to respondent by certain of its suppliers had not been proportionalized. The record also shows that respondent was not a passive recipient of these discriminatory payments but that it had, in fact, solicited them. Respondent, and not the suppliers, originated the plan under which the payments were made and in most instances respondent approached the supplier with the plan. The record shows that suppliers entered into contracts with respondent on the basis of individual negotiations and that in some instances respondent made special arrangements to secure the supplier's participation, such as by agreeing to handle its products on an exclusive or other preferential basis. There is also evidence that respondent brought pressure to bear on suppliers who were reluctant to renew their contracts under the sign program and did so successfully. There can be no doubt from the facts of record that discriminatory payments were made to respondent by its suppliers as a result of respondent's solicitation and inducement.

"In this same connection, the record shows that respondent knew that the sign program was a cooperative advertising arrangement. It also knew that certain of its suppliers had promotional allowance programs which were available to their customers. Respondent also knew that, in general, the arrangements for participation in the sign program were not negotiated as part of such announced advertising allowance programs. It also knew that with one exception, the arrangement was a specially tailored or negotiated deal outside of the supplier's generally announced program. The record also shows that in some instances respondent received from the supplier an allowance under the supplier's generally announced advertising program in addition to the benefits which it received from the sign deal. We think that these circumstances should have at least "provoked inquiry in the mind of a prudent businessman," *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 66 (1952), and that respondent should have inquired whether the participating suppliers were proportionalizing the payments made under the sign arrangement.

"The sign deal was not limited to a single transaction, but was a program continuing over a period of four years. During that time respondent was urging its suppliers to become participating advertisers, and the record shows that certain of these suppliers, by participating, granted respondent allowances which they did not make available to respondent's competitors on proportionally equal terms. Under these circumstances, it would have been remarkable if these suppliers had not informed respondent during the course of the negotiation that it was receiving preferential treatment. There is ample evidence in the record that respondent was so informed. The letters of the broker, Frederick Gash, which are referred to in the initial decision, certainly placed respondent on notice that it was receiving benefits under the sign program which were not available to other customers of the participating suppliers represented by Gash."

On its appeal to the Commission from the initial decision of the examiner Grand Union objected to the terms of the order to cease and desist which he had entered. That order, subsequently adopted by the Commission, required Grand Union, in or in connection with its purchase (in commerce) of grocery products or related merchandise, forthwith to cease and desist from—

"Knowingly inducing, receiving or contracting for the receipt of anything of value as compensation or in consideration for advertising, promotional displays or other services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when such payment is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of the suppliers' products."

In disposing of respondent's objection the Commission observed (Apdx 209a) :

"The final question presented for our determination concerns the scope of the order to cease and desist. Although respondent does not suggest how the order should be modified, it apparently believes that it should not be prohibited from knowingly inducing or receiving a discriminatory allowance directly from a supplier but that the order should be limited to situations where respondent or its supplier acts through a third person. In other words, its contention seems to be that the order should go no further than to prohibit respondent from engaging in the illegal practice by the means which it had previously employed. We think that such a prohibition would be of little value and that to be effective the order "must proscribe the method of unfair competition as well as the specific acts by which it has been manifested." *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F.2d 968 (1941) ; *Federal Trade Commission v. Ruberoid Company*, 343 U.S. 470 (1952)."

After that opinion was filed respondent submitted to the Commission a motion to modify the order to cease and desist to the following terms (Apdx 215a) :

"Knowingly inducing, receiving or contracting for the receipt of anything of value as compensation or in consideration for advertising, promotional displays or other services or facilities furnished in connection with the sale or offering for sale of products sold to respondent by any of its suppliers where the thing of value is received by respondent from a person other than any of its suppliers pursuant to a contract, arrangement or understanding, between one or more of respondent's suppliers and such third person, when respondent knows, or should know from the circumstances known to it, that such payment is not available on proportionally equal terms to all other customers of such supplier or suppliers competing with respondent in the sale and distribution of the supplier's products."

The principal difference between the Commission's order and Grand Union's proposed substitute was that the former prohibited all inducing, contracting for, and receiving the benefit of discriminatory payments, whether made directly to it or another, while the latter would leave the company free to obtain discriminatory payments directly from its suppliers. Respondent, while extensively arguing in its motion the need for clarity and specificity in Commission orders, gave no reason why it should not be prohibited from obtaining the benefit of discriminatory payments from its suppliers when received directly. The Commission denied the motion (Apx 225a).

In the court of appeals, in addition to contending that the Commission's decision on the merits of the case was erroneous in fact and in law, Grand Union argued that the Commission had erred by not framing its order in the terms proposed by Grand Union. The court in its opinion, while recognizing the principle that the Commission has "wide discretion to frame orders enjoining continuation of past practices found unlawful as well as similar or related future violations," held that in this case "the order should be limited to the particular practice found to violate the statutes" and "should also be limited to a prohibition of either knowing receipt or knowing inducement and receipt." It directed the Commission (300 F.2d at 101) to submit a proposed decree modifying the order "in conformity with the opinion," to which Grand Union could object by filing a counterproposal.

The Commission, while it did not agree with the modifications of its order, submitted a proposed decree which it believed to be in conformity with the court's opinion. The Commission's proposed decree was in the following language:

"Knowingly receiving, or inducing and receiving, or contracting for the receipt of, the benefit of anything of value from any of its suppliers through any third person (but not directly from said supplier), as compensation or in consideration for advertising, promotional displays or other services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when such payment is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of the supplier's products."

Grand Union thereafter submitted an alternative proposed decree, as follows:

"Knowingly receiving, or knowingly inducing and receiving the benefit of anything of value from any of its suppliers through any third person (but not directly from said supplier or any of its brokers, sales agents or other representatives) as compensation or in consideration for the enjoyment, use or occupancy of any billboard, sign or like advertising or promotional service of facility furnished by or through respondent in connection with the sale or offering for sale by respondent of products sold to respondent by the supplier, when respondent knows, or should know from the circumstances known to it, that such benefit or an alternative benefit is not made available by the supplier on proportionally equal terms to all its other customers competing with respondent in the sale and distribution of the supplier's products."

It accompanied its proposed decree with a memorandum in which it construed a phrase in the opinion as meaning that "it is the receipt alone of benefits for which Grand Union should be held accountable under the order and decree" and therefore the order should not prohibit it from "contracting for" such receipt (p. 2 of memorandum). It also argued for the first time (pp. 3-6) that the order should cover only situations involving a "billboard, sign or like advertising or promotional service or facility." The Commission had no opportunity to reply to these new arguments, since the court's rule 13(1), which the court in its opinion had stated should be followed, provides that upon filing of a respondent's proposed decree "The court will thereupon settle and enter the decree without further hearing or argument."

On April 27, 1962, the court issued a final decree which prohibits only the knowing receipt of the benefit of discriminatory payments to third persons by its suppliers:

"Receiving, or inducing and receiving, the benefit of anything of value from any of its suppliers through any third person (but not directly from said supplier), as compensation or in consideration for any advertising or promotional display services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when respondent knows, or should know, that such benefit is not affirmatively offered or otherwise made available by such suppliers on propor-

tionally equal terms to all their other customers competing with respondent in the sale and distribution of the suppliers' products."

The modified order leaves respondent free (1) to contract for the receipt of payments and benefits both directly and through third parties, (2) to induce its suppliers to make discriminatory payments directly and indirectly, so long as the benefits of the payments so induced are not thereafter received by Grand Union, and (3) to receive any discriminatory payments or benefits directly from its suppliers. Each of these three actions is closely related to or an integral part of the illegal arrangement used by Grand Union in this case, and in addition each of them is separately illegal. The first two were committed by Grand Union in this case, and the third was not committed by it only because the single supplier shown by the record to have made its payments directly to Grand Union chose to obey Section 2(d) and make proportionally equal payments to its other customers—an action which, so far as Grand Union was concerned, was entirely fortuitous.

The most serious of the modifications is that freeing respondent from all restraint against receipt of discriminatory benefits directly from its suppliers. The court gave no explanation for that action, and Grand Union gave no reason for its request for the modification, either to the court or to the Commission. All that the court did was make general statements about the desirability of clarity and specificity in Commission orders, state that (1) "Grand Union's violations cannot be considered flagrant," (2) that it "cannot be held to have known to a certainty that its part in the transactions was a violation of § 5," and (3) that "the arrangement . . . has terminated and there is nothing in the record to suggest that Grand Union intends to resume this or any related activity." Upon these three findings it concluded that the Commission's order must be "limited to the particular practice found to violate the statute" (300 F.2d at 100).

Thus the court has announced the existence of an exception to the rule laid down by the Supreme Court that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428 (1957).

The latter is the most recent decision of the Supreme Court concerning the permissible scope of Commission orders in anti-monopoly cases arising under Section 5 of the Federal Trade Commission Act. The Commission had found a price-fixing conspiracy effectuated by the common use of a particular method of scaling prices which was not itself illegal, and issued an order prohibiting not only continuation of the conspiracy, but requiring each participant to abandon the the separate use of that pricing system. The court upheld the requirement, and in so doing cited and relied upon three of its earlier decisions as to the permissible scope of Commission orders: *Jacob Siegel v. Federal Trade Commission*, 327 U.S. 608, 611 (1946), and *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 726 (1948), both *Federal Trade Commission Act* cases, and *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952), a Clayton Act case. The court said (352 U.S. at 428) that the Commission "is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist," that it is "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which had been disclosed," and "has wide latitude and judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." (These statements also appeared in *Jacob Siegel*.) The court quoted its statement in *Cement Institute* that the Congress in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation," and said that in the light of this it should not "lightly modify" orders of the Commission. It then made the ruling, quoted above, to which the court of appeals in this case has announced an exception, following which it said that its decisions have narrowed the issue in cases such as this to the question: "Does the remedy selected by the Commission have a reasonable relation to the unlawful practices found to exist?" The court of appeals in this case did not decide that issue, although expressly presented by the record under review, respondent's contentions, and the Commission's brief and argument. We submit that it is impossible to avoid the fact that the practices forbidden by each of the deleted portions of the Commission's order have close and reasonable relations to the illegal practices found.

This view is confirmed by the most recent decision by the Supreme Court upon a challenge to the scope of a Commission order, *Federal Trade Commission v. Broch & Co.*, 368 U.S. 360 (1962). That case arose under the Clayton Act before its recent amendment to conform its enforcement provisions to those existing under the Federal Trade Commission Act when the *Siegel, Cement Institute, National Lead*, and *Mandel* (discussed infra) decisions were rendered. In *Broch* the court rejected challenges to two separate provisions in the Commission's order, and repeated again (368 U.S. 364) that "the Commission has a wide discretion to formulate a remedy adequate to prevent Broch's repetition of the violation he was found to have committed," citing *Siegel* and *Cement Institute*. The first challenged paragraph of the order, which closely resembles the one in this case, was upheld without qualification, while the second, far broader and more general than here, was upheld because Broch's objections were premature under applicable enforcement procedures (368 U.S. at 364-67). That decision, we believe, provides no authority for the type of drastic limitation imposed by the court upon the order in this case.

In deciding whether Commission orders meet the test of those principles it must be remembered that they are not designed to punish or to impose compensatory damages for past actions, but to prevent illegal practices in the future. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 470 (1952), by those who have demonstrated by their actions in the past that they need "some fencing in," *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957), and that "to be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested," *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971-972 (3d Cir. 1941). "Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices," *Ruberoid Co.*, *supra*, 343 U.S. at 473, and in exercising its "specialized, experienced judgment" "in the shaping of its remedies within the framework of regulatory legislation," *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1968), the Commission not only may "appraise the facts of the particular case" but also may "draw from its generalized experience," *Siegel Co.*, *supra*, 327 U.S. at 614.

The court of appeals' reliance upon *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941), is entirely misplaced. In that case the Board found that an employer had violated subsections (1) and (5) of Section 8 of the National Labor Relations Act (49 Stat. 452, 453), by refusing to bargain and by interfering with bargaining negotiations (312 U.S. at 429). Subsection (5) declared it unlawful for an employer to refuse to bargain collectively with the representatives of his employees, while subsection (1) prohibited interference with its employees' exercise of any of the several rights enumerated in Section 7 of the Act ("to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" (49 Stat. 452)). The Board's order not only directed the employer to bargain and to cease and desist from its refusal to do so (the Section 8(5) violation), but also in a separate paragraph directed it to cease and desist from "in any manner interfering with, restraining, or coercing its employees in the exercise of their rights [reciting every one of them] as guaranteed in Section 7 of the Act" (which would be Section 8(1) violations).

The Supreme Court upheld the portion of the Board's order directing respondent to cease and desist from "refusing to bargain collectively" (the entire subsection (5) requirement (312 U.S. at 432), and disapproved "in the circumstances of [that] case" *only* the Board's position that because a violation of subsection (5) was also a violation of subsection (1), and subsection (1) protected all the different rights guaranteed by Section 7, proof of a violation of subsection (5) allowed an order explicitly prohibiting the employer from any interference with each of the several Section 7 rights (312 U.S. at 432-33).

It was as though the Commission had in this case prohibited not only petitioner's participation in its supplier's future violations of Section 2(d) of the Clayton Act, but also its participation in any violations of any other subsections of Section 2. Only if the Commission had done this would its order have corresponded to the portion of the *Express Publishing* order held to be improper. As it is, the order here corresponds to the portion of the *Express Publishing* order which was upheld.

In that decision, furthermore, the Supreme Court explicitly limited its holding to such situations, saying (312 U.S. at 437), "we hold only that the National Labor Relations Act does not give the Board authority * * * to enjoin violations of *all the provisions* of the statute merely because the violation of *one* has been found" (emphasis supplied). Nothing in that decision even suggests disapproval of an order's prohibiting participation in all future violations of the same single and narrow statutory provision violated, and such a prohibition was explicitly affirmed (312 U.S. at 432). *Express Publishing* is thus authority in support of the Commission's order, rather than against it.

The most recent decision of the Supreme Court upon the permissible scope of Commission orders in cases arising under the enforcement provisions of the Federal Trade Commission Act is *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391-393 (1959). In that case the Commission had proceeded under Section 5 against violations of the Fur Products Labeling Act, found that Mandel had violated three out of six requirements of a particular subsection of the latter Act, and issued an order prohibiting all six types of violations. The court of appeals struck the prohibitions against the three types of violations not found and the Supreme Court reversed, upon principles equally applicable here. The Court said:

We do not believe the Commission abused the "wide discretion" that it has in a choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed by the record. *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 611. It is not limited to prohibiting "the illegal practice in the precise form" existing in the past. *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." *Labor Board v. Express Pub. Co.*, 312 U.S. 426, 436. The practice outlawed by § 4 is "misbranding." The disclosure required for a properly branded garment is specified. These disclosure requirements are so closely interrelated that the Commission might well conclude that a retailer who for example failed to disclose that the fur was bleached or dyed might well default when it came to disclosure of the fact that used fur was contained in the garment. One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in. Here, as in *Sherman Act decrees (Local 167 v. United States*, 291 U.S. 293, 299; *International Boxing Club v. United States*, 358 U.S. 242, 253), the question of the extent to which related activity should be enjoined is one of kind and degree. We sit only to determine if the trier of facts has exercised an allowable discretion. Where the episodes of misbranding have been so extensive and so substantial in number as they were here, we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure.

The parallel between that case and this is, we think, much closer than would at first appear. Here, as there, the Commission is using its powers under Section 5 of its Organic Act to enforce the requirements of another statute. In this case the violations are even more extensive than in *Mandel* (see 359 U.S. at 393, n. 9). Here petitioner has, on a series of occasions for several years, participated with many of its suppliers in a large number of transactions which for those suppliers constituted violations of the Clayton Act and for petitioner constituted violations of the Federal Trade Commission Act. Here, as there, the order prohibited only like and related illegal actions. We believe that the circumstances of the instant case show clearly that it was an occasion for applying the principles stated by the Supreme Court in *Mandel* and reaching a similar result.

We believe, upon the facts of this case as found by the Commission and upheld by the Court (by its *sub silentio* rejection of Grand Union's attack upon the substantiality of the evidence to support the findings), that the Commission's order as issued cannot be considered an abuse of discretion, that the court of appeals erred in modifying the order, and that the modifications render the order a practical nullity. Deletion of the prohibition against receipt of payments and benefits directly from suppliers makes complete evasion not only possible but easy. Deletion of the other prohibitions, upon Grand Union's last-minute objections, is unprecedented approval of and reward for litigation by ambush, and deletion of the prohibition against "contracting for the receipt of "discriminatory allowances leaves Grand Union free to repeat actions which are violations of the express terms of Section 2(d) on the part of its suppliers and were held by the Commission in this case, without disapproval by the court, to constitute

violations of Section 5 on the part of Grand Union. Even the same panel of this court which decided this case appears to regard such actions as violative of Section 5, for in *American News Company v. Federal Trade Commission* 300 F. 2d 104 (2d Cir. 1962), where the Commission's order contained the same provision, the court's modifications left that prohibition in the order. The same court also included in its modified order in the *Svrance* case a prohibition against that supplier's "contracting to pay" discriminatory allowances to third persons for its customers' benefit. In *Giant Food Inc v. Federal Trade Commission*, D.C. Cir. No. 16,507, June 14, 1962, where the propriety of the inclusion of such a prohibition was briefed and argued, the court, although directing minor modifications, affirmed that provision.

The Commission regards the deletion of the provisions concerning "inducing" without receiving or contracting for discriminatory allowances, and that concerning "other" services or facilities, to be so minor as not themselves to warrant seeking Supreme Court review, and therefore does not intend to ask the filing of petitions for certiorari in *American News*, where only such modifications were made, or in *Giant Food*, if the court adopts the Commission's proposed final decree incorporating the language of the opinion therein. However, it believes that their inclusion in the Commission's order in this case was not improper.

It is requested that a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be filed in the Supreme Court of the United States. It must be anticipated that Grand Union will file such a petition and, because the particular practice involved has not previously been the subject of a court decision, may obtain review. In that event certiorari is more likely to be granted to review as well the modifications of the order, while failure to file a petition in this case, particularly after failure to file in *Svrance*, may be viewed as an acquiescence in the new rule of law announced by the court in these two cases.

There are transmitted herewith copies of the pertinent briefs, the appendix (printed by petitioner), the opinion of the court of appeals, the Commissioner's proposed decree, petitioner's proposed decree and accompanying memorandum, the decree entered by the court of appeals, a copy of the final decree in *American News*, a copy of the opinion of the Court of Appeals for the District of Columbia Circuit in *Giant Food*, and a copy of the Commission's proposed final decree therein.

By direction of the Commission.

Enclosures :

PAUL RAND DIXON, *Chairman*.

SHULTON, INC.

6. *Shulton, Inc. v. F.T.C.*, 305 F. 2d 36 (7th Cir. 1962)

(a) *Court Action*: Order set aside and remanded to permit petitioner to present
2(b) defense.

(b) *Commission Action*:

1. On July 27, 1962 directed 1) that certiorari not be sought in this matter
- 2) reopened proceeding 3) remanded to hearing examiner 4) directed hearing examiner to file a revised initial decision upon completion of hearings.

Note: 5-0.

SEPTEMBER 4, 1962.

(11) *Shulton, Inc. v. Federal Trade Commission*, 7th Cir. No. 13508
(Docket 7721—Shulton, Inc.)

(a) Memorandum of July 24, 1962, from J. B. Truly, Acting General Counsel, with reference to the opinion and judgment of May 10, 1962, of the United States Court of Appeals for the Seventh Circuit setting aside the Commission's order in Docket 7721 and dismissing the complaint, and to the Court's further judgment of July 12, 1962, modifying its May 10, 1962, judgment so as to remand the case to the Commission with directions to afford the respondent an opportunity to present a defense under Section 2(b) of the amended Clayton Act to the charges of the complaint that respondent has violated the provisions of Section 2(d). Mr. Truly recommended that certiorari not be sought and that the Commission enter an order reopening the proceeding and directing the hearing examiner to afford Shulton an opportunity to present a 2(b) defense.

(b) Memorandum of July 26, 1962, from Mr. Truly submitting draft of order in accordance with his above recommendation, and expressing the opinion that the order should not be issued until October 11, 1962, or until the Supreme Court has acted on Shulton's petition in the event that Shulton files for certiorari before that date.

On July 27, 1962, the five Commissioners (1) directed that certiorari not be sought in this matter; (2) reopened the proceeding in Docket 7721; (3) remanded the matter to Hearing Examiner Walter R. Johnson for such further proceedings as are necessary to comply fully with the opinions and judgments of the Court and for the receipt of such rebuttal evidence as counsel supporting the complaint may offer; (4) directed that the hearing examiner, upon completion of the hearings, shall file with the Commission a revised initial decision based upon any such additional evidence as may be received; and (5) directed the issuance and service upon the parties of an order to that effect.

It was directed that the order herein be not issued until October 11, 1962, or until the Supreme Court has acted on Shulton's petition in the event that Shulton files for certiorari before that date.

SUNSHINE BISCUITS, INC.

7. *Sunshine Biscuits, Inc. v. F.T.C.*, 306 F.2d 48 (7th Cir. 1962)

(a) *Court Action*: Order set aside and Commission directed to dismiss complaint.

(b) *Commission Action*:

1. On August 14, 1962 directed that Solicitor General be requested to file petition for certiorari. *Vote*: 4-0.

2. On October 30, 1962 reaffirmed to Solicitor General Commission's request for filing of petition for certiorari.

3. On November 8, 1962 directed that request for petition for certiorari be withdrawn. *Vote*: 3-0, Mr. Higginbotham abstained. Mr. Elman did not participate.

4. On November 20, 1962 directed issuance of press release with statements added by Commissioners Elman and Higginbotham. *Vote*: 5-0.

SEPTEMBER 4, 1962.

(15) *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 7th Cir., No. 13,570 (Docket 7708—Sunshine Biscuits, Inc.)

Memorandum of August 13, 1962, from the General Counsel transmitting draft of letter to the Solicitor General requesting that he file in the Supreme Court a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's opinion and judgment of July 11, 1962, setting aside the Commission's order in this matter and directing the Commission to dismiss its complaint. The draft stated the position of Mr. Elman in substantially the same language as that used in the letter requesting certiorari in the Exquisite Form Brassiere case (Docket 6966).

On August 14, 1962, pursuant to the recommendation of Mr. Anderson, Messrs. Dixon, Anderson, Kern and Elman directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment in question, and the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by the General Counsel, was approved and ordered forwarded after signature by the Chairman.

OCTOBER 30, 1962.

(1) *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 7th Cir., No. 13,750 (Docket 7708—Sunshine Biscuits, Inc.)

Draft of letter to Hon. Archibald Cox, Solicitor General, in response to his letter of October 23, 1962, with reference to the Commission's request under its action of September 4, 1962, that he petition the Supreme Court to review the decision of the United States Court of Appeals for the Seventh Circuit in the above proceeding. Mr. Cox expressed the opinion that review by the Supreme Court in this case should not be sought.

The reply, transmitted by the General Counsel with memorandum of October 26, 1962, expressed the opinion, for the reasons recited, that a petition for certiorari should be filed, and reaffirmed the Commission's request to that effect.

NOVEMBER 8, 1962.

(1) *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 7th Cir., No. 13,570
(Docket 7708—Sunshine Biscuits, Inc.)

Pursuant to agreement on November 5, 1962, on November 6, 1962, Messrs. Dixon, Anderson and MacIntyre determined that the request, pursuant to the action of September 4, 1962, for a petition for a writ of certiorari in the above matter be withdrawn, and directed that the Solicitor General be so notified.

The above action was confirmed by the Commission.

Mr. Higginbotham abstained from voting as to the foregoing action, and Mr. Elman was recorded as not participating therein.

NOVEMBER 20, 1962.

(1) *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 7th Cir., No. 13,570
(Docket 7708—Sunshine Biscuits, Inc.)

Pursuant to the agreement on November 15, 1962, Mr. Dixon presented a re-drafted press release explaining the Commission's reasons for not seeking Supreme Court review of the above Court's decision setting aside a cease and desist order of the Commission.

The submitted press release was approved and ordered issued together with the statements of Messrs. Elman and Higginbotham added thereto.

AUGUST 14, 1962.

Re *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 7th Cir. No. 13570—
FTC Docket 7708.

Hon. ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On July 11, 1962, the United States Court of Appeals for the Seventh Circuit issued its opinion and entered its judgment setting aside an order to cease and desist of the Federal Trade Commission and directing the Commission to dismiss its complaint.

In so doing the court construed section 2(b) of the amended Clayton Act to excuse price discriminations, which otherwise would violate section 2(a), where the lower prices meet the equally low prices of competitors and are afforded for the purpose of acquiring new customers. The Commission (Commissioner Elman dissenting) had ruled that section 2(b) only permits as an act in self-defense against the price raids of competitors, the meeting of equally low prices of competitors in order to retain customers; that the section does not permit such price discriminations for the purpose of securing new customers. This question as to the interpretation of section 2(b) of the Clayton Act is the only question raised by the court's decision.

The Commission's order was issued pursuant to a complaint charging Sunshine with having discriminated in price in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. More specifically, the complaint recited the sale of potato chips to certain large retail grocery and drug chains at prices lower than those charged to competing purchasers. Section 2(a) in pertinent part provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *"

Sunshine admitted the particular price discriminations specified in the complaint and stipulated that it had discriminated in price in favor of still other customers. It also stipulated that the effect of the price discriminations may be substantially to lessen competition or to injure, destroy or prevent competition with the favored customers. As characterized by the court, "the evidence submitted by the Commission counsel before the hearing examiner consisted of a stipulation in which Sunshine admitted all essential elements necessary to establish a prima facie violation of section 2(a)" (slip opinion 2).

Sunshine took the position that its price discriminations were justified under the affirmative defense provided by section 2(b) of the amended Clayton Act. Section 2(b) provides in pertinent part:

"Upon proof being made * * * that there has been discrimination in price * * *, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchasers or purchasers was made in good faith to meet an equally low price of a competitor * * *."

Upon consideration of Sunshine's affirmative defense, the Commission found (Petitioner's Appendix 144):

"4. Respondent claims that it granted the aforesaid discounts for the purpose of meeting in good faith equally low prices granted or offered by its competitors. In some instances, it was necessary for respondent to grant discounts in order to prevent the loss of its customers to competitors. In a number of other instances, however, respondent granted discounts to buyers who had been purchasing from its competitors and was thus able to obtain new customers.

"(5) The defense of meeting competition contained in the proviso to Section 2(b) of the amended Clayton Act is limited in its scope to those situations in which a seller is acting in self-defense against competitive price attacks and is not applicable where the seller makes discriminatory price reductions in order to obtain new customers. In those instances in which respondent lowered its price to obtain new customers, it was not acting defensively and cannot avail itself of the meeting competition defense provided by Section 2(b)."

The Commission held that Sunshine had failed to establish a valid defense under section 2(b), and issued its order to cease and desist.

In an accompanying opinion (P.A. 146-151) the Commission expressed its understanding that the meeting competition defense contained in section 2(b) of the Clayton Act excuses discriminatory practices having the very anticompetitive effects which Congress sought to prevent by section 2(a); that Congress was aware of the basic conflict between the remedial objectives of the statute and this defense; and that the legislative history discloses a Congressional intent to restrict the application of the meeting competition defense.

The Commission relied upon *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 241 (1951), where the Supreme Court stated that the section 2(b) defense, following the Robinson-Patman amendment, "still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." The Commission also relied upon the decision of the Second Circuit in *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674, 677 (1959), *cert. denied*, 361 U.S. 826 (1959), where that court held that "it is well settled that a lower price is within § 2(b) * * * only if it is used defensively to hold customers rather than to gain new ones."

The Seventh Circuit in the instant case, however, held that the Commission was in error in ruling that the section 2(b) defense is not available where the seller makes discriminatory price reductions in order to obtain new customers. With respect to the Standard Oil case the court stated that since, in that case, Standard Oil "had made the lower price in question only to retain its customers and had not acquired new customers thereby, the question presented in the instant case was not before the Supreme Court." Considering the language of *Standard Oil* in the light of the issue presented in that case, the court of appeals concluded that the language did not lend support to the Commission's position (slip opinion 4). The Seventh Circuit did not consider the Second Circuit's opinion in *Standard Motor Products* as persuasive inasmuch as the only authority cited by the Second Circuit was the *Standard Oil* case (slip opinion 5).

The Seventh Circuit concluded that the section 2(b) proviso clearly applies whether the purchasers involved are new or old customers, so that there was no need to resort to legislative history, which was deemed by the Court to be, at best, inconclusive. The court also held that the Commission's construction would be unworkable because of the practical difficulty in distinguishing between old and new customers, and would be economically unsound because it would permit a seller to have a monopoly of his old customers and would require price discriminations between old and new customers (slip opinion 5-6).

The Commission believes that the Seventh Circuit was in error in so deciding the case. While the Supreme Court did not, in the *Standard Oil* case, have before it the identical issue decided by the Commission in the *Sunshine* case, the Supreme Court did in *Standard Oil* render a considered opinion to the effect that the section 2(b) defense only authorizes, as an act of self-defense against a price raid by a competitor, the good faith meeting of a lawful lower price of the competitor in order to retain a customer. (See pages 21 through 25 of the Commission's brief for a detailed analysis of the *Standard Oil* opinion to this effect.) It is also significant that the minority reproduced the following portion of the majority opinion as expounding the majority's understanding of the meaning of the section 2(b) defense of the amended Clayton Act as compared to the "meeting competition" clause of section 2 of the original Act (340 U.S. at 255-256) :

"It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price 'in the same or different communities . . . ' and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the 'lower price' of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price."

The Commission, therefore, believes that the United States Court of Appeals for the Second Circuit was correct when it, in *Standard Motor Products*, cited the *Standard Oil* case for the proposition that "It is well settled that a lower price is within § 2(b) * * * only if it is used defensively to hold customers rather than to gain new ones."

Section 2(b), as an exception to the basic policy objectives of section 2(a) (the remedial portion of the statute) must be strictly construed as allowing only, as a means of self-defense against the price raid of a competitor, the meeting of the lower price of the competitor in order to retain a customer. The legislative history evidences the intention of the Congress that the proviso in question be strictly limited. (See Commission's brief, pages 28-35).

The court's anticipation of possible difficulties in distinguishing between new and old customers does not, we think, furnish a sound basis for the court's decision. No such problems were present in the instant case. The court's opinion was rendered with respect to discriminatory prices granted purchasers for the purpose of acquiring new customers. Practical problems of whether a customer is new or old can be met in a practical manner when and if they arise.

We do not believe the court properly concluded that the Commission's construction of section 2(b) would defeat the purpose of the Robinson-Patman Act by stifling competition for new customers, creating a monopoly in a seller with respect to his old customers and forcing price discriminations between old and prospective customers. To the contrary, the Commission's decision would effectuate the purpose of the Robinson-Patman Act by eliminating a method of competition deemed unfair by the Congress. Under the Commission's decision there would still be competition for new customers, but not by means of discriminatory prices which could not be cost justified and which would injure the other customers of the seller. Sellers could still compete for new business by offering lower prices, except that they would also have to give the benefit of the lower prices, to the extent that they could not be cost justified, to their other customers who would otherwise be injured. Further, it is the court's construction of section 2(b), rather than the Commission's, that would result in the greater incidence of price discriminations between new and old customers. Under the court's construction, a seller could discriminate against all of his existing customers in order to secure a new account. Under the Commission's construction, a seller would be required not to discriminate against an existing account when he wanted to compete for a new one. The Commission's decision would not prevent competition for new accounts; it would simply prohibit discriminations against other customers when so competing. (See further discussion at pages 36 through 40 of the Commission's brief.)

This case involves a most important interpretation of the Clayton Act. The remedial objective of section 2(a) is to prevent injury to competition resulting from price discriminations. As the section 2(b) proviso excuses price discriminations having the very anti-competitive effects which section 2(a) would prevent, there is a basic conflict between section 2(b) and section 2(a). Therefore, if the Seventh Circuit opinion broadly construing the section 2(b) proviso

is allowed to stand, section 2(a) would, to an appreciable extent, be written out of the Act. The Robinson-Patman amendment was directed particularly to protect small businessmen in their purchases as against their larger competitors. Small businessmen stand to lose this protection by virtue of the Seventh Circuit's opinion which opens the door to price discriminations by sellers for the purpose of acquiring the new business of large accounts.

In view of the importance of the case, the inconsistency of the opinion with that of the Supreme Court in *Standard Oil*, as well as the direct conflict with the decision of the Second Circuit in *Standard Motors*, we request that a petition for certiorari be filed.

Commissioner Elman, who dissented from the Commission's decision in this case and who therefore agrees with the decision of the court of appeals, concurs in the request that a petition for certiorari be filed for the following reasons: The question of statutory construction presented is important; it is a constantly recurring one which should be authoritatively settled; and, since a majority of the Commission does not accept the decision of the court of appeals, Supreme Court review is the only way of securing a definitive resolution of the question.

Transmitted herewith are copies of Sunshine's briefs and separate appendix filed in the court of appeals, the Commission's brief and appendix filed in that court, and the court's opinion and judgment.

By direction of the Commission.

PAUL RAND DIXON, *Chairman*.

THOMASVILLE CHAIR CO.

8. *Thomasville Chair Co. v. F.T.C.*, 306 F.2d 541 (5th Cir. 1962).

(a) *Court Action*: Order set aside and cause remanded.

(b) *Commission Action*:

1. On September 25, 1962 directed that Solicitor General be requested to file a petition for certiorari. *Vote* 5-0.

2. On November 27, 1962, directed that no further efforts be made to seek certiorari. *Vote*: 4-1, Commissioner Anderson voting in the negative.

3. On September 19, 1963 directed General Counsel to prepare necessary papers ordering dismissal of proceedings. *Vote*: 4-0. Commissioner Anderson withheld his vote.

4. On October 18, 1963 complaint in this matter was dismissed. *Vote*: 5-0.

SEPTEMBER 25, 1962.

Mr. Elman presented the following Matters:

(1) *Thomasville Chair Co. v. Federal Trade Commission*, 5th Cir., No. 18,996 (Docket 7273—Thomasville Chair Company)

Mr. Elman presented memorandum of September 21, 1962, in which he reported his consideration of this matter in view of memorandum of September 19, 1962, from the General Counsel's Office, transmitting draft of letter to the Solicitor General requesting the filing of a petition for a writ of certiorari to review the opinion and judgment entered August 14, 1962, by the United States Court of Appeals for the Fifth Circuit setting aside the order in Docket 6237 and remanding the matter for further proceedings "not inconsistent with" rulings made in the opinion.

After consideration, on motion of Mr. Elman, the Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment in question, and the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by the General Counsel, was approved and ordered forwarded after signature by the Chairman.

NOVEMBER 27, 1962.

(2) *Thomasville Chair Company v. Federal Trade Commission*, 5th Cir., No. 18,996 (Docket 7273—Thomasville Chair Company)

Mr. Dixon reported his consideration of this matter in view of the following memoranda with reference to the Commission's request, pursuant to the action of September 25, 1962, of the Solicitor General that a petition for a writ of certiorari be filed in the Supreme Court for review of the opinion and judgment entered August 14, 1962, by the United States Court of Appeals for the Fifth Circuit setting aside the order in Docket 6237 and remanding the matter for further proceedings "not inconsistent with" rulings made in the opinion: (a) memorandum of November 21, 1962, from Acting General Counsel Truly with reference to letter of November 20, 1962, from Hon. Archibald Cox, Solicitor, Department of Justice, vigorously opposing certiorari, partly on the basis of recommendations made by the Department's Antitrust Division and by Mr. Cox's staff (Mr. Truly attached copies of memoranda from the Department staff members); and (b) memorandum of November 27, 1962, recommending that Mr. Cox be urged to file a petition for certiorari, and transmitting for approval a draft of letter to that effect.

After consideration, on motion of Mr. Dixon, in the light of the statements of the Solicitor General to the Commission with respect to this matter, and of the facts herein as the Commission understands them, it was directed that no further efforts be made to seek certiorari of the Court's decision.

The General Counsel was instructed to prepare a letter advising Mr. Cox in accordance with the above action.

As to the foregoing action, Mr. Anderson voted in the negative.

SEPTEMBER 19, 1963.

(3) *Thomasville Chair Company v. Federal Trade Commission*, 5th Cir. No. 18,996
(Docket 7273—Thomasville Chair Company)

Mr. Elman presented memorandum of September 17, 1963, in which he reported his consideration of memorandum of July 26, 1963, from Assistant General Counsel Truly, regarding the opinion and judgment of August 14, 1962, by the Fifth Circuit Court of Appeals, setting aside the order herein and remanding the case to the Commission for further proceedings not inconsistent with the Court's opinion. For the reasons recited, Mr. Truly recommended that the Commission issue an order dismissing its complaint and that its order (or an accompanying opinion) state that the Commission adheres and will follow the decision in the first *Broch* case, 363, U.S. 166, 176, to the extent and manner indicated. The General Counsel, in his endorsement of Mr. Truly's memorandum, urged that great care be given to the wording of the order dismissing the complaint, particularly with reference to any statements as to the Commission's future position vis-a-vis the *Broch* case and that the Commission should use extreme care in any press release issued in connection with this case.

Mr. Elman, in his memorandum, agreed that the complaint should be dismissed and that a statement should accompany the dismissal in order to dispel the confusion likely to be generated by the unclear language of the Court's opinion, and set forth a memorandum to accompany the order dismissing the complaint.

After discussion, the suggested memorandum set forth in Mr. Elman's memorandum was amended, and the matter was referred to the General Counsel for the preparation of the necessary papers and submission thereof to the Commission for its consideration.

Mr. Anderson withheld his vote in this matter until such time as he has read the documents to be prepared by the General Counsel.

OCTOBER 18, 1963.

(3) *Thomasville Chair Company v. Federal Trade Commission*, 5th Cir. No. 18,996
(Docket 7273—Thomasville Chair Company)

Mr. Elman reported his consideration of memorandum of October 15, 1963, from the General Counsel, reporting pursuant to the action of September 19, 1963, and transmitting drafts of order dismissing the complaint in Docket 7273 and a memorandum to accompany the order.

After consideration, the Commission's complaint in Docket 7273 was dismissed, and order to that effect, and memorandum to accompany the same, were approved and referred to the Secretary for issuance and service upon the parties.

SEPTEMBER 25, 1962.

Re *Thomasville Chair Company v. Federal Trade Commission*, 5th Cir. No. 18,996—FTC Docket 7273.

Hon. ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On August 14, 1962, the United States Court of Appeals for the Fifth Circuit issued its opinion and entered judgment in this case, setting aside the order to cease and desist and remanding the matter for further proceedings "not inconsistent with" rulings made in its opinion. The

two principal rulings are, in effect, that the cost-justification proviso in section 2(a) of the amended Clayton Act applies also to section 2(c), and that one of the Commission's several findings, supporting its conclusion that petitioner had been granting discriminatory discounts in lieu of sales commissions, was not supported by substantial evidence. The purpose of this letter is to request the filing of a petition for certiorari to review that decision.

The first ruling is contrary to all precedent and authority, including the ruling of the Supreme Court in the most recent decision upon this question, *Federal Trade Commission, v. Broch*, 363 U.S. 166, 170-171, 176 (1960). The second ruling is equally flagrant error, reached by misunderstanding the finding, ignoring the evidence upon which it was based, and accepting as fact petitioner's argument flatly contrary to the evidence.

The case is, essentially, a very simple one. Thomasville Chair Company sells two lines of furniture, all through commissioned salesmen. On one line all customers pay the same prices and all salesmen receive the same (6%) commission on all sales. On the other line a few big customers are granted a discount (of 5%) and on these sales the salesmen are paid a reduced (3%) commission.

When the Commission began its investigation of this long-standing arrangement, petitioner asserted, in effect, that it was passing on to the favored customers, as a part of their discount, the saving it achieved by reducing its salesmen's commissions on sales to them. (See the Commission's brief, pp. 29-33.) Later, however, after the Supreme Court's decision in *Broch*, petitioner changed its story, and denied that any part of the salesmen's commissions were being passed on to the favored few, claiming instead that the lower commissions were paid because the salesmen expended less effort in selling to the favored customers, while the discount was allowed because petitioner effected, on sales to those customers, other savings at least equal to their discount.

The Commission, in an interlocutory order on an appeal from a ruling of the hearing examiner, held (Joint Appendix, p. 36) that although a seller's cost saving consisting of a reduction in salesmen's commissions to favored buyers could not be passed on to them without violating 2(c), petitioner's belated claim raised a factual issue as to whether or not such passing-on had occurred, and therefore petitioner could present evidence to support that line of defense, including evidence, which it had proffered, of cost savings other than the reduction in sales commissions.

After that ruling petitioner presented such a defense, including three successive cost studies, to support its assertion that such other savings were the real bases of the discount. When the case came before the Commission, upon appeal from the examiner's initial decision accepting petitioner's version of the matter, the Commission found that petitioner had in fact been passing on all or a part of the reduction in commissions. That finding was based upon a number of circumstances shown by the record, including the facts that petitioner's assertion that all of the favored customers purchased in larger quantities than the unfavored ones was disproved by its own records, and that petitioner's own evidence showed that its claim of other cost saving on sales to the favored customers, approximating their 5 percent discount, was not true, so that the only possible source for much of the discount was the reduction in sales commissions, as petitioner had originally admitted. Upon these findings and conclusions the Commission issued an order which was carefully framed to prohibit petitioner from basing all or any part of any future discriminatory discount upon savings achieved by reducing sales commissions on sales to the favored customers, while at the same time leaving petitioner completely free to pass on all or any part of any cost savings it might achieve in any other manner.

In the court of appeals petitioner urged a multiplicity of issues. The court decided one of them (that section 2(c) applies to discounts in lieu of commissions to petitioner's type of salesmen) in the Commission's favor (slip op. p. 7), reserved most of the other questions (slip op. p. 1), and made the two rulings upon which it based its decision to remand.

The first ruling constitutes an incorporation of the 2(a) cost-justification proviso into section 2(c). The court said (slip op. p. 2) that it is not a violation of 2(c) for a seller to base a discount to favored customers upon an accompanying reduction in sales commissions, if the reduction may be justified by "differences in the cost of manufacture, sale, or delivery resulting from the differing methods of quantities in which such commodities are . . . sold or delivered." The quotation is the court's and is, *in hanc verba*, from section 2(a).

The differences between the court's ruling and that of the Commission are not merely theoretical. Under the court's ruling 2(c) is a dead letter, for almost every large buyer in almost every industry is able to buy direct, through its own

purchasing agents, and thereby relieve its suppliers of all or part of their expenses of maintaining salesmen, or relieve its sellers' brokers of all or most of their expenses. Under the rule announced by the court, such reduction or elimination of sales expenses would cost-justify the reduction or elimination of commissions on such sales, and qualify the buyers for discriminatory discounts equal to the reductions. Under the Commission's ruling this is not allowed, but sellers may freely grant and buyers freely receive discounts based upon any other consideration, without violating the section. The Commission's construction of the section gives complete effectuation to its provisions and purpose, without entrenching upon those of any other statutory provision, but the court's would amend the plain language of the section and produce the precise result which the Congress considered an economic evil and enacted the section to stop. *Broch*, 363 U.S. at 170-73; *Great Atlantic & Pacific Tea Co.*, 26 F.T.C. 486, 508-12 (1938), *aff'd*, 106 F. 2d 667, 673-75 (3d Cir. 1939), *cert. denied*, 308 U.S. 625.

In *Broch* the Supreme Court explicitly held that the cost-justification proviso of Section 2(a) is not available as a defense in 2(c) cases. 363 U.S. at 170-71, 176. In holding to the contrary the court of appeals has ignored the pertinent portions of that decision, and erroneously taken as authority for its novel ruling certain comments which actually pertain to the wholly different issue, in cases such as this, of whether a discount which accompanies a reduction in a sales commission is in fact being given in lieu of that commission. In *Broch* the Court took note of the fact that the inference that a seller has granted a discount in lieu of brokerage can arise only when different customers pay different prices for the same products, and, concomitant therewith, commissions on sales to the favored customers are lower than on sales to the unfavored ones; in other words, that the price reduction is "discriminatory" and is accompanied by a commission reduction. (This has long been the Commission's position, e.g., *Main Fish Co.*, 53 F.T.C. 88, 89, 96-7 (1956), cited with approval by the Court, 363 U.S. at 176.) Naturally, no such inference arises if the seller eliminates all use of salesmen or brokers, or uniformly reduces commissions on sales to all customers, or lowers price uniformly to all customers. *Cf. Robinson v. Stanley Home Products*, 272 F. 2d 601, 603-4 (1st Cir. 1959).

Despite that clear meaning of the Court's reference to the *Broch* price reduction as "discriminatory," the court of appeals (slip op., p. 9) held that by use of that word the Court meant "without justification based on actual bona fide differences in the cost of sales resulting from the differing methods or quantities in which such commodities are sold or delivered." This, almost verbatim, is the 2(a) proviso, and its incorporation into 2(c) is flatly contrary to the Supreme Court's statement, appearing right in the middle of the discussion misunderstood by the court of appeals (363 U.S. at 176), that while 2(a) "permits the defense of cost justification," 2(c) "does not."

It is also contrary to every other court decision upon the issue, including one, *Webb-Crawford Co. v. Federal Trade Commission*, 109 F.2d 268, 269 (5th Cir. 1940), *cert. denied*, 310 U.S. 632, in which the same court of appeals held that section 2(c) is "entirely independent" of section 2(a) and its qualifications. Others include *Great Atlantic & Pacific Tea Co.*, *supra*, 106 F.2d at 676-77 (cited with obvious approval in *Broch*, 363 U.S. at 172-73); and *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F.2d 687, 690 (2d Cir. 1938), *cert. denied*, 305 U.S. 634. *Cf. Oliver Bros. v. Federal Trade Commission*, 102 F.2d 763, 766-67 (4th Cir. 1939); *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393, 400 (1st Cir. 1940); and *Modern Marketing Service v. Federal Trade Commission*, 149 F.2d 970, 973 (7th Cir. 1945). See also the discussion in *Simplicity Pattern Co. v. Federal Trade Commission*, 360 U.S. 55, 65-71 (1959).

This has been the Commission's construction of the section since it was enacted: the issue was first raised and decided in the second 2(c) case, *Great Atlantic & Pacific*, 26 F.T.C. 486, 508-12 (1938).

The court also misunderstood the factual issue decided by the Commission, and the basis of that decision. The issue was whether or not the discriminatory discount was granted in lieu of the reduction in commissions. The evidentiary indications that it was were the correlation between the two reductions, the admissions of petitioner mentioned above, admissions by its officials that they were uncertain why the discriminatory pricing system had been established, and the facts that the discount had often gone to customers purchasing in volumes much smaller than those which petitioner claimed created the saving, that before its discount was questioned petitioner had made no cost studies

to even attempt to determine the existence of any other saving, and that its subsequent cost studies demonstrated the non-existence of other savings sufficient to provide a basis for the discount.

The contrary evidence was petitioner's officials' belated self-serving assertions that the discount was based entirely upon other savings, to support which petitioner presented, successively, three cost studies intended to show the existence of differences in costs of selling to favored and unfavored customers. Each of the first two cost studies was so discredited, when presented and subjected to analysis, that petitioner sought and was granted permission to try again. The third cost study was the one credited by the examiner but rejected by the Commission. It was invalid for several reasons (see the Commission's brief, pp. 34-42), but even if it had shown the existence of the claimed cost savings, it would not have established that petitioner had, in the past, been passing them on in the form of the discount, but only that it could have done so (leaving the issue to be settled by the other evidence), and that it might do so in the future, as is permitted by the order to cease and desist.

Even petitioner's third cost study, if it were taken at its face value despite its fatal defects, would fall nearly 1% short of accounting for the 5% discrimination in price granted the favored customers, when only cost savings other than the reduction of salesmen's commissions are considered. That study purported to show such savings only to the amount of 4.08% of the selling price (see petitioner's brief, pp. 10-11); plainly the remaining 0.92% (one-fifth of the discount), even upon petitioner's own version of the matter, had to consist of a passing-on of a part of the reduction in commissions, and the Commission correctly so found.

One of the several reasons the Commission disbelieved petitioner's belated version of its arrangement was the difference between the criterion petitioner's officials stated it had used to determine whether its customers qualified for the discount, and the actual performance of the customers who received the discount in the period before the Commission's investigation came to petitioner's attention.

The Commission found that petitioner had said the criterion it used in selecting the favored customers was annual purchases of at least \$50,000, and that the fact was that purchases of many of the favored customers amounted to substantially less than that amount (J.A. 57). This difference was only one of the minor record indicia of the falsity of petitioner's claim, but it did show that the claimed cost saving could not exist for a substantial portion of the favored customers even if it did exist for the rest of them (J.A. 64-65). (Other evidence established that the saving did not exist for the rest of the group.)

The court of appeals held (slip op. pp. 5, 6, 10) that this finding was not supported by substantial evidence, and attributed to the Commission (p. 6) a conclusion which it did not draw and which is completely irrelevant to the case as decided by the Commission: "that there was no legal criterion for the maintenance of the list of 'J' [favored] customers." The fact of the matter is that no criterion used to select favored customers could be classified as "legal" or "illegal" in the context of section 2(c) as construed by the Commission; the only proper question is whether petitioner was actually using, in selecting the customers to be favored with the discount, *any* criterion other than the accompanying reduction in salesmen's commission. The legality of discounts based upon other cost savings, if any, and therefore the legality of the classification of customers for such purposes, can be at issue only in 2(a) cases in which the cost-justification defense is raised (see *Main Fish Co.*, 53 F.T.C. 88, 97 (1956)), and the Commission had plainly ruled, as the court recognized, that that defense was not being entertained in this case.

But, in addition to its erroneous attribution of that conclusion to the Commission, the court also plainly erred in ruling that the finding was not supported by substantial evidence. That ruling is not based upon "a fair assessment of the record," *Federal Trade Commission v. Standard Oil Co.*, 353 U.S. 396, 398 (1958), and does not "depend upon appreciation of circumstances which admit of different interpretations," 355 U.S. at 400, but is "the rare instance when the standard [of review for substantiality of evidence] appears to have been misapprehended or grossly misapplied," 355 U.S. at 401. Cf. *Federal Trade Commission v. Algoma Lumber Co.*, 391 U.S. 67, 73 (1934); *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 700-01 (1962).

The finding rejected by the court was in exact accordance with the testimony given by petitioner's executive vice president, who testified at length about the criterion purportedly used to select the favored customers (J.A. 84-7). His testimony included the statements that a customer was judged over a period of several years on its performance, after which the criterion was: "If he purchases

sufficient amounts of furniture, say he buys two carloads in the beginning of each season, or the equivalent thereof, then we would thereafter extend him that better price."

He was then asked to be more definite (J.A. 84): "What's this fifty thousand dollar break-even point that's in this complaint? Is that the difference? You speak of two carloads for each season for each year, and they vary from five to eleven thousand dollars. That leaves me in the air. Do you have a financial level there?" He answered: "We can't judge it exactly by the financial level, but if you had eight carloads of furniture and they were worth between five and eleven thousand dollars, you would be getting approximately fifty thousand dollars worth of furniture each year at least." He was asked: "That means then that the fifty thousand dollars is a break-even point. Is that right?" He answered: "I think you can say that, sir. I would say this that we wouldn't have absolutely a strict interpretation of that. If the man bought right at fifty thousand dollars worth this year and had seventy-five the previous year, we wouldn't knock him off the list, sir."

A few moments later the questioning returned to this subject (J.A. 86-7): Question: "Your answer with respect to the fifty thousand dollar figure that the Hearing Examiner mentioned was not quite clear to me. Is that fifty thousand dollar figure utilized as a rule of thumb for a dividing point between who shall get the jobber price and who shall be assigned the carload price?" Answer: "After viewing his purchases you may. That's one standard that can be applied. Yes." Question: "Well, is that applied? What is the fact?" Answer: "Well, we apply a standard like that or judge it by the number of orders in terms of carloads that he has given us from our own records." Question: "But is that, the number of carloads, just another way of describing a customer, who will buy fifty thousand dollars worth approximately?" Answer: "Yes, that's just another way. You can judge it either way, sir." Question: "You come out to about the same?" Answer: "About the same thing. The reason we have to judge it sometimes in carloads, as I say, over a period of time, is because a man may buy one hundred thousand dollars worth of furniture this year and next year may buy over one hundred for several years because of some local condition, or he might buy only forty. But we do not judge him just on that one period of time."

This witness clearly claimed that the criterion was sustained annual purchases averaging more than \$50,000 per year, with a period of grace thereafter. This was the claim which the Commission tested against the actual performance of representative groups of favored customers over a period of several years, with the result that the Commission concluded that the criterion was not being met by a substantial portion of those customers, and therefore that petitioner's claim that the discount was being granted because of quantity-of-purchase savings rather than the reduced sales commissions, was not true. (For a detailed analysis of the matter, see the Commission's brief, pp. 35-38.) This evidence was clearly substantial. Cf. *Federal Trade Commission v. Washington Fish & Oyster Co.*, 282 F. 2d 595, 598 (4th Cir. 1960).

In any event, contrary to the court's view, the question was not whether the favored customers were classified as such on the basis of their purchases of 8 carloads per year (at a minimum of \$5000 per carload) or on the basis of \$50,000 total purchases per year: the crucial question was whether, without regard to the volume of purchases, their 5% differential in price was based upon cost savings other than the 3% reduction in salesmen's commissions. Petitioners submitted three successive cost studies, and succeeded only in proving that the reductions were a necessary source of all or a part of the price discount.

The Commission held that a seller may not, in a 2(c) case, cost-justify a discriminatory discount to favored customers by showing it has achieved savings derived from reductions in brokerage or other commissions on sales to them (J.A. 35-36). This was obviously correct, for such passing-on of commissions is the essential and dispositive element of the "in lieu of" type of 2(c) violation. The court, however, held that a showing of such cost savings would constitute a *defense* in a 2(c) case. We think this holding is clear error of law, under the plain language of the statute under the expressed intent of the Congress, under the *Broch* and other decisions cited, and under unvarying administrative precedent.

Transmitted herewith are copies of the briefs, the printed record, and the opinion and judgment of the Court of Appeals.

By direction of the Commission.

PAUL RAND DIXON, *Chairman*.

ALHAMBRA MOTOR PARTS

9. *Alhambra Motor Parts v. F.T.C.*, 309 F.2d 213 (9th Cir. 1962)

(a) *Court Action*: Order affirmed insofar as related to Alhambra's brokerage operations. With respect to warehouse redistribution discount, order set aside and remanded for further proceedings.

(b) *Commission Action*:

1. On January 16, 1963, remanded to hearing examiner for further proceedings. *Vote*: 5-0.

JANUARY 16, 1963.

(1) *Alhambra Motor Parts, et al. v. Federal Trade Commission*, 9th Cir., No. 17,222 (Docket 6889—Alhambra Motor Parts, et al.)

Mr. MacIntyre reported his consideration of memorandum of January 2, 1963, from the General Counsel, with reference to the opinion of October 9, 1962, and final decree entered on November 15, 1962, by the United States Court of Appeals for the Ninth Circuit affirming and enforcing in part and setting aside in part the Commission's order in Docket 6889.

The General Counsel transmitted draft of order reopening the proceeding in Docket 6889 and remanding the case to the hearing examiner.

After consideration, this proceeding was reopened and remanded to Chief Hearing Examiner Earl J. Kolb for such further proceedings as are necessary to comply fully with the opinion and decree of the Court, with the direction that the Chief Hearing Examiner, upon completion of the hearings, issue a revised initial decision based upon the present record and such additional evidence as may be received, and order to that effect was approved and referred to the Secretary for issuance and service upon the parties.

(419)

VANITY FAIR PAPER MILLS

10. *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F.2d 430 (2nd Cir. 1962)

(a) *Court Action*: Order enforced as modified.

(b) *Commission Action*:

1. On January 15, 1963 directed that certiorari not be sought. *Vote*: 5-0.

JANUARY 15, 1963.

(3) *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 2d Cir. No. 27,562
(Docket 7720—Vanity Fair Paper Mills, Inc.)

Mr. Anderson presented memorandum of January 9, 1963, in which he reported his consideration of memorandum of January 4, 1963, from Assistant General Counsel Truly, with reference to the opinion of November 27, 1962, of the United States Circuit Court of Appeals for the Second Circuit modifying the Commission's order in Docket 7720, and directing enforcement of the order as modified. Mr. Truly recommended that certiorari not be sought.

After consideration, on motion of Mr. Anderson, it was directed that certiorari not be sought in the above matter.

(420)

AMERICAN OIL CO.

11. *American Oil Co. v. F.T.C.*, 325 F. 2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964)

(a) *Court Action*: Order set aside and Commission directed to dismiss complaint.

(b) *Commission Action*:

1. On January 21, 1964 voted to request Solicitor General to petition for certiorari. *Vote*: 5-0

2. On April 6, 1964, Commissioners Dixon, Elman, MacIntyre and Reilly ordered General Counsel to request Solicitor General for assistance in obtaining reversal of Seventh Circuit decision in this case.

JANUARY 21, 1964.

The American Oil Co. v. Federal Trade Commission, 7th Cir., No. 13879, Decided November 19, 1963 (Docket 8183—American Oil Co.)

Memorandum of January 20, 1964, from the General Counsel, recommending that the Solicitor General be requested to file petition for writ of certiorari to review the opinion and judgment, November 19, 1963, of the United States Court of Appeals for the Seventh Circuit in the above matter, setting aside the Commission's order in Docket 8183. The General Counsel transmitted draft of letter to Hon. Archibald Cox, The Solicitor General, in accordance with the recommendation.

After consideration, the letter to Mr. Cox was amended.

The Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment in question, and the amended letter to Mr. Cox, making such request and transmitting pertinent material was approved and ordered forwarded after signature by the Chairman.

Mr. Elman requested that his position, as follows, be shown on the letter to Mr. Cox: "Commissioner Elman dissented from the Commission's decision and accordingly does not concur in the substantive views herein expressed. He agrees, however, that the issues involved are sufficiently important in the administration of the Robinson-Patman Act to warrant the Commission in requesting Supreme Court review."

Mr. Anderson was recorded as in favor of the foregoing action.

APRIL 8, 1964.

(1) *The American Oil Co. v. Federal Trade Commission*, 7th Cir., No. 13879 (Docket 8183—American Oil Co.)

Colgate-Palmolive Co. v. Federal Trade Commission, 1st Cir., No. 6145 (Docket 7736—Colgate-Palmolive Co., et al.)

Letter of April 3, 1964, from Archibald Cox, Solicitor General, Department of Justice, referring to the Commission's letters of January 21, 1964, and February 19, 1964, recommending that Supreme Court review be sought in each of the above cases, and concluding (1) that while the Colgate-Palmolive case has substantial problems, it is an appropriate case for Supreme Court review, and (2) that it would be most unwise to file a petition for certiorari in the American Oil case.

On April 6, 1964, Messrs. Dixon, Elman, MacIntyre and Reilly directed the Office of the General Counsel to prepare and transmit to Mr. Cox, after signature by the Chairman, a letter (1) urging Mr. Cox, for the reasons set forth, to assist the Commission in attempting to obtain a reversal of the Seventh Circuit's decision in the American Oil Case, (2) enclosing three copies of the staff's proposed draft of petition, subject to Mr. Cox's revision, and (3) requesting, if Mr. Cox is of the opinion that he cannot assist the Commission in this matter, that he approve the statement on page 20 of the memorandum—"The Solicitor General has authorized the filing of this petition without joining therein".

JANUARY 21, 1964.

Re *The American Oil Co. v. Federal Trade Commission*, 7th Cir., No. 13,879;
Decided November 19, 1963—FTC Docket 8183.

Hon. ARCHIBALD COX,
The Solicitor General, Department of Justice, Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On November 19, 1963, the United States Court of Appeals for the Seventh Circuit filed its opinion and judgment in this matter setting aside an order to cease and desist issued by the Federal Trade Commission. The Court's decision, the Commission believes, is the result of the application of an erroneous legal standard. The Commission's efforts to enforce Section 2 of the Clayton Act, as amended, may seriously be hampered if this decision stands. For the reasons stated below, we request that a petition for a writ of certiorari be filed.

The case arose under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (Section 2(a); 15 U.S.C. 13(a)). Involved is the question of whether American's discriminations in price between purchasers competing in the resale of its products had the effect prescribed by Section 2(a). The legal question, we believe, that is presented by the Court's opinion is as follows:

Whether, as a matter of law, a seller's price discriminations between competing purchasers has the adverse effect prescribed by the statute where the amount of the discrimination is substantial, is directly reflected in the resale price of the product, and results or probably will result in the shift of retail customers from the unfavored purchasers to the favored purchasers.

The salient facts are stated by the Court of Appeals. Ten of American's dealer-customers were located in and around Smyrna and Marietta, Georgia, adjoining cities located approximately fifteen miles northwest of Atlanta (slip opinion 2). The pattern of traffic flow between the two cities, and to and from the principal industrial and shopping areas therein, was such that local motorists had ready access to most of these ten American dealers (slip opinion 3).

For purposes of gasoline pricing American divided the Smyrna-Marietta area into two areas. Four of American's dealers were located in the Smyrna area and six of its dealers in the Marietta area (slip opinion 3). During a seventeen day period in October, 1958, American discriminated in price favoring its Smyrna dealers over its Marietta dealers by discounts ranging from 3.5 cents to 11.5 cents per gallon of gasoline (slip opinion 3-4). In view of the fact that dealers generally maintain a gross margin of profit of five cents per gallon, the price differences in the dealers' resale pump prices were measured by the amounts of discounts that American afforded its favored dealers over its unfavored dealers (slip opinion 3).

The differentials in price were sufficient to divert Marietta purchasers to Smyrna stations (slip opinion 6). There was a preference on the part of some motorists for American's gasolines (slip opinion 6), and customers of unfavored dealers purchased American's gasolines at the stations of favored dealers (slip opinion 7-8).

American's price reductions were made in response to a gasoline price war originating in Smyrna when an operator of a major brand station (Shell) posted a pump price meeting exactly the pump price of a station (Paraland) selling an "unbranded or private brand of gasoline" (slip opinion 4). With the assistance of their respective suppliers, other stations in the vicinity selling other "major brands" (Texaco, Sinclair and Gulf), as well as an American dealer (Hicks), lowered their pump prices to match those of the Shell station. (*ibid.*). As the retail prices of the warring stations dropped, American and the other suppliers of major brand gasoline extended greater discounts to their Smyrna area dealers, thus discriminating against their Marietta area dealers (*ibid.*).

The Commission found (Pet. Apdx. 633-634), and it has not been disputed, that American's favored and non-favored dealers competed with each other in the resale of American's gasolines. The Commission found that American's price discriminations were substantial, that such discriminations were directly reflected in the dealers' resale prices of American's gasolines, and that customers were diverted from the unfavored dealers to the favored dealers because of the price difference. The Commission concluded (Pet. Apdx. 635) that the price discriminations seriously impaired the competitive opportunities of those dealers who were required to pay higher prices, and, accordingly, were such discrimination as may be to substantially lessen competition or to injure, destroy or prevent competition with the favored dealers.

The Commission rejected (Pet. Apdx. 635-636) American's contention that the fact that American's discriminations in price existed only for a brief period mitigated against any harmful effects on competition arising therefrom. The Commission pointed out (Pet. Apdx. 636) that the statutory test was whether the discriminations gave rise to a reasonable probability of substantial adverse effect upon competition, not that actual injury to competition had occurred.

The Commission also rejected (Pet. Apdx. 635) American's argument that its non-favored dealers "would have been injured" by the lower prices of dealers selling other brands of gasoline irrespective of whether American reduced its price to the Smyrna dealers. The Commission pointed to the fact that American *had* discriminated in price and that such a discrimination may be adversely to affect competition between American's dealers in the resale of American's gasolines.

In setting aside the Commission's order the Court held that the effect upon competition requisite to establishing a Section 2(a) violation was the effect caused by a discrimination in price that "constituted a probable threat to the ability of the Marietta dealers to *continue in competition*" (slip opinion 6, emphasis supplied). In slightly different language the Court iterated this erroneous concept of the law at least five times (slip opinion 5, 6, 7). Noting that American's price discriminations were "temporary" (slip opinion 7, 9), and holding the "actual economic loss" sustained by American's unfavored dealers to be "slight" and "minimal" (slip opinion 6, 8), the Court, relying upon its opinion in *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961), ruled that the Commission erred in concluding that there was a likelihood of any substantial impairment of the "vigor or health of the contest for business" between American's competing dealers. The Court also held (slip opinion 6, 8) that in any event the price war condition prevailing in the Smyrna area at the time American engaged in its challenged price discriminations was the cause of any injury sustained by American's unfavored dealers, and that American's price discriminations were "the result of such condition not the cause of it."

The Court, by ruling that the requisite effect of a price discrimination upon competition between purchasers is measured by the probability of *permanent* injury to the competitive abilities of the unfavored purchaser, *i.e.*, impairment of the unfavored purchaser's "ability * * * to continue in competition," has evinced, we believe, a complete misunderstanding of the purposes of Section 2(a). Its decision is in conflict with controlling decisions of the Supreme Court. Further, the Court's holding that American's price discriminations were not the *cause* of any adverse competitive effect is clearly erroneous.

1. The legal standard applied by the Commission in this case was that enunciated by the Supreme Court in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948). There the Commission challenged, as having the prescribed statutory effect upon "second line" competition, Morton Salt's quantity discounts on its "Blue Label" brand of salt. In pertinent part, the Supreme Court's construction of Section 2(a) in light of the crucial facts which obtained in that case was as follows (334 U.S. at 46-47, 49, 50):

* * * [T]he statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition * * * or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect."

Corn Products Co. v. Federal Trade Commissions, 324 U.S. 725, 742.^a Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.

* * * It is urged that the evidence is inadequate to support the Commission's findings of injury to competition. As we have pointed out, however, the Commission is authorized by the Act to bar discriminatory prices upon the "reasonable possibility" that different prices for like goods to competing purchasers may have the defined effect on competition.

That respondent's quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale prices of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition * * * and to injure, destroy, and prevent competition."

* * * There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. * * *

* * * The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—*injury to competition*. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

We submit that the test that was applied in the instant case by the Court of Appeals—i.e., the effect on competition is to be measured by "the ability of the [non-favored dealers] to continue in competition"—is in direct conflict with the statutory test set forth by the Supreme Court in *Morton Salt*. Under the Supreme Court's construction of Section 2(a), American's discrimination as a matter of law, had the prescribed effect upon customer competition, and the *Morton Salt* case is controlling and conclusive precedent for that conclusion.

The Court of Appeals distinguished *Morton Salt* on the ground that case involved "a built-in routine and permanent price advantage" rather than a temporary price reduction as is here involved (slip opinion 7, 8). But this distinction cannot negate the application of the Supreme Court's construction of Section 2(a) to the facts of this case. The Supreme Court related its conclusion in part to the fact that the "price differentials between competing purchasers [were] sufficient to influence their resale price of salt," and that this was important notwithstanding that it was only "one of many articles in a grocery store." The Commission's conclusion in that case that this had the requisite effect was deemed "obvious" by the Supreme Court. Where, as here, gasoline is the principal product sold by a service station operator, and the discriminations in price ranged from 3.5 cents to 11.5 cents per gallon of gasoline, a difference that was directly reflected in the retail price of a product upon which a dealer maintained a 5 cents per gallon gross

^a Court's footnote: "This language is to be read also in the light of the following statement in the same case, discussing the meaning of § 2(a), as contained in the Robinson-Patman Act, in relation to § 3 of the Clayton Act:

"It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect. Cf. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which "may be to substantially lessen competition," the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of these consequences, but to reach those which would probably have the defined effect on competition, 324 U.S. at 738; see also *United States v. Lexington Mill Co.*, 232 U.S. 399, 411. * * *"

margin of profit, and where such a differential when reflected in the retail price was sufficient to and did divert customers of the unfavored purchasers to the favored purchasers, the "reasonable probability of substantial injury to customer competition" is equally "obvious."

The fact that American's price discriminations were only "temporary" is irrelevant under the statute. What is important is that in the circumstances of this case the discriminations would have the statutory effect as long as they lasted. It is the probability of harm that controls.

2. The reliance of the Court of Appeals (slip opinion 5, 6) upon its decision in *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F.2d 835 (7th Cir. 1961), is misplaced. That case and most of the authorities cited therein involved primary-line situations—i.e., the competition allegedly affected was between sellers. We concede that the "vigor or health of the contest for business" in primary-line cases should not be related solely to "shifts in business" between sellers. But where price discriminations will result in shifts in business between competing purchasers the requisite adverse effect of the discrimination upon competition is manifest. The Clayton Act protects small individual businessmen, including service station operators, from supplier discrimination having that effect. See *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).

Congress made it clear that the Robinson-Patman amendment to the Clayton Act was designed to shift the emphasis from a showing of a substantial lessening of competition to that of injury to competition. See H.R. Rep. 2287, 74th Cong., 2d Sess. 3-8 (1936). To accomplish this Congress prescribed discriminations in price the effect of which "may be . . . to injury, destroy or prevent competition" between purchasers.

Accordingly, the statement by the Court that "the statute's concern with the individual competitor is but incidental" does not reflect the intention of Congress. In the circumstances of this case a shift of customers from the unfavored American dealer to the favored American dealer, whether an immediate or probable result of the price discriminations, constitutes the requisite effect contemplated by the statute. It is through protection of the individual competitor that Congress sought to preserve competition.

The Commission is not unmindful of the criticism that has been leveled at Clayton Act enforcement cases based upon a literal interpretation of the Supreme Court's *Morton Salt* decision. But, contrary to the view of the Court of Appeals (slip opinion 9), the Commission did not measure the requisite statutory "substantiality" of adverse effect by the substantiality of the price discriminations. The Commission relied upon the resulting effect upon customer competition that would necessarily flow from such price discriminations in the context of the operation of a gasoline service station. There can be no doubt that American's price discriminations were basically unfair to the unfavored service station operators. The Commission's approach in the instant case is consistent with the views of the Supreme Court. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).

3. The holding of the Court of Appeals that there was no causal relation between the price discrimination to the favored customers and the probability of an adverse effect upon the competition of the unfavored customers with the favored customers is also erroneous. The Smyrna price war conditions did not precipitate the adverse effects upon America's customer competition to the exclusion of American's price discriminations. American reduced its prices concurrently with the other suppliers of major brands of gasoline; it joined in the parade of price reductions from the outset of the price war. Whatever the resulting effect upon customer competition, the responsibility therefor must, as a matter of law, be equally shared by all discriminating suppliers, including American.

In this respect, the Court's observation that the Marietta dealers would have retained all their patrons even if American had not discriminatorily lowered its price to its favored dealers in Smyrna is not only speculative but wholly irrelevant. The Court of Appeals has ignored the fact that American had an alternative course of action open to it; it could have reduced its prices to its Marietta dealers as well as its Smyrna dealers. Hypothetically, American's Marietta dealers would then have retained all their patrons and would not have been adversely affected by the price war conditions. While we agree with the Court that the Supreme Court's *Sun Oil* decision is not directly concerned with the issue involved here, pertinent is the following observation (371 U.S. at 518-519):

"* * * [T]he nearby Sun dealers competing with McLean * * * were also vitally interested in the particular competitive struggle to which Sun was moved to respond by making price concessions only to McLean. These dealers were hurt * * * [W]e are not free on the basis of our own economic pred-

ilections to make the choice between harm to McLean, on the one hand, and to other Sun operators on the other, or to balance the comparative degree of individual injury in each instance; that choice is foreclosed by the determination in the statute itself in favor of equality of treatment."

The statement by the Court of Appeals that the price war, rather than the component price discriminations that create such a condition, was the cause of any immediate or probable adverse effect, would effectively insulate all participants from responsibility under Section 2(a). This holding directly avoids and makes inoperative the specific provisions of Section 2(b), which is designed to exempt from the statute certain price discriminations made in response to competitive pricing practices. The result of the Court's holding is untenable.

4. The phenomenon of gasoline price wars has been the subject of detailed and extended analysis. See *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963). Whatever may be the reasons therefor, or whatever may be the economic problems inherent in the distribution of gasoline, the fact remains that price wars are made possible by the suppliers' price discriminations between their purchasers. It is the ability to restrict the price war to a particular arena that makes it an effective competitive weapon. The damaging effect upon the business of the gasoline retailers, especially those on the perimeter of the arena, is well documented (*ibid.*, and authorities cited therein). In 1956 the Select Committee on Small Business of the United States Senate, reporting on this subject, indicated that the price discrimination features of price war conduct should be subjected to scrutiny under the antitrust laws and recommended that the Commission proceed immediately to enforce the Robinson-Patman Act in this respect. S. Rept. No. 2810, 84th Cong., 2d Sess. (1956), pp. 28-29.

Pending at various procedural stages with the Commission are numerous matters involving the second-line price discrimination features of gasoline price wars. For example, in *Texaco, Inc.*, Docket No. 6898, the matter has been argued and is before the Commission for final decision; in *Shell Oil Co.*, Docket No. 8537, the case is presently before the Commission; and in *Humble Oil & Refining Co.*, Docket No. 8544, counsel supporting the complaint have rested their case in chief. Four other matters involving second-line price discriminations by major oil companies in price wars are in various stages of investigation. The *American Oil* decision represents the first case in which a Commission determination that price war price discriminations have the effect on competition prescribed by Section 2(a) has been subjected to judicial review, and all the pending matters in this area are within the ambit of the Court's holdings in *American Oil*.

In addition, it is estimated that since January 1960, over 1,000 operators of major brand retail gasoline stations have communicated with the Commission either directly or through Congress, registering formal protests concerning price discriminations granted by their suppliers to competing gasoline retailers. There are approximately 200,000 service station operators who, although dealers for the major oil companies, are independent businessmen. As we have said before, the effect of the Court's decision in the instant case would in large part void any attempt by the Commission to protect these businessmen from their supplier's injurious discriminations in price.

In this connection we note the language of the Supreme Court in *Sun Oil* (371 U.S. at 518-519):

"* * * It is the very operators of the other Sun stations which compete with McLean who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such purchasers from a single supplier, Sun, would not be injured by that supplier's discriminatory practices."

We believe, for the reasons stated, that the decision of the Court of Appeals is erroneous as a matter of law, and that the case should be taken to the Supreme Court.

Copies of the briefs and other pertinent Court papers were forwarded on December 12, 1963, to Mr. Robert B. Murrall, Chief, Appellate Section, Antitrust Division.

Commissioner Elman dissented from the Commission's decision and accordingly does not concur in the substantive views herein expressed. He agrees however, that the issues involved are sufficiently important in the administration of the Robinson-Patman Act to warrant the Commission in requesting Supreme Court review.

By direction of the Commission,

PAUL RAND DIXON,
Chairman.

NUARC CO.

12. *Nuarc Co. v. F.T.C.* 316 F.2d 576 (7th Cir. 1963)

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. One June 18, 1963 directed that certiorari not be sought. Vote: 5-0.

JUNE 18, 1963.

(2) *The Nuarc Company v. Federal Trade Commission*, 7th Cir., No. 13926
(Docket 7848—Nuarc Company, Inc.)

Mr. Anderson presented memorandum of June 17, 1963, in which he reported his consideration of memorandum of June 13, from the General Counsel, with reference to the opinion and judgment of April 19, 1963 of the United States Court of Appeals for the Seventh Circuit, setting aside the Commission's order in Docket 7848. The General Counsel expressed the opinion, for the reasons recited, that certiorari should not be sought, nor could it be obtained.

After consideration, on motion of Mr. Anderson, it was directed that certiorari not be sought in this matter.

As to the foregoing action, Mr. MacIntyre voted in the negative.

CENTRAL RETAILER-OWNED GROCERS, INC.

13. *Central Retailer-Owned Grocers, Inc. v. F.T.C.*, 319 F.2d 410 (7th Cir. 1963)

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. On September 10, 1963, directed General Counsel to request Solicitor General to file petition for certiorari. *Vote*: 5-0, Commissioner Elman noting that while he agreed with the Seventh Circuit's decision, issue should be resolved by the Supreme Court.

2. On September 12, 1963, Mr. Truly authorized to tell anyone making inquiry that Commission was unanimously seeking certiorari. *Vote*: 5-0.

3. On November 7, 1963, directed General Counsel to prepare letter to Solicitor General for chairman's Signature withdrawing request to petition for certiorari. *Vote*: 3-2, Commissioners Elman and MacIntyre voting in the negative.

4. On November 12, 1963, approved letter to Solicitor General withdrawing request for filing of petition for certiorari. *Vote*: 3-2, Commissioners Elman and MacIntyre, the former for the minute record only, not concurring.

SEPTEMBER 10, 1963.

(46) *Central Retailer-Owned Grocers, Inc., v. Federal Trade Commission*, 7th Cir., No. 13,820 (Docket 7121—National Retailer-Owned Grocers, Inc., et al.)

Memorandum of August 23, 1963, from the General Counsel, transmitting draft of proposed letter to the Solicitor General, requesting that he petition the Supreme Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review the decision of July 2, 1963, of that Court, setting aside the Commission's order in Docket 7121.

On August 23, 1963, the five Commissioners directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the judgment in question, and the letter to the Solicitor General, making such request and transmitting pertinent material, as submitted by the General Counsel, was approved and ordered forwarded after signature by the Chairman.

As to the foregoing action, Mr. Elman, while agreeing with the decision of the Court of Appeals for the Seventh Circuit, agreed that the questions raised by the decision are important and should be resolved by the Supreme Court and, therefore, joined in the Commission's request that the Solicitor General seek certiorari, and it was directed that Mr. Elman's position be shown on the letter to the Solicitor General.

SEPTEMBER 12, 1963.

(2) *Central Retailer-Owned Grocers, Inc. v. Federal Trade Commission*, 7th Cir., No. 13,820 (Docket 7121—National Retailer-Owned Grocers, Inc., et al.)

Mr. Dixon referred to the numerous inquiries from members of the food industry as to the action which the Commission proposes to take in this matter, in which, under the action of August 23, 1963, the Solicitor General was requested to petition the Supreme Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision of that Court setting aside the order in Docket 7121.

After discussion, on motion of Mr. Higginbotham, James B. Truly, Assistant General Counsel for Appeals, was authorized to informally advise anyone making inquiry regarding this matter that the Commission *unanimously* requested the Solicitor General to seek certiorari.

It was further directed that the Solicitor General be advised that the Commission is informing persons, when asked, that this agency has requested the Department of Justice to petition for a writ of certiorari.

NOVEMBER 7, 1963.

(6) *Central Retailer-Owned Grocers, Inc., et al. v. Federal Trade Commission*, 7th Cir., No. 13,820 (Docket 7121—National Retailer-Owned Grocers, Inc., et al.).

Mr. Dixon presented (1) memorandum of October 30, 1963, from the General Counsel to him, setting forth a suggested letter to the Solicitor General in connection with this matter, in which the Commission, under its action of September 10, 1963, directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari, and (2) letter of November 4, 1963, from the Solicitor General in which that official stated, among other things in the second paragraph, that he is "still persuaded that this is not an appropriate case for a petition for certiorari".

After consideration, in view of the letter of November 4, 1963, from the Solicitor General, and particularly in view of the second paragraph thereof, Mr. Dixon moved that no further action be taken with respect to seeking certiorari in this matter. The motion was seconded by Mr. Anderson.

As to Mr. Dixon's motion, Messrs. Dixon, Anderson and Higginbotham voted in the affirmative, and Messrs. Elman and MacIntyre voted in the negative. The motion was carried, and it was so ordered.

The General Counsel was instructed to prepare an appropriate letter for the signature of the Chairman, advising the Solicitor General of the above action.

NOVEMBER 12, 1963.

(2) *Central Retailer-Owned Grocers, Inc., et al. v. Federal Trade Commission*, 7th Cir., No. 13,820 (Docket 7121—National Retailer-Owned Grocers, Inc., et al.).

Draft of letter to Hon. Archibald Cox, Solicitor General, as submitted by the General Counsel, pursuant to the action of November 7, 1963.

After consideration, the letter to Mr. Cox was approved and ordered forwarded after signature by the Chairman.

Messrs. Elman and MacIntyre, the former for the minute record only, did not concur in the decision of the Commission not to press further its earlier request that certiorari be sought in this matter.

AUGUST 23, 1963.

Re *Central Retailer-Owned Grocers, Inc., et al. v. Federal Trade Commission*, 7th Cir. No. 13,820 (decided July 2, 1963)—FTC Docket 71221.

Hon. ARCHIBALD COX,
The Solicitor General, Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On July 2, 1963, the United States Court of Appeals for the Seventh Circuit filed its opinion and judgment in the above-entitled case, setting aside an order to cease and desist issued by the Federal Trade Commission. The Court's opinion, while superficially based upon a finding of a lack of substantial evidence to support the Commission's decision, actually, the Commission believes, is the result of an erroneous conclusion of law. The Commission's efforts to enforce Section 2 of the Clayton Act, as amended, may seriously be hampered if this decision stands. For the reasons stated below, we request that a petition for a writ of certiorari be filed.

The case arose under the brokerage section of the Clayton Act, as amended by the Robinson-Patman Act (Section 2(c); 15 U.S.C. 13(c)). Involved is the determination of the nature of certain allowances, discounts and price reductions induced and received from certain suppliers by Central Retailer-Owned Grocers, Inc. ("Central"), a retailer-owned wholesale group buying organization.

The Commission found (Pet. Apdx. 458) that Central was a "controlled intermediary of its member-wholesalers for the purpose of purchasing private label merchandise" and that it "clearly acts in the capacity of a buyer's broker." The Commission further found (Pet. Apdx. 458-459) that the price concessions obtained by Central in its purchases from certain of its suppliers were in effect discounts in lieu of brokerage paid for services rendered by Central for its members. The Commission held (Pet. Apdx. 459-460) that the receipt of such discounts, allowance and price reductions violated Section 2(c) of the Clayton Act.

In setting aside the Commission's order to cease and desist, the Court held that the "inference" of the Commission that the price concessions received by Central were discounts in lieu of brokerage was "improperly drawn from comparisons of brokerage paid by such dealers on sales which they made through brokers, with the price reductions granted to Central" (Slip Opinion p. 7). The Court further held (*ibid.*) that the "fact that Central, because of its strong purchasing power, was able to buy at favorable prices, or on discounts and allowances by its suppliers, is not proof that Central was rendering a brokerage service." The Court added (*ibid.*):

"... Central was able to secure favorable prices from its suppliers, because of (1) their assured volume of business, (2) their lack of any credit risk, (3) a reduction in their billing work, and (4) Central's advance commitments for later requirements. The result was that the suppliers knew that, in selling to Central, they were for these reasons realizing savings in their business operations, which enabled Central's members, in turn to benefit when they purchased from Central."

Although the decision of the Court of Appeals is phrased in terms of the substantiality of the evidence, the Court has decided an important legal question without considering the obvious savings in brokerage which accrued to the suppliers on sales to Central. The Court has in effect ruled that a seller's payment to a buyer for benefits resulting in cost savings to the seller arising from services performed by the buyer for itself is not a "commission brokerage, or other compensation, or an allowance or discount in lieu thereof" within the meaning of Section 2(c).

The Court has evinced a misunderstanding of the purposes of Section 2(c); its decision, we believe, is in conflict with the decisions of others of appeals and of the Supreme Court.

1. The Court of Appeals held that "it was established that lower prices were obtained from suppliers because of advantages to the suppliers resulting from the cooperative buying efforts of the members through Central" (Slip Opinion p. 6). The Court held that each element of savings arose from Central's "unique" way of doing business," i.e., buying and selling merchandise to themselves (Slip Opinion p. 5).

Central's "unique way of doing business" is to make "private label" merchandise available to its members at a reduced cost. To accomplish this its members furnish it with estimates of how much "private label" merchandise they will probably need during the ensuing year. On the basis of these advance estimates Central solicits its suppliers to obtain price concessions, and enters into understandings with the suppliers covering the anticipated needs. Thereafter, as members require quantities of the "private label" merchandise, they submit orders to Central. Central then transmits the orders to a supplier and the supplier ships the products ordered directly to the ordering member (Slip Opinion pp. 4-5). Central's services to its members in this respect are essential to the acquisition and distribution of "private label" merchandise. Central's receipt of lower prices from its suppliers in connection with such services, described as the "unique" way of doing business, is tantamount to the receipt of allowances in lieu of brokerage. As stated in the House Report on the "brokerage section" (H.R. 2951, 74th Cong., 2d Sess. 15 (1936)) :

"This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.¹"

The scope of the "for services rendered" exception is limited.² In *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 674 (3d Cir. 1939) the Court said:

¹ Courts of Appeals have consistently applied this clear Congressional mandate in construing and applying Section 2(c): *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 609 (4th Cir. 1945); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, 398-399 (1st Cir. 1940); *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 674 (3d Cir. 1939); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 766 (4th Cir. 1939); *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 691 n. 63 (2d Cir. 1938).

² In *Federal Trade Commission v. Washington Fish & Oyster Co.*, 282 F. 2d 595, 597 n. 4 (9th Cir. 1960), the Court stated: "This exception, however, does not include services of a kind which a buyer normally performs for himself, such as warehousing and reselling * * * or which are of a merely incidental nature * * *."

"The phrase 'except for services rendered' is employed by Congress to indicate that if there be compensation to an agent it must be bona fide brokerage, viz., for actual services rendered to his principal by the agent. * * * While the phrase, 'for services rendered,' does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who had engaged him. * * *

Payment by a seller to a buyer in compensation for the type of service rendered by Central for its members are not payments that are excepted by the "for services rendered" proviso. See *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970, 978 (7th Cir. 1945).

In *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 609 (4th Cir. 1945), cert. denied, 326 U.S. 994, Southgate asked that it be permitted to show that for the payments it received from its suppliers it "renders services consisting of 'promoting, offering for sale, selling, ordering, receiving, adjusting shortage or damage claims, handling, warehousing, distributing, invoicing, collecting, assumption of credit risks.'" The Court said:

"The services which the company proposes to show by the evidence that was excluded are services rendered to itself, as purchaser, and not to those from whom it has purchased them."

In *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 766 (4th Cir. 1939), the Court said:

". . . In furnishing the service which it has contracted to furnish the buyers, it affords to the sellers facilities for placing their goods before the buyers and obviates the necessity of their employing brokers to reach these customers; but this is a service rendered the buyers which Oliver has bound itself to render them under their subscription contracts. The benefit to the sellers is incidental to this service rendered the buyers and is not the result of a service undertaken for the benefit of the sellers."

And in *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393, 398 (1st Cir. 1940), the Court said:

". . . Undoubtedly the sellers received valuable benefits and advantages from the business given them by the Service Company, other than the ordinary profits on the sales. For instance, they were saved the expense incident to obtaining the business and dealing separately with numerous customers taking a large amount of merchandise. In that way and to that extent the Service Company rendered services and had contractual relationships with the sellers. For those benefits the sellers were willing to pay and did pay and, no doubt, after such a course of dealing had been established, it was considered by all parties that there was an implied agreement to pay, but it is a mistake to assume that the payments made were other than essentially commissions on the sales or to suppose that such a practice was lawful after the passage of the Robinson-Patman Act."

Although the Supreme Court in *Federal Trade Commission v. Broch*, 363 U.S. 166, 173 (1960), may have indicated that a buyer may be compensated by a seller for services rendered by the buyer to the seller, there is nothing in that opinion which would validate Central's receipt of payment for services rendered to itself which only incidentally benefited the seller.

We believe that receipt of payments for the reasons stated by the Court of Appeals, as a matter of law, constitutes the receipt of a "commission, brokerage or other compensation, or any allowance or discount in lieu thereof" within the meaning of Section 2(c).

2. Petitioners argued in the Court of Appeals that from their "unique" method of doing business the sellers realized cost savings other than savings in brokerage and that only such savings were reflected in the price concession that such suppliers granted to them. But petitioners did not offer a "cost justification" defense to show such savings. While cost studies may be admissible in a 2(c) case, they are admissible only for the purpose of showing that savings in costs were legitimate savings which might have been proved in defense of a 2(a) case, and that, accordingly, the reduced price was *not* the result of payments in lieu of brokerage.

Compare Commission's decision in *Thomasville Chair Co.*, 58 F.T.C.—(1961) [CCH Trade Reg. Rep. Par. 29,510, p. 37,808 (Transfer binder 1961)], order set aside, *Thomasville Chair Co. v. Federal Trade Commission*, 306 F.2d 541 (5th Cir. 1962).

Section 2(a) of the Clayton Act provides:

"That nothing here contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery

resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The Court of Appeals held that Central's suppliers realized savings because of Central's assured volume of business and Central's advance commitments for later requirements. The Court specifically referred to the testimony of Robert Gordon (of W. O. Sommers, Inc.) who related the price concessions that his company granted to Central to savings realized on Sommer's purchases of raw materials at the start of the brining year (Slip Opinion p. 6).

The savings here could not have been used as a part of such a cost justification under Section 2(a). This alleged cost saving depends upon "incremental" or "marginal" costs—i.e., "the additional cost to the seller in producing those product units involved in the particular price quotation." Rowe, Price Discrimination Under the Robinson-Patman Act 281 (1962). As a matter of law, such "incremental" cost considerations are not available in justifying price discriminations between a supplier's customers. *Ibid.*; H.R. Rep. No. 2287, 74th Cong., 2d Sess. 10 (1936); 80 Cong. Rec. 9417 (1936); *Goodyear Tire & Rubber Co.*, 22 FTC 232, 289 (1936).

The fact that the supplier's payment to Central was based in part upon savings resulting from "incremental" costs, and thus not "cost justifiable" under Section 2(a), supports the Commission's conclusion that the payment was "a commission, brokerage, or other compensation," or "an allowance in lieu thereof" within the meaning of Section 2(c). We believe that the Court's reliance upon such savings in reaching a conclusion contrary to the Commission's, is erroneous.

Further, it is undisputed that when the member wholesalers "require quantities of the private label merchandise, they submit orders to Central. Central then, in each instance prepares a combination confirmation order form, sending a copy of the order to the supplier of the particular product ordered and the confirmation to the ordering member . . . Upon receipt of the order, the designated supplier ships the product ordered directly to the member and bills Central" (Slip Opinion p. 5). This parallels the method of delivery when "packer label" merchandise is sold through brokers, i.e., the supplier ships the products ordered directly to the wholesaler. Accordingly, it is clear that no differences exist as to the method in which the commodities are delivered within the meaning of the "cost justification proviso." Any difference in the method in which the commodities were sold would reflect the normal brokerage saved by eliminating the broker from the transaction.

3. To be considered in determining whether this is an appropriate case in which to seek Supreme Court review is the fact, contrary to the Court's opinion, that the record in this case clearly shows that the price concessions granted to Central by its suppliers reflected savings in brokerage realized by the suppliers when they sold direct to Central. This fact is supported by the testimony of suppliers and by comparison of the monetary amount of the savings in brokerage with the monetary amount of the price concessions.

Although purportedly relying upon the "specific testimony of many individual representatives of the various suppliers" (Slip Opinion p. 6), the Court of Appeals quotes only the testimony of one of them to the effect that his lower price to Central was due to the fact that Central's assured quantity of purchases "took a certain amount of the speculation out of our business." The Court does not refer to the testimony of other seller representatives (see Commission's brief at pp. 26-27):

Steffen of M. Steffen, Inc., testified (Pet. Apdx. 279-280):

" . . . We handle the shipments; [Central] handles the orders, gives us the order. We ship and paid their bills. We don't have to make any calls on the customer." [Emphasis added.]

Chalmers of Olds Products Company testified (Pet. Apdx. 125, 126, 181, 183):

"The difference is the saving we make in their soliciting and their selling and getting the orders for us and in the volume they do . . . We just give them a special price for the volume of business they give us, the work they do in soliciting, the prompt payment, no credit losses . . . [Central] looks after the getting of orders and selling them; and we cannot afford to pay any brokers anything for work that is not done . . . We save every kind of selling expense, everything in connection with anything that might be expense in the business." [Emphasis added.]

Luehrig of Tharinger Macaroni Company testified (Pet. Apdx. 247):

"By figuring our costs on the volume of business we get from [Central] and our regular overall picture of all distributors." [Emphasis added.]

This testimony, apparently ignored by the court of appeals, plainly shows that the services rendered by Central for its members were considered by some suppliers to be the equivalent of brokerage services. These sellers have specifically

admitted that they paid Central for the savings that accrued to them because Central solicited orders from their member wholesalers, and it cannot be disputed that the solicitation of orders from wholesalers was the principal function performed by the sellers' brokers on sales to other customers.

In addition, Olds Products Co. and Tharinger Macaroni Co. (see testimony of the representatives of these suppliers, *supra*) issued dual price lists, one a price list for Central, the other for the general trade. An examination of the price lists used by Olds Products Co. (CX 298; CX 194 A-B) reveals 38 common items. In 34 instances the price to Central was the equivalent of, to the nearest $\frac{1}{2}$ cent, the net amount realized by the supplier on sales through brokers. An examination of the price lists used by Tharinger Macaroni Co. (CX 317 A-B) reveals 17 common items. In 15 instances the price to Central was the equivalent of, to the nearest $\frac{1}{2}$ cent, the net amount realized by that supplier on sales through brokers. Tables showing this are attached hereto as Tables A and B.³

On the face of this record we believe the court of appeals erred when it stated (Slip Opinion pp. 8-9):

"There were no savings in brokerage expenses involved in this case and hence the following principle announced in *Federal Trade Commission v. Broch & Co.*, 363 U.S. 166, 176, does not apply here:

"* * * A price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers. * * *"

4. In setting aside the Commission's order to cease and desist the Court of Appeals said that reason did not permit it under the facts of this case "to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce ultimate prices to consumers and make the retailers stronger in their competition with large chain stores" (Slip Opinion p. 7). This statement by the Court appears to suggest that the Commission has held cooperative buying ventures illegal *per se* under Section 2(c). This clearly is not the case. The Commission found on this record that Central, as a buyer for its wholesaler-members, exacted concessions in price which constituted allowances in lieu of brokerage. The Commission's discussion of Central's method of doing business related to Central's argument that it was entitled to such concessions due to savings which accrued to its suppliers from its "unique" method of doing business; the Commission showed that this method of doing business was, in large part, merely the activity normally pursued by a buyer's broker, and that compensation for such services was prohibited by Section 2(c). Certainly any group buying organization, or in fact any buyer, is permitted under the statute to effect those economies permitted under Section 2(a). But there is nothing in the circumstances of this case that would permit Central to stand in a preferred position by benefiting from economies outside the ambit of that Section.

The court of appeals stated that "in the case at bar the Commission would drive such groups out of existence" (Slip Opinion p. 8). But, as recently indicated by the Supreme Court in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 519 (1963), the courts are not free on the basis of their "economic predilections" to make a choice foreclosed by the determination in the statute itself in favor of equality of treatment. We believe the Supreme Court's statement to be appropriate in the circumstances of this case.

5. This case involves, as did the *Broch* case, the situation where sellers yield to economic pressures of buyers by granting unfair preferences in connection with the sale of goods, a practice which the Robinson-Patman Act was enacted to prevent. As stated by the Supreme Court (363 U.S. at 174):

"The form in which the buyer pressure is exerted is immaterial and proof of its existence is not required. It is rare that the motive in yielding to a buyer's demands is not the 'necessity' for making the sale."

Such "pressure" was exerted here, and the seller's "motive in yielding to a buyer's demands" is apparent. The court, in effect, has presented all large buyers with a built-in defense in instances where they persuade sellers to replace brokers on direct sales. If the court has correctly stated the law, this exemption probably will not be limited to buying groups such as Central; it may apply also to chain stores, which without doubt perform the same services for which Central has been compensated in this case. This was exactly the "sort of thing that it was the purpose of the act to prevent." *Oliver Bros. v. Federal Trade Commission*, 102 F.2d 763, 770 (4th Cir. 1939). See *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939).

³ It should be pointed out that mathematical correlation between brokerage and price concession was specifically noted by the Supreme Court in the *Broch* case. 363 U.S. at 168.

We believe, for the reasons stated, that the decision of the court of appeals is erroneous as a matter of law, and is contrary to the decision cited herein. It is therefore requested that a petition for a writ of certiorari be filed.

As we have stated, this case was decided by the court of appeals on July 2, 1963. We regret the delay in making this request. We believe, however, that the importance of the case warrants a request by you for additional time for filing a petition for certiorari if the remaining time is insufficient for that purpose.

Transmitted herewith are copies of the briefs, the printed record, books of exhibits, and the opinion and judgment of the court of appeals.

By direction of the Commission.¹

PAUL RAND DIXON, *Chairman.*

Attachments—Tables A and B.

TABLE A.—OLDS PRODUCTS CO.

Item	General price	Percent brokerage	Amount brokerage	Net price	Central's price
Mustard:					
6 1/2 ounce wedge jars:					
Salad style.....	0.79	5	0.0385	.7515	0.75
Duss. style.....	.80	5	.04	.76	.76
6 1/2 ounce Viennese (wedge jar).....	1.45	5	.0725	1.3775	1.38
9 ounce Victory jar:					
Salad style.....	.83	5	.0415	.7885	.79
Duss. style.....	.85	5	.0425	.8075	.81
8 ounce thin tumbler:					
Salad style.....	.92	5	.046	.874	.875
Duss. style.....	.93	5	.0465	.8835	.885
1 pound Victory jar:					
Salad style.....	1.08	5	.054	1.026	1.03
Duss. style.....	1.11	5	.0555	1.0545	1.06
2 pound Victory jar:					
Salad style.....	1.65	5	.0825	1.5675	1.57
Duss. style.....	1.70	5	.085	1.615	1.62
26 ounce Victory jar:					
Salad style.....	1.44	5	.072	1.368	1.37
Duss. style.....	1.49	5	.0745	1.4155	1.42
1 gallon jars:					
Salad style.....	.51	5	.0255	.4845	.485
Duss. style.....	.53	5	.0265	.5035	.505
8 ounce beer mugs:					
Salad style.....	1.42	5	.071	1.349	1.35
Duss. style.....	1.44	5	.072	1.368	1.37
12 ounce beer mugs:					
Salad style.....	1.60	5	.08	1.52	1.52
Duss. style.....	1.62	5	.081	1.539	1.54
1 pound 1 ounce refrigerated jar:					
Salad style.....	1.37	5	.0685	1.3015	1.30
Duss. style.....	1.40	5	.07	1.33	1.33
24 1 pound fluted refrigerated jars:					
Salad style.....	1.27	5	.0635	1.2065	1.21
Duss. style.....	1.30	5	.065	1.235	1.23
Mustard (Shurfine):					
12 pound fluted refrigerated jars:					
Salad style.....	1.29	5	.0645	1.2255	1.23
Duss. style.....	1.32	5	.066	1.254	1.25
Mustard (Tastewell):					
16 ounce Victory jar:					
Salad style.....	1.05	3	.0315	1.0185	1.02
Duss. style.....	1.08	3	.0324	1.0476	1.05
32 ounce Victory jar:					
Salad style.....	1.58	3	.0474	1.5326	1.54
Duss. style.....	1.64	3	.0492	1.5908	1.59
26 ounce Victory jar:					
Salad style.....	1.38	3	.0414	1.3386	1.34
Duss. style.....	1.43	3	.0429	1.3871	1.39
4 1 gallon wide mouth:					
Salad style.....	.49	3	.0147	.4753	.475
Duss. style.....	.51	3	.0153	.4957	.495
Mustard (Shurfine):					
6 1/2 ounce table server:					
Salad style.....	.995	5	.04975	.94525	.98
Duss. style.....	1.005	5	.05025	.95475	.99
6 1/2 ounce Victory jar:					
Salad style.....	.745	5	.03525	.70975	.685
Duss. style.....	.765	5	.03825	.72675	.705

¹ Commissioner Elman, while he agrees with the decision of the Court of Appeals for the Seventh Circuit, agrees that the questions raised by the decision are important and should be resolved by the Supreme Court. He therefore joins in the Commission's request that the Solicitor General seek certiorari.

TABLE B.—THARINGER MACARONI CO.

Item	General price	Percent brokerage	Amount brokerage	Net price	Central's price
12 ounce cello macaroni.....	3. 05	5	0. 1525	2. 8975	2. 90
1 pound cello egg noodles.....	2. 70	5	. 135	2. 565	2. 57
12 ounce cello egg noodles.....	2. 15	5	. 1075	2. 0425	2. 04
8 ounce cello egg noodles.....	2. 95	5	. 1475	2. 8025	2. 80
6 ounce cello egg noodles.....	2. 35	5	. 1175	2. 2325	2. 23
1 pound super X egg noodles.....	2. 85	5	. 1425	2. 7075	2. 71
1 pound cello Italian Lig.....	4. 45	5	. 2225	4. 2275	4. 23
2 pound window front carton.....	3. 53	3	. 1059	3. 4241	3. 42
10 pound box egg noodles.....	1. 95	3	. 0585	1. 8915	1. 89
20 pound box egg noodles.....	3. 85	3	. 1155	2. 7345	3. 74
10 pound box macaroni.....	1. 31	3	. 0393	1. 2707	1. 27
20 pound box macaroni.....	2. 56	3	. 0768	2. 4832	2. 48
10 pound box shells.....	1. 31	3	. 0393	1. 2707	1. 27
20 pound box shells.....	2. 56	3	. 0768	2. 4832	2. 48
5 pound box.....	. 68	3	. 0204	. 6596	. 66
7 ounce carton macaroni.....	1. 88	5	. 094	1. 7860	1. 85
12 ounce cello K egg noodles.....	2. 40	5	. 12	2. 28	2. 30

R. H. MACY & CO., INC.

14. *R. H. Macy & Co., Inc., v. F.T.C.* 326 F. 2d 445 (2nd Cir. 1964)

(a) *Court Action*: Order enforced as modified.

(b) *Commission Action*:

1. On March 3, 1964 directed that certiorari not be sought. *Vote*: 4-0, Commissioner Reilly not participating.

MARCH 3, 1964.

R. H. Macy & Co., Inc. v. Federal Trade Commission, 2d Cir. No. 27,687
(Docket 7869—R. H. Macy & Co., Inc.)

Mr. MacIntyre reported his consideration of memorandum of February 24, 1964, from Assistant General Counsel Truly, approved by the General Counsel, concerning (1) the opinion and judgment, filed January 16, 1964, by the United States Court of Appeals for the Second Circuit, affirming the decision in Docket 7869, but directing modification of the Commission's order therein in accordance with the cases indicated, and (2) the Court's decree of February 14, 1964, modifying the terms of the Commission's order to make it conform substantially to the modified orders in the cases cited. For the reasons recited, Mr. Truly expressed the opinion that a request for a writ of certiorari is not warranted, and recommended against it.

After consideration, on motion of Mr. Dixon, it was directed that certiorari not be sought in this matter.

Mr. Reilly did not participate in the foregoing action.

TRI-VALLEY PACKING ASSOCIATION

15. *Tri-Valley Packing Association v. F.T.C.*, 329 F. 2d 694 (9th Cir. 1964)

(a) *Court Action*: Order reversed and case remanded.

(b) *Commission Action*:

1. On July 1, 1964, directed that cause be remanded to hearing examiner for further proceedings. *Vote*: 4-1, Commissioner Elman dissenting.

JULY 1, 1964.

(1) *Tri-Valley Packing Association v. Federal Trade Commission*, 9th Cir., No. 18125 (Docket 7225—Tri-Valley Packing Association, Docket 7496—Tri-Valley Packing Association)

Mr. Dixon presented memorandum of June 30, 1964 in which he reported his consideration of memorandum of May 26, 1964, from the General Counsel recommending that Dockets 7225 and 7496 be reopened and remanded to the hearing examiner for initial compliance with the opinion and judgment of the United States Court of Appeals for the Ninth Circuit. The General Counsel transmitted draft of order to effect that result.

Mr. Dixon concurred in the recommendation of the General Counsel.

After consideration, the order to cease and desist in the consolidated proceedings in Dockets 7225 and 7496 having been reversed and set aside by the United States Court of Appeals for the Ninth Circuit by its judgment entered on March 18, 1964, and the Court having by said judgment remanded the cause for the further proceedings directed in its opinion of the same date, the Commission reopened this matter and remanded the same to Hearing Examiner Edgar A. Buttle for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court, with the direction that the hearing examiner shall, upon completion of the further proceedings, file a revised initial decision based upon the record made prior to the remand and any additional evidence that may be received.

Order to the above effect was approved and referred to the Secretary for issuance and service upon the parties.

Mr. Elman dissented from the foregoing action.

FORSTER MFG. CO.

16. *Forster Mfg. Co., Inc. v. F.T.C.*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965)

(a) *Court Action*: Order set aside and cause remanded for further proceedings.
(b) *Commission Action*:

1. On October 15, 1964 Commission approved its opinion on remand. *Vote*: 3-1, Commissioner Elman dissenting, Mr. Reilly not participating.

2. On November 18, 1964 agreed that further action herein would be withheld pending disposition by the Supreme Court of respondent's petition for certiorari. *Vote*: 5-0.

3. On March 24, 1965 directed that respondents and Commission Counsel may file briefs on application of 2(b) and clarification and modification of order. *Vote*: 5-0.

OCTOBER 15, 1964.

(2) *Forster Mfg. Co., Inc., et al. v. Federal Trade Commission*, 1st Cir. No. 6134 (Docket 7207—Forster Mfg. Co., Inc., et al.)

Mr. Dixon presented memorandum of October 9, 1964, in which he reported his consideration of memoranda of August 25 and September 4, 1964, from the General Counsel's office regarding the opinion of July 29, 1964, of the United States Court of Appeals for the First Circuit setting aside the Commission's order in Docket 7207 and remanding the case to the Commission with the indicated directions and suggestion.

In the first of the above memoranda, the General Counsel expressed the opinion that certiorari not be sought, and that the Commission should attempt to comply with the directions of the Court; advised that the time for filing a petition for rehearing had been extended; and expressed the further opinion that it would be inappropriate for the Commission to act upon the remand until the court has acted on the respondents' petition for rehearing.

The General Counsel's office, in its memorandum of September 4, 1964, stated that the Court had denied Forster's petition for rehearing.

Mr. Dixon recommended that the submitted drafts of opinion on remand and final order be issued.

After consideration, the Commission approved its opinion on remand and final order in Docket 7207.

Mr. Elman dissented from the foregoing action and stated that he would circulate copies of a dissenting opinion to the other Commissioners.

Mr. Reilly did not participate in the foregoing action for the reason that oral argument herein was heard prior to his taking the oath of office.

NOVEMBER 18, 1964.

(1) *Forster Mfg. Co., Inc., et al. v. Federal Trade Commission*, 1st Cir., No. 6134 (Docket 7207—Forster Mfg. Co., Inc., et al.)

Pursuant to the action of October 15, 1964, the Commission considered this matter further and, after consideration, it was agreed that further action herein would be withheld pending disposition by the Supreme Court of the respondents' petition for certiorari.

MARCH 24, 1965.

- (2) *Forster Mfg. Co., Inc., et al. v. Federal Trade Commission*, 1st Cir., No. 6134 (Docket 7207—Forster Mfg. Co., Inc., et al.)

Mr. Dixon presented memorandum of March 23, 1965, in which he reported his consideration of this matter in the light of (1) opinion of July 29, 1964, by the United States Court of Appeals for the First Circuit remanding Docket 7207 to the Commission for application of the requirements of Section 2(b) of the amended Clayton Act to the evidence of certain of the discriminatory transactions found unlawful by the Commission, and for possible clarification and modification of the order to cease and desist issued by the Commission; and (2) petition by counsel for the respondents, filed March 15, 1965, for leave to file a brief presenting their views as to the proper disposition of the Section 2(b) question remanded to the Commission by the Court.

Mr. Dixon recommended that the submitted draft of order granting leave to file be issued.

The action of October 15, 1964, approving an opinion and final order on remand was rescinded.

After consideration, the order was amended.

The Commission (1) directed that the respondents and Commission counsel may, within forty-five days after service upon them of appropriate order, file with the Commission a brief presenting their views as to the proper disposition of both questions remanded by the Court, namely, the application to the evidence of the requirements of Section 2(b) of the amended Clayton Act to the transaction referred to by the Court, and the possible clarification and modification of the order in Docket 7207 referred to by the Court; and (2) approved the revised order to the above effect.

Miss Jones was recorded as in favor of the foregoing action.

BORDEN CO.

17. *Borden Co. v. F.T.C.*, 339 F.2d 133 (5th Cir. 1964), *rev'd and remanded*, 383 U.S. 637 (1966).

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. On January 25, 1965, ordered General Counsel to request Solicitor General to file petition for certiorari. *Vote*: 4-1, Commissioner Elman not concurring.

2. On April 1, 1965 staff directed to prepare letter to Solicitor General transmitting memorandum prepared by Bureau of Economics. *Vote*: 5-0.

3. On April 7, 1965 ordered meeting with Solicitor General. *Vote*: 5-0.

JANUARY 25, 1965.

The Borden Company v. Federal Trade Commission, 5th Cir., No. 20,463
(Docket 7129—Borden Company)

Mr. Dixon presented memorandum of January 22, 1965, from J. B. Truly, Assistant General Counsel, approved by the General Counsel, expressing the opinion that it is of great importance to obtain a Supreme Court decision resolving the question of "like grade and quality" decided by the Court of Appeals in the instant Borden case, and recommending approval of the submitted draft of letter to Hon. Archibald Cox, Solicitor General, Department of Justice, transmitting pertinent papers and requesting Mr. Cox to file a petition for a writ of certiorari to review the opinion and judgment of December 4, 1964, of the United States Court of Appeals for the Fifth Circuit in this case.

Interested staff members from the Office of the General Counsel were present during the consideration of this matter.

After consideration, the letter to Mr. Cox, as submitted by Mr. Truly, was revised (1) to delete indication of the transmittal therewith of the following memoranda: December 9, 1964, from Mr. Elman to J. V. Buffington, Assistant to the Chairman; December 29, 1964, from the Director of the Bureau of Economics to Mr. Buffington; and January 18, 1965, from the Director of the Bureau of Restraint of Trade to Mr. Buffington; and (2) to indicate the transmittal therewith, in place of the above memoranda, memorandum of January 13, 1965, from the Chief of the Division of Discriminatory Practices, Bureau of Restraint of Trade, to the General Counsel, which memorandum listed 15 cases that may be affected by the above Court decision.

On motion of Mr. Brown, the Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment in question, and the revised letter to Mr. Cox, making such request and transmitting pertinent material, was approved and ordered forwarded after signature by the Chairman.

Mr. Elman did not concur in the foregoing action, and it was directed that the following language be added to the letter to Mr. Cox: "Commissioner Elman does not concur, and will shortly prepare and forward to the Solicitor General a statement of his views."

It was agreed that Mr. Elman would circulate his statement, when prepared, to the other Commissioners.

APRIL 1, 1965.

(5) *The Borden Company v. Federal Trade Commission*, 5th Cir., No. 20, 463
(Docket 7129—Borden Company)

Mr. Dixon presented letter of March 11, 1965, from Archibald Cox, Solicitor General, Department of Justice, regarding the above matter, in which Mr. Cox, pursuant to the action of January 25, 1965, was requested to petition the Supreme Court for a writ of certiorari to review the December 4, 1964, opinion and judgment of the United States Court of Appeals for the Fifth Circuit with respect to the Commission's order in Docket 7129.

Mr. Cox (1) stated that he has obtained an extension of time for filing a petition for certiorari because he is very dubious about the wisdom of pressing the Commission's 2 to 1 decision in Docket 7129 upon the Supreme Court, (2) enclosed a memorandum dated March 11, 1965, stating informally the sources of his doubt and suggesting questions for further examination, and (3) expressed the hope that the Office of the Solicitor General may have some discussion of the problem with the Department's Antitrust Division, as well as the Commission.

With his circulation of March 31, 1965, Mr. Dixon submitted a draft of memorandum prepared by Dr. Willard F. Mueller, Director, Bureau of Economics, as a proposed reply to the memorandum of March 11, 1965, from Mr. Cox.

After consideration, the staff was directed to prepare a letter to Mr. Cox transmitting the memorandum prepared by Dr. Mueller and advising that the individual Commissioners may transmit their comments regarding the matter to the Department of Justice within the next few days.

It was agreed that the letter to Mr. Cox would be forwarded after signature by the Chairman.

APRIL 7, 1965.

(1) *The Borden Company v. Federal Trade Commission*, 5th Cir., No. 20,463
(Docket 7129—Borden Company)

Reference was made to the action herein of April 1, 1965, and after consideration, April 14, 1965, at 2:30 p.m., was agreed upon as the time for a meeting between the Commission and the Office of the Solicitor General for a discussion of this case.

JANUARY 25, 1965.

Re *The Borden Company v. Federal Trade Commission*, 5th Cir., No. 20,463—FTC
Docket 7129.

HON. ARCHIBALD COX,
Solicitor General, Department of Justice, Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On December 4, 1964, the United States Court of Appeals for the Fifth Circuit issued its opinion and judgment setting aside the Commission's order to cease and desist against the Borden Company. For reasons stated below, the Commission believes that certiorari should be requested.

After a hearing on a complaint charging violation of Section 2(a) of the Clayton Act, the Commission, with one Commissioner noting his dissent and two Commissioners not participating, found that Borden had discriminated in price between competing purchasers of Borden brand evaporated milk and Borden's private label evaporated milk, that Borden brand milk and its private label milk were of like grade and quality, that the statutory criteria of injury to competition had been met as to both the primary and secondary lines of competition, and that Borden had failed in its effort to cost justify the discriminations. Accordingly, the Commission issued an order to cease and desist.

On appeal the court found that Borden always sold its private label at lower prices than its Borden Brand milk, but held that Borden brand and Borden's private label milk are not "of like grade and quality" within the meaning of Section 2(a). The court set aside the Commission's order for this reason, and thus did not reach the questions of injury and cost justification.

In reaching its decision the court recognized that the facts on the question of like grade and quality are undisputed and that the question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality." It also recognized the "undisputed fact" that the chemical content of the products is identical and that they are packed exactly the same except that private label milk bears the private labels of purchasers and Borden brand milk

bears the Borden label (slip op. 4-5). The court held that because Borden brand milk is a premium product, having a public acceptance not enjoyed by private label milk, the two products are not "of like grade and quality." In short, it held that because of a preference on the part of consumers for Borden brand milk and because that milk commands higher prices than private label milk, the "grade and quality" of the milk are not the same.

The ruling of the court is important to the Commission in the future administration of the Clayton Act and to the antitrust bar in the litigation of treble damage actions. We believe Supreme Court review is warranted.

1. The court's disposition of the case is, we believe, contrary to the legislative history of the Act, contrary to the majority views expressed in the Report of the Attorney General's National Committee to Study the Antitrust Laws, 158 (1955), and contrary to the views of two prominent writers in the antitrust field (Patman and Austin). These authorities are discussed in the Commission's opinion (R. 100-105) and in its brief in the court of appeals (pp. 10-16), to which reference is made.

2. The Commission in reaching its decision relied in part (R. 101) on its prior decisions in *Page Dairy Co.*, 50 F.T.C. Dec. 395 (1953), *United States Rubber Co.*, 28 F.T.C. Dec. 1489 (1939), *The Goodyear Tire & Rubber Company*, 22 F.T.C. Dec. 232 (1936), *reversed on other grounds*, 101 F. 2d 620 (6th Cir. 1939), and *United States Rubber Co.*, 46 F.T.C. Dec. 998 (1950), where it held that products identical in all respects except labels are of like grade and quality under Section 2(a). The court held that these cases are "clearly distinguishable" because in none of them "was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not" (slip op. 9).

It is clear that in three of the cases it *could* have been shown that "the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not." Each of the cases except *Page Dairy* involved a comparison between highly advertised brand-name products—U.S. Royal tires, Goodyear tires and U.S. Keds (canvas shoes)—and identical products sold under unadvertised private labels. Unless the entire theory of advertising is in error, there must have been a consumer preference for the well-known advertised products, and we believe the cases support the Commission's decision here.

But if the court's opinion correctly states the law, the Commission in similar price discrimination cases in the future will be unable to establish "like grade and quality," because plainly the consuming public prefers highly advertised brands over unknown private brands. The court's construction of the statute will permit any seller of a well-known advertised product to escape the prohibitions of Section 2(a) by selling the identical product at a lower price to favored purchasers under private labels.

3. The court stated (slip op. 11): "The Commission precedents which are more analogous to this case are those involving the closely related 'meeting competition' defense under Section 2(b)," citing prior Commission decisions in *Anheuser-Busch, Inc.*, 54 F.T.C. Dec. 277 (1957), *Standard Oil Co.*, 49 F.T.C. Dec. 923 (1953), *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. Dec. 351 (1948), and *Callaway Mills col.*, 3 Trade Reg. Rep. ¶ 16800 (1964). The court said: "We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case" (slip op. 12).

While the Commission in the cited cases did take consumer preference into account in determining whether there had been a good faith meeting of competition, it did not unqualifiedly carry over the 'like grade and quality' concept into Section 2(b). These cases stand for the principle, often applied by the Commission, that where the price of a premium product is reduced to the price of an unadvertised non-premium competitive product, there cannot be a "good faith" meeting of competition. It seems clear that consumers will prefer and will purchase a well-known advertised product if there is no price differential between it and an unknown brand. Thus in such cases prices are not met in any true sense; they are undercut.

This is all the Commission held in the cited cases. For example, in *Anheuser-Busch* the Commission held that "respondent cannot justly claim that it was meeting competition" (54 F.T.C. Dec. at 302). And in *Standard Oil* the Commission held that "public acceptance is determined in large measure by factors other than actual grade and quality" (49 F.T.C. Dec. at 952).

The court gave particular attention (slip op. 11-12) to the Commission's recent

decision in *Callaway Mills*. In that case the Commission did not assign to the "grade" concept the public demand or salability characteristics of the product, as stated by the court. It indicated that "grade" and "quality" are important factors in determining "public demand" or "salability" in an industry where slight variations in the "materials and construction" of carpets have great effect on "public demand" or "salability." The Commission stated that in the factual setting of the case before its respondents should have introduced proof as to both the comparative quality and salability of their goods and the competitive goods allegedly defended against. It pointed out that there was no evidence that the product whose price respondents allegedly were meeting was "similar in grade and quality." The Commission held, in effect, that the respondents had not made out a Section 2(b) defense because they had not shown that respondents were meeting the price of a product of substantially equal public acceptance.

4. The court was less than candid in discussing its own decision in *Hartley & Parker, Inc. v. Florida Beverage Corporation*, 307 F. 2d 916 (5th Cir. 1962). In that treble damage action the court had under consideration the sufficiency of a complaint which charged that the defendant had discriminated in price by selling its nationally advertised intoxicating liquors to plaintiff at one price while selling identical liquors under private labels to a favored customer at a lower price. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals reversed. In doing so it quoted with seeming approval from plaintiff's brief on the question of "like grade and quality," as follows (307 F. 2d at 923) :

"'Grade and quality' of alcoholic beverages depend on alcoholic content, flavorings, refinements and distilling, etc., rather than on names and labels. To paraphrase, 'Four Roses, by any other name, would still swill the same.'"

In distinguishing the case in the instant decision (slip op. 9) the court said that in *Hartley & Parker*, "The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product," while the Borden name was not used in selling private label milk. The court said (slip op. 8) that the complaint it upheld in *Hartley & Parker* alleged that the products were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands . . . packaged and labeled under different trade names."

But it appears from the face of the opinion in *Hartley & Parker* (307 F. 2d at 923) that the complaint charged that the representations quoted by the court were made "to various retail liquor dealers," not to consumers. We are dealing here, as recognized throughout the court's opinion, with "public acceptance," "consumer preference," "intense public demand", not with the preference of retailers. We do not agree that representations as to the identity of products made to retailers, with no allegation that they were also made to consumers, distinguish *Hartley & Parker* from this case.

5. The Report of the Attorney General's National Committee to Study the Anti-trust Laws states (p. 158) : "The majority of this Committee, however, recommends that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test . . . [T]he Committee majority believes that abandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices . . .

The Commission is in full accord with this statement. The degree of enmeshment in "complex economic investigations" and the "easy evasion of the statute" that may result from the court's opinion, if allowed to stand, is indicated in part by the large number of investigations and formal proceedings now pending before the Commission in which "like grade and quality" may be an issue. These cases are listed in the enclosed staff memorandum of January 13, 1965, from the Chief, Division of Discriminatory Practices, Bureau of Restraint of Trade, to the General Counsel.

Also enclosed are copies of the court's opinion and judgment, the printed record and briefs in the court of appeals.

Commissioner Elman does not concur, and will shortly prepare and forward to the Solicitor General a statement of his views.

By the Commission.

PAUL RAND DIXON,
Chairman.

JANUARY 26, 1965.

Re the *Borden Company v. Federal Trade Commission*, 5th Cir. No. 20,463—FTC Docket 7129.

HON. ARCHIBALD COX,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: By letter dated January 25, 1965, the Commission requested you to file a petition for certiorari in this matter, with the statement that Commissioner Elman's views would be forwarded later. At Commissioner Elman's request, I am enclosing two copies of his memorandum stating his views.

Sincerely yours,

J. B. TRULY,
Acting General Counsel.

MEMORANDUM TO THE SOLICITOR GENERAL FROM PHILIP ELMAN

The following are my reasons for believing that Supreme Court review should not be sought in this case.

1. I think the decision of the Court of Appeals is clearly correct. Brand name goods are of different grade or quality from private label goods, even if physically identical, by the test of the marketplace: they consistently command a substantially higher price. Through advertising, the producer attempts to differentiate his name brand from unbranded goods as well as from goods selling under other brand names. If—like Borden—he is successful, the result is that the consumer accepts the name brand as a different and premium product, for which he is willing to pay a premium price. A producer who spends millions of dollars for advertising to build consumer acceptance for his brand is not "discriminating" when he charges a higher price for the branded article than for a physically identical article which he does not advertise at all and is sold under private label.

2. Accepting the proposition that brand-name goods may be of different grade or quality from physically identical but unbranded goods does not open a loophole in Section 2(a) or disregard the legislative history or intent of the statute. The decision of the Court of Appeals is very narrow, and, indeed, is wholly consistent with the Commission's basic position that merely affixing different labels to goods which are physically identical does not make them of different grade or quality within the meaning of the statute. The court expressly refused to countenance the "easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices" with which the report of the Attorney General's Committee was concerned, and stated (pp. 10–11, slip opinion):

"That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike 'grade'. Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Broaden brand here, as compared to the private label brands."

All the court held or said is that where in fact there is an established difference in retail price between private brand and name brand products traceable to a substantial and demonstrable difference in the intensity of consumer demand, the fact that the name brand and private brand products may be physically identical is not controlling. The court found, as a fact, that Borden name brand milk was a premium brand and Borden private label milk was non-premium; it relied on evidence that purchasers were perfectly willing to buy and stock both products despite the price differential between them, thereby demonstrating that the grade difference between them, though not a physical one, was *bona fide*, substantial, and economically and commercially significant. It was not an artificial distinction, and it was not concocted for purposes of defeating the Commission's jurisdiction under Section 2(a).

I do not think the court's decision impairs the Commission's power to look through label difference, and find like grade and quality, where such differences have no actual and substantial economic significance. All the court said, to repeat, is that physical differences are not the only differences that count in consumer products—as we all know to be the case. Should the Supreme Court review this decision, the Commission runs the risk of the Court's laying down a rule far less acceptable to the Commission. The Court might affirm the decision of the Court of Appeals without making Judge Hutcheson's careful distinction between genuine and artificial label differences.

3. The Court of Appeals implicitly accepted the Commission's handling of the premium-product issue with respect to the application of the Section 2(b) good faith meeting of competition defense, notably in *Anheuser-Busch*. The court seems even to have accepted the Commission's position in *Callaway Mills* that the seller to prevail under 2(b) must prove that his product was comparable in consumer acceptability to the competitor's product whose price he was meeting. I happen to believe the Commission was in error in requiring such proof of respondent in *Callaway Mills*. But in any event the Commission cannot have it both ways; if like grade and quality means like consumer acceptance for 2(b) purposes, it should mean the same thing for 2(a) purposes. The Commission's inconsistent positions in *Borden* and *Callaway Mills* should be faced up to and resolved by the Commission—not by the Supreme Court.

4. The question of how to deal under the antitrust laws with the practice of dual branding is exceedingly complex; but it has never been really confronted or analyzed by the Commission; and it is therefore not in a proper posture for Supreme Court determination.

The practice of private brand distribution has been a very important force for the preservation of competition in consumer product industries. This is because product differentiation, in the form of brand preferences created by massive advertising and promotions, is a significant barrier to entry in many such industries. The private brander, i.e., a distributor who assumes the burden of creating consumer acceptance for the manufacturer's product by selling under his own brand name rather than the manufacturer's, offers an outlet for small manufacturers who cannot afford massive advertising, and thus fosters the entry of small firms into manufacturing. At the same time, private brand distribution has been an important source of price competition in the distribution of consumer products where the structure at the manufacturing level is oligopolistic. For example, dual branding has been an important factor helping to keep gasoline retailing competitive.

There is a risk that the Supreme Court, in passing on the legal question presented here, might endanger the structure of private brand distribution by failing to appreciate the economic role and significance of private branding. A decision that went too far in equating private brand with brand name lines might impair the Commission's ability to protect private brand distributors from unfair and oppressive tactics of their name brand competitors, notably in the gasoline industry. The Commission would not welcome a ruling on like grade and quality which by implication entitled Sun Oil Company to price its gasoline so as to eliminate any retail price differential between Sunoco and Super Test. The Supreme Court has sometimes exhibited a penchant for writing broadly on narrow legal questions, as in its *Sun Oil* decision; and what it writes is not always to the Commission's liking. Thus, the language of the Court in *Sun Oil* was later relied upon by the Court of Appeals for the Seventh Circuit in setting aside the Commission's order in *American Oil*.

The reason I think it particularly risky to ask the Supreme Court to consider the question of the liability of the dual brander under the Robinson-Patman Act as presented in the present case is that neither the Commission in its opinion nor the Court of Appeals in its opinion analyzed or discussed the competitive significance of dual branding. One searches the Commission's opinion in vain for any glimmering of awareness of the difficult economic issues posed by dual branding; the Commission, once it had leapt the hurdle of like grade and quality, drew a virtually automatic inference of competitive injury from the existence of the price differential. The Court of Appeals never reached the competitive injury issue because it decided the case on like grade and quality. Thus, if certiorari was granted, the Court would be in the position of having to determine whether the Robinson-Patman Act should be deemed applicable to dual branding on a record devoid of illuminating discussion and analysis of the nature and significance of the practice. I am frankly afraid of what the Court might do with a question presented to it in so abstract a manner.

5. The Court of Appeals' decision does not prevent the Commission from acting effectively against unfair or anticompetitive uses of dual branding. The use of "fighting brands" as a method of predatory competition is a familiar anticompetitive weapon and is clearly an "unfair method of competition" forbidden by Section 5 of the Federal Trade Commission Act. See Stevens, *Unfair Competition* (1917), pp. 40-53. If Borden uses its unbranded evaporated milk as a means of unfairly hurting competitors or favoring large buyers at the expense of small, I have no doubt that the Commission has ample authority under Section 5 to prevent such conduct. The advantage of proceeding under Section 5 would be to compel the Commission to confront explicitly the question of whether and in what circumstances dual branding is in fact anticompetitive, rather than, as in the present case, permit the Commission, relying on inapposite decisions (e.g., *Morton Salt*) construing Section 2(a) in very different competitive contexts, to presume injury to competition from the practice of dual branding as such.

6. If the Commission's position should be sustained by the Supreme Court, the result could be a Pyrrhic victory that in the long run would cripple effective action against anticompetitive dual branding. If this practice is dealt with under the standards of the Robinson-Patman Act, with its built-in cost justification and meeting competition defenses, the Commission and the courts will not have a sufficiently flexible enforcement tool to distinguish between dual branding which helps and that which hurts competition. The Act is unique in making meeting competition in good faith an absolute defense to a charge of antitrust violation. And every higher price for an advertised brand can, to some extent, be cost justified; the question in a Robinson-Patman Act proceeding would be whether the costs of advertising are high enough to justify the higher price. Answering this question does not, in my opinion, move one very far toward determining whether a particular practice of dual branding injures or promotes competition: moreover, the cost justification defense is, as we all know, a legal and accounting quagmire. It would be neither practicable nor desirable to have the legality of so complex a practice as dual branding depend on the kind of inquiry that has to be made in evaluating a cost justification defense.

It would make for more intelligent and effective governmental action in this field if the controlling statutory provision is Section 5 of the Federal Trade Commission Act rather than Section 2(a) of the Clayton Act. Again, I would point out, this policy question is one for the Commission to decide—and one the Commission has never really confronted.

7. The Commission's decision in this case was concurred in by only two members of the Commission, and, as I have said, its discussion of the competitive consequences and impact of dual branding is singularly unilluminating. I do not think the Commission's policy toward dual branding has evolved to the point at which Supreme Court review would be appropriate, or would be helpful in the development of sound legal principles to govern the application of the antitrust laws to this important and widespread practice. It is a truism that policy should originate with the responsible agency rather than with the reviewing court. To support the Commission's disposition of the like grade and quality issue as presented in this case would require furnishing the Supreme Court with economic data and analysis which the Commission should have, but has not, considered. The case is accordingly in no posture for Supreme Court review.

If Supreme Court review is nevertheless sought, I would strongly urge that the issue of like grade and quality be presented to the Court as a narrow, purely threshold question of law, just as the issue of discrimination was presented to the Court in *Anheuser-Busch*. In view of the Commission's failure to consider the implications of its decision here, it would be most inappropriate and could have unfortunate consequences if the Court went beyond resolving the narrow jurisdictional question and predetermined such issues as competitive injury and cost justification in dual-branding cases brought under the Robinson-Patman Act.

BORDEN CO.

18. *Borden Co. v. F.T.C.*, 339 F.2d 953 (7th Cir. 1964)

(a) *Court Action*: Order vacated and set aside.

(b) *Commission Action*:

1. On February 8, 1965 directed General Counsel to prepare draft of letter requesting Solicitor General to file petition for certiorari noting that entire Commission, with the exception of Mr. Elman is in favor of certiorari. *Vote*: 4-1, Commissioner Elman not participating.

2. On February 16, 1965, directed General Counsel to request Solicitor General to file petition for certiorari. *Vote*: 4-0, Commissioner Elman not participating.

FEBRUARY 8, 1965.

3. *The Borden Company v. Federal Trade Commission* 7th Cir., No. 14,622.
(Docket 7474—Borden Company)

Memorandum of February 1, 1965, from the General Counsel with reference to the opinion of December 28, 1964, of the United States Court of Appeals for the Seventh Circuit, setting aside the Commission's order in Docket 7474, prohibiting price discriminations in the sale of fluid milk.

The General Counsel requested instructions as to whether a draft of a letter to the Solicitor General, requesting certiorari on the commerce question, should be prepared.

In his agenda circulation of February 3, 1965, Mr. Dixon (1) recommended that a letter to the Solicitor General, requesting a writ of certiorari, be prepared, (2) stated that the only uncertainty in his mind is whether the request should be limited to the "commerce" question, as suggested by the General Counsel, and (3) expressed the opinion that the above Court was also in error in its holding that the respondent's below-cost discriminatory price in Walkerton, Indiana, was not shown to have a probable effect on primary-line competition within the meaning of Section 2(a).

After consideration, on motion of Mr. Dixon, the General Counsel was directed (1) to prepare a letter to the Solicitor General (a) requesting that a writ of certiorari, limited to commerce, be filed, and (b) advising that the entire Commission, with the exception of Mr. Elman, is in favor of certiorari; and (2) to submit the letter to the Commission for its approval.

Mr. Elman did not participate in the foregoing action.

FEBRUARY 16, 1965.

Special matter: *The Borden Company v. Federal Trade Commission* 7th Cir.
No. 14,622 (Docket 7474—Borden Company)

Mr. Dixon presented draft of letter to the Solicitor General as submitted by the General Counsel with memorandum of February 15, 1965, pursuant to the action of February 8, 1965. The draft bore a notation that the entire Commission, with the exception of Mr. Elman, favors requesting certiorari in this case.

After consideration, on motion of Mr. Dixon, the Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, filed December 28, 1964, insofar as the decision relates to the commerce question, and the letter to the Solicitor General, making such request and transmitting pertinent material, as submitted by the General Counsel, was approved and ordered forwarded after signature by the Chairman.

Mr. Elman did not participate in the foregoing action.

FEBRUARY 17, 1965.

Re *The Borden Co. v. Federal Trade Commission*, 7th Cir. No. 14,622—FTC Docket 7474.

HON. ARCHIBALD COX,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On December 28, 1964, the United States Court of Appeals for the Seventh Circuit issued its opinion and judgment setting aside the Commission's order to cease and desist against The Borden Company. For reasons stated below, the Commission believes that Certiorari should be requested.

The complaint charged that Borden had engaged in price discriminations in the sale of fluid milk in various communities, which resulted in injury in the primary and secondary lines of commerce and thus violated Section 2(a) of the Clayton Act. After a hearing the Commission held that Borden's discriminatory sales in the Portsmouth, Ohio, area were "in commerce" within the meaning on that term as used in Section 2(a), and found injury in the secondary line of competition. It also found primary line injury based on Borden's pricing practices in the Walkerton, Ohio, community, but we do not seek review of that part of the court's decision holding that there was no substantial evidence to support this finding.

Borden did not introduce any evidence to rebut the showing of secondary line injury made by complaint counsel. It relied solely upon the contention that its sales in Portsmouth were not "in commerce" and therefore not within the jurisdiction of the Commission under the statute. The Commission held that although the milk sold in Portsmouth was never physically transported across a state line, it nevertheless was sold "in commerce" because "[a] product is in commerce when the forces establishing its price structure or distributional policy cross state lines."

The Commission noted the stipulated facts concerning the organizational structure of The Borden Company, which is divided into a number of regional districts. Each district encompasses several states, and in turn is divided into sub-districts of smaller geographic scope. There is a Borden processing plant at Portsmouth which is within the Midwest District of The Borden Company, a district comprising part or all of eight states with headquarters at Columbia, Ohio. The Commission considered this decentralization of the company to be a matter of economic efficiency for a corporation engaged in nationwide marketing of perishable goods, and held that it did not have the effect of transferring the authority for company policy to Borden's regional divisions. It noted the homogeneity of Borden products throughout the country, the steady transfer of personnel among the company's divisions, and the ultimate authority for company policy which remained in Borden's main office in New York as indicia that the favored prices to the Portsmouth outlets of national chain stores could not have been negotiated solely on the authority of intrastate forces.

The Commission opinion was written by Chairman Dixon, with an unelaborated statement by former Commissioner Anderson that he concurred in the result. Commissioner Elman dissented, and the other Commissioners did not participate in the decision.

On appeal, the court found that the sales in Portsmouth were not "sales in commerce" within the meaning of Section 2(a) because "the sales of milk were negotiated in Ohio, the milk was produced, processed and delivered in Ohio for resale in Ohio" (slip op., p. 4). The court held that "the Portsmouth transaction could not be relied on without amending the Act by judicial construction amounting to judicial legislation" (slip op., p. 8).

A majority of the Commission believes that Supreme Court review of the ruling on commerce is warranted, for the following reasons:

1. The court's decision presents a pure question of law, for Borden, in the words of its counsel, did not "put in a scrap of defensive evidence because the interest to commerce was unproven." The undisputed facts are that Borden, throughout the years 1959 and 1960, allowed discounts of 10% to 12% to the Portsmouth outlets of four chain stores (A. & P., Kroger, Alber's, Schaefer).

During the same period, four independent local groceries competing with the favored purchaser were receiving discounts from list price of only 5% and two independent competitors received no discount (see Commission's brief, pp. 7-8, 43-47). The disposition of the case thus turns solely on the question of commerce.

2. The court's ruling opens the door for huge interstate business complexes such as The Borden Company to escape liability under the antitrust statutes, simply by compartmentalizing their business activities in such fashion as to avoid the physical transportation of a product across a state line. A product may be sold "in commerce" under circumstances other than those which involve such transportation.

The essence of the Commission's holding in this case is that a product is "in commerce" when the forces establishing its pricing policies and distributional structure cross a state line. Unquestionably, such forces were the motivating power behind the setting of Borden's discriminatory allowances to national chain store outlets in Portsmouth. Should the court's decision not be overturned, those business organizations which deal in products of a perishable nature or products which are difficult to transport will be able to escape liability under the Clayton Act for discrimination in prices favoring large chain stores and other customers resulting in injury to smaller local businesses. Such a result seems directly contrary to the purpose and intent of the statute, for it is businesses of this very nature in which true competition is most viable in the present American economic structure. The small dairies, bakeries and similar businesses will be denied the protection against price discrimination the law affords other small businesses. It seems illogical and unjust for large interstate companies, doing business amounting to multi-millions of dollars annually, to thwart the antitrust statutes by the mere fact that they are engaged in businesses the natures of which allow compartmentalization on an intrastate basis.

3. The Commission decision is supported by five legal propositions.

a. The requirement of Section 2(a) that a sale occur "in commerce" does not mean that only those sales which in and of themselves constitute a transaction in interstate commerce are subject to the statute. Rather, any sale which is part of a nexus which constitutes interstate commerce falls within the jurisdiction of the Commission under the statute (see Commission's brief, pages 24-28; *Swift & Co. v. United States*, 196 U.S. 375 (1905), *affirming* 122 Fed. 529, 531-32 (N.D. Ill. 1903)).

b. If any essential preliminaries or aftermaths to a sale are interstate in nature, the sale is made "in commerce" regardless of whether there is a physical transportation of a product across state lines (Commission's brief, pp. 28-33; *Progress Tailoring Co. v. Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946)).

c. Where interstate commerce is utilized to support continuation of discriminatory pricing practices, the reliance or potential reliance of the discriminating party upon interstate funds or promotions brings that party under Section 2(a) of the Clayton Act (Commission's brief, pp. 33-36; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954)).

d. Since The Borden Company is domiciled outside the state of Ohio where the discriminatory sales took place, sales from Borden to purchasers in Ohio were sales which, in legal fact, constituted commerce and were "in commerce" (Commission's brief, pp. 36-40; *Swift & Co. v. United States*, *supra*).

e. An interstate business whose national operations are carried out in substantially the same manner throughout the nation pursuant to the directions of its home office is so completely enmeshed in interstate activity that any sale by such company of one of its principal products, made pursuant to interstate directions and control, must be considered a sale "in commerce" (Commission's brief, pp. 40-42; *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944)).

The Commission recognizes that *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963), upon which the Seventh Circuit relied in this case (slip op., p. 3), apparently reaches a contrary result. However, it must be noted that *Willard* was decided on the pleadings without a trial, and the allegations of fact before the court did not present a record upon which the interstate operation and integration of the company allegedly practicing price discrimination were demonstrated. It should also be noted that Mr. Justice Black, in *Willard*, took the unusual step of dissenting from a denial of certiorari because he believed the result inconsistent

with the Court's decision in *Moore v. Mead's Fine Bread Co.*, *supra*. Of course, a denial of certiorari implies no approval of the lower court decision, but attorneys representing interstate businesses will rely upon *Willard* and *Borden* until there has been Supreme Court review of the proposition for which these cases stand. We believe that this is a proper case to obtain such review. The law concerning interstate commerce under the Robinson-Patman Act is correctly set forth in the *Moore* case and in the *Shreveport Macaroni* decision of the Fifth Circuit (321 F. 2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964)). The latter case held that sales on which discriminatory allowances under Section 2(d) of the Clayton Act were paid were sales in interstate commerce although the deliveries were intrastate. If *Moore* and *Willard Dairy* are considered reconcilable by the Supreme Court, the Department of Justice, the Commission and the antitrust bar should be informed of this by a specific decision.

We note that the Seventh Circuit's opinion may have indicated disapproval of the "concurrence in the result," with no elaboration, by a Commissioner whose vote was necessary to constitute a majority of the quorum deciding this case (slip op., pp. 2-3). But the law upholds the validity of such a result (Commission's brief, pp. 58-61; *Chicago B. & O. R.R. v. United States*, 60 F. Supp. 580 (E.D. Ky. 1945)). If the Commission decision on the merits is correct, we do not believe the case will be remanded or reversed because of the voting division among the Commissioners.

In recent decisions, the Supreme Court has delineated the broad scope of the commerce power under the Civil Rights Act and under the Natural Gas Act. *Heart of Atlanta Motel, Inc. v. United States* (No. 515, decided December 14, 1964), 33 U.S.L. Wk. 4059, 4064; *California v. Lo-Vaca Gathering Co.* (Nos. 46, 47 and 57, decided January 18, 1965, 33 U.S. L. Wk. 4159). This may be a propitious time to seek determination from the Supreme Court of the scope of the Commission's jurisdiction under Section 2(a) of the Clayton Act.

The entire Commission, with the exception of Commissioner Elman, favors requesting certiorari in this case. Transmitted herewith are copies of the printed record, briefs in the Court of Appeals, slip opinion and judgment.

Very truly yours,

PAUL RAND DIXON, *Chairman*.

JOSEPH KAPLAN, INC.

19. *Joseph Kaplan, Inc. v. F.T.C.*, 347 F.2d 875 (D.C. Cir. 1965)

(a) *Court Action*: Order enforced as modified.

(b) *Commission Action*:

1. On June 22, 1965 directed that certiorari not be sought. *Vote*: 5-0.

JUNE 22, 1965.

(14) *Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission*, D.C. Cir. No. 18,380 (Docket 7813—Joseph A. Kaplan & Sons, Inc.)

Circulated by Mr. Dixon.

June 22, 1965—It was directed that certiorari of the opinion and judgment of May 13, 1965, of the Court of Appeals for the District of Columbia in the above matter not be sought.

(451)

UNIVERSAL-RUNDLE CORP.

20. *Universal-Rundle Corp., v. F.T.C.*, 352 F. 2d 831 (7th Cir. 1965), *rev'd and remanded*, 387 U.S.

(a) *Court Action*: Order set aside and cause remanded.

(b) *Commission Action*:

1. On February 2, 1967 authorized Mr. Truly to inform Mr. Rifkind of Solicitor General's office to use own judgment in Supreme Court argument with reference to disclosure of investigations of competitors of Universal-Rundle. *Vote*: 5-0.

2. On February 8, 1966 directed General Counsel to transmit letter to Solicitor General requesting filing of petition for certiorari. *Vote*: 5-0.

FEBRUARY 2, 1967.

(2) *Federal Trade Commission v. Universal-Rundle Corporation*, Supreme Court No. 101 (*Docket 8070—Universal-Rundle Corporation*)

Assistant General Counsel James B. Truly and Attorney William R. Harper of Mr. Truly's staff were called in and heard with respect to the request of Mr. Robert S. Rifkind of the Office of the Solicitor General for permission to disclose certain investigations of competitors of Universal-Rundle Corporation which have been conducted by the Commission if such disclosure becomes necessary during the course of argument before the Supreme Court in the above matter. Mr. Truly reported on the number of past investigations, and on the number of those presently in the investigational stage.

After discussion, Mr. Truly was instructed to inform Mr. Rifkind that the Commission accorded to him the same rights of access to the Commission's files, insofar as the above matter and those relating thereto are concerned, as those of a member of the Commission's staff, and has authorized him when arguing the above matter before the Supreme Court to use his own judgment as to whether and under what circumstances to disclose the other investigations of competitors of Universal-Rundle Corporation.

FEBRUARY 8, 1966.

(5) *Universal-Rundle Corporation v. Federal Trade Commission*, 7th Cir., No. 14,763 (*Docket 8070—Universal-Rundle Corporation*)

Memorandum of February 1, 1966, from the General Counsel recommending that the Solicitor General be requested to file a petition for certiorari for review of the opinion and judgment of October 22, 1965, of the United States Court of Appeals for the Seventh Circuit remanding the above case to the Commission with directions to grant the petitioner's request that the order to cease and desist in Docket 8070 be stayed until such time as the Commission shall investigate and proceed against the pricing practices of competitors of Universal-Rundle. In accordance with his recommendation, the General Counsel transmitted draft of letter to the Solicitor General.

FEBRUARY 4, 1966.

Re *Universal-Rundle Corporation v. Federal Trade Commission*, 7th Cir., No. 14763—FTC Docket 8070.

HON. THURGOOD MARSHALL,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On October 22, 1965, the United States Court of Appeals for the Seventh Circuit issued its opinion and judgment remanding this case to the Commission, finding that the Commission patently abused its administrative discretion in refusing to stay the effect of an order to cease and desist against Universal-Rundle Corporation (352 F.2d 831). The Commission's petition for rehearing and rehearing *en banc* was denied by separate orders on December 17, 1965, Judge Swygert voting to grant rehearing *en banc*. The time for filing a petition for certiorari will expire on March 17, 1966.

For the reasons hereinafter stated, the Commission believes that certiorari is warranted.

Universal-Rundle Corporation is a nationwide manufacturer, distributor, and seller of plumbing fixtures. On June 12, 1964, by unanimous decision, the Commission ordered that the corporation cease and desist discriminating in the price of plumbing fixtures sold to competing customers in violation of Section 2(a) of the Clayton Act (P.A. 28-45). This order was issued upon the finding that Universal-Rundle's practice of granting substantial discounts on "U-R" brand plumbing fixtures sold in truckload quantities injures other Universal-Rundle customers that are unable to buy in such volume. On July 20, 1965, after the order to cease and desist was issued, Universal-Rundle petitioned the Commission to stay the effective date of the order until such time as the Commission shall have instituted industry-wide proceedings to correct the truckload discount practices of other plumbing fixture manufacturers (P.A. 46-56). Universal-Rundle had not contended in its defense of the charges of the complaint that the Commission should have proceeded on an industry-wide basis or that it should have issued complaints simultaneously against other members of that industry: indeed, it had not even alleged that its competitors were engaged in similar practices. Although its petition for a stay was supported by an affidavit, there is no evidence in the record, in the adversary sense, that the allegations of the petition are true.

On August 4, 1964, the Commission, in the exercise of its discretion (see *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958)) denied this petition on grounds that are patently reasonable (P.A. 62-63). Noting that it had not held, as contended by Universal-Rundle, that truckload discounts are illegal *per se* under Section 2(a), it stated what seems to be obvious—that "it must be determined in each case [of alleged violation of Section 2(a)] whether the discount creates a price difference whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anticompetitive effects." The Commission pointed out that even if a *prima facie* violation by Universal-Rundle's competitors were established, each competitor could interpose the statutory defenses to justify the discrimination (*viz.*, meeting competition and cost justification, neither of which was urged by Universal-Rundle). It held, therefore, that "the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industry-wide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent."

Thus the Commission gave specific and sound reasons why, in the exercise of its discretion, it refused to stay the order to cease and desist. In light of its analysis of the situation before it, quoted at length in our main brief (pp. 50-51), it is difficult to see how the court could state (slip op. 5): "It is apparent that the Commission has directed its attack against a general practice which is prevalent in the industry," and "No reason is apparent why the Commission did not bring in [Universal-Rundle's] larger, competitors and seek a final decree covering all of them."

Section 11(c) of the Clayton Act authorizes the court of appeals upon the filing of a petition for review to "enter a decree affirming, modifying, or setting aside" the order of the Commission, and "enforcing the same to the extent that such order is affirmed * * *." But the court did not perform its statutory function. It did not pass upon the principal questions raised by the appeal, which were concerned primarily with the substantiality of the evidence to support the Commission's findings of the existence of competition and injury. It noted that Universal-Rundle is the sixth largest manufacturer of plumbing fixtures in the industry, and that it grants truckload discounts on all items averaging about 10%. It assumed, contrary to fact (see Petition for Rehearing 6-7) that Universal-Rundle's larger competitors also granted truckload discounts on all items, averaging 13% to 18%. It held that the Commission's "approach" in "centering this proceeding solely" on Universal-Rundle was "inequitable" and "unjustified," and constituted "a patent abuse of discretion" within the meaning of those words as used in the Supreme Court's decision in *Moog, supra*. It reached this conclusion solely because Universal-Rundle had alleged that some competitors sold some products at truckload discounts, which, as the Commission held, is not in itself unlawful.

The court "reserved" ruling on the merits of the Commission's order to cease and desist, set aside the Commission's order denying the petition for a stay, remanded the case and directed the Commission to grant the relief prayed.

Almost every sentence of the *Moog* decision, rather than supporting the court of appeals, is squarely in point to the effect that the court exceeded its authority and usurped the function of the Commission. As the Supreme Court said, whether an order such as this "should be held in abeyance until the respondent's competitors are proceeded against is for the Commission to decide" (355 U.S. at 413-414). If the Commission did not abuse its discretion in *Moog*, where the court of appeals had found that the company proceeded against was facing economic extinction" because of the existence of the order, it is impossible to conceive that it abused its discretion here, where the only allegation is that business losses may occur because some competitors are selling some products at truckload discounts (see our Main Brief 52-53, Petition for Rehearing 10-13).

Moreover, the Seventh Circuit's decision not only is contrary to *Moog* but is contrary to a decision of a different panel of the same court in *United Biscuit Company of America v. Federal Trade Commission* (350 F.2d 615 (1965), decided August 9, 1965, just two and one-half months prior to the decision in this case). There, relying on *Moog*, the court of appeals correctly held (at 624): "The Commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected." A petition for certiorari was filed by United Biscuit on January 7, 1966, and the Commission understands that the Antitrust Division is preparing a brief in opposition.

As we have stated, the Commission believes that the question raised here is controlled by the *Moog* decision. Since it may be said that certiorari is not warranted because all the Supreme Court could do is reaffirm its decision in *Moog*, we point to a specific reason why, in our view, Supreme Court review should be requested.

The Seventh Circuit, generally speaking has been unfriendly to the efforts of the Commission in recent years. Members of the bar, particularly the antitrust bar, are aware of this, and for this reason, we believe, more petitions for review of Commission orders to cease and desist are filed there than in any other circuit—far more than that court's numerical share if all eleven circuits were equally favored.

While statistics as to the number of petitions filed during specific periods are not readily available, the same picture is presented by the number of decisions. Between July 1, 1962 and June 30, 1965 (fiscal years 1963, 1964 and 1965), the several courts of appeals decided 34 restraint of trade cases on petitions to review Commission orders to cease and desist, 14, or 41%, of these were decided by the Commission. The Commission is justly apprehensive, we believe, that if this decision stands an even larger proportion of petitions to review will be filed in the Seventh Circuit, particularly in cases such as this where the Commission, in its discretion, has proceeded on a case-by-case method against less than all members of an industry. This is aside from the effect the decision may have on other circuits.

If you agree with the Commission that certiorari should be sought, it may be that you will want to request summary reversal in light of the Supreme Court's decision in *Moog*.

Transmitted herewith is a copy of a letter dated November 24, 1965, from the General Counsel of the Department of Agriculture to the General Counsel of the Commission expressing concern over the effect of the decision on the administration of such statutes as the Commodity Exchange Act, the Packers and Stockyards Act and the Perishable Agricultural Commodities Act. Also transmitted are the briefs and appendix filed in the court of appeals, slip opinion and judgment, petition for rehearing and the orders denying rehearing.

By the Commission.

PAUL RAND DIXON, *Chairman*.

BASCOM DOYLE

21. *Bascom Doyle v. F.T.C.*, 356 F.2d 381 (5th Cir. 1966) and *Pacific Molasses Co. v. F.T.C.*, 356 F.2d 386 (5th Cir. 1966).

- (a) *Court Action*: Order against Doyle vacated and complaint dismissed.
(b) *Commission Action*:

1. On February 24, 1966 directed that certiorari not be sought and that Bureau of Restraint of Trade recommend what further action outside this adjudicative proceeding, if any, should be pursued against Pacific Molasses. *Vote*: 4-1, Commissioner MacIntyre not concurring.

2. On March 29, 1966 directed a *de novo* investigation of Pacific Molasses. *Vote*: 5-0.

3. On July 28, 1966 complaint dismissed without prejudice. *Vote*: 4-0, Commissioner MacIntyre not participating for minute record only.

FEBRUARY 24, 1966.

- (2) *Pacific Molasses Company and James M. Ferguson v. Federal Trade Commission*, 5th Cir., No. 21,752, *Bascom Doyle v. Federal Trade Commission*, 5th Cir., No. 21,714, (Docket 7462—*Pacific Molasses Company*)

Memorandum of February 15, 1966, from the General Counsel regarding the opinions of January 24, 1966, of the United States Court of Appeals for the Fifth Circuit, setting aside the order in Docket 7462 against Pacific Molasses Company and James M. Ferguson, and remanding the case to the Commission; and setting aside the order insofar as it ran against Bascom Doyle, a former branch manager of the company, as an individual, and dismissing the complaint as to him.

The General Counsel recommended, for the reasons recited, that certiorari not be sought in either of the above matters, and suggested that, if the Commission agrees, it may wish to refer the matter to the Bureau of Restraint of Trade for a recommendation as to whether the case against Pacific Molasses should be tried again; and in this connection, pointed out that the evidence on which the order was based is now over ten years old.

In his adjudicative-matter circulation of February 21, 1966, Mr. Dixon concurred in the recommendation that certiorari not be sought, and recommended that the matter be referred to the Bureau of Restraint of Trade for recommendation as to what further proceedings, if any, should be pursued against Pacific Molasses Company.

After consideration, on motion of Mr. Dixon, it was directed that certiorari not be sought in either of the above cases.

Mr. MacIntyre did not concur in the foregoing action.

The matter was referred to the Bureau of Restraint of Trade with instruction to submit to the Commission that Bureau's recommendation as to what further action outside this adjudicative proceeding, if any, should be pursued against Pacific Molasses Company.

MARCH 29, 1966.

- (2) *Docket 7462—Pacific Molasses Company*

Memorandum of March 24, 1966, from the Bureau of Restraint of Trade reporting pursuant to the action of February 24, 1966, and recommending that action along the lines indicated below be taken in this matter.

This item was submitted as special-matter with Mr. Dixon's circulation of March 28, 1966.

On March 29, 1966, pursuant to the recommendation of Mr. Dixon, the five Commissioners directed that an investigation *de novo* of Pacific Molasses Company be conducted in conjunction with the compliance investigations in Dockets 7461 and 7462—Southwestern Sugar & Molasses Company, et al., being undertaken by the Division of Compliance, Bureau of Restraint of Trade.

JULY 28, 1966.

(2) *Pacific Molasses Company, et al v. Federal Trade Commission*, 5th Cir., No. 21,752 (Docket 7462—Pacific Molasses Company, et al.)

(a) "Respondents' Memorandum to the Federal Trade Commission Suggesting Mootness and Recommending Dismissal of the Above-entitled Matter," filed July 11, 1966, by counsel for the respondents; and (b) answer to the above memorandum, by counsel supporting the complaint, approved by the Director of the Bureau of Restraint of Trade, filed July 19, 1966.

With his adjudicative-matter circulation of July 26, 1966, Mr. Dixon submitted memorandum of the same date in which he expressed the opinion that the case should be dismissed and the staff allowed to look into the respondent's current pricing practices in the course of the investigation it is now conducting in the molasses industry. Mr. Dixon submitted draft of an appropriate order.

After consideration, the Commission having considered the relative staleness of the evidence in the record of this proceeding at this point and other relevant factors, and having determined that further proceedings, if any, should be directed to the respondent's current pricing practices, dismissed the complaint in this matter without prejudice.

Order to the above effect was approved.

For the minute record only, Mr. MacIntyre did not participate in the foregoing action.

JANTZEN, INC.

22. *F.T.C. v. Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966), *rev'd and remanded*, 386 U.S. 228 (1967).

(a) *Court Action*: Petition for enforcement of cease and desist order dismissed.

(b) *Commission Action*:

1. On March 29, 1966 directed that certiorari not be sought. *Vote*: 3-2. Commissioners Dixon and MacIntyre voting for certiorari.

2. On April 5, 1966, action of March 29, 1966 was rescinded. Directed that Solicitor General be requested to file a petition for certiorari. *Vote*: 3-2. Commissioners Elman and Jones voting in the negative.

3. On April 13, 1966 approved letter requesting petition for certiorari with accompanying statements of Commissioners Elman and MacIntyre. *Vote*: 5-0.

4. On June 21, 1966 directed that revised letter re *Jantzen* be sent to Senator Sparkman, *Vote*: 3-2, Commissioner Elman not concurring, Commissioner Jones, for the minute record only, adhered to position recorded in action of April 6, 1966.

MARCH 29, 1966.

(9) *Federal Trade Commission v. Jantzen, Inc.*, 9th Cir., No. 20,021, (Docket 7247—Jantzen, Inc.)

Memorandum of March 23, 1966, from the General Counsel with reference to the opinion and judgment of February 4, 1966, of the United States Court of Appeals for the Ninth Circuit dismissing the Commission's application for affirmance and enforcement of its order in Docket 7247.

The General Counsel expressed the opinion that the case is an important one and that Supreme Court review is warranted, and transmitted draft of letter to the Solicitor General requesting that he file a petition for certiorari.

In his special-matter circulation of March 23, 1966, Mr. MacIntyre concurred in the above recommendation.

After consideration, Mr. MacIntyre moved that certiorari be sought. The motion was seconded by Mr. Dixon.

As to Mr. McIntyre's motion, Messrs. Dixon and MacIntyre voted in the affirmative, and Messrs. Elman and Reilly and Miss Jones voted in the negative. The motion was lost for want of a majority.

Whereupon, it was directed that certiorari not be sought in the above matter.

APRIL 5, 1966.

(5) *Federal Trade Commission v. Jantzen, Inc.*, 9th Cir., No. 20,021 (Docket 7247—Jantzen, Inc.)

Special-matter circulation of April 4, 1966, by Mr. MacIntyre with which he transmitted memorandum of the same date referring to the action herein of March 29, 1966, under which it was directed that certiorari not be sought in the above matter; transmitting memorandum of April 1, 1966, from the Bureau of Restraint of Trade to Mr. MacIntyre, submitted pursuant to his oral request of the same date, in which the Bureau submitted its views as to the practical problems immediately presented, and in the offing, as a result of failure to seek certiorari in this case, and recommending, for the reasons recited, that the Commission reconsider and reverse the above action, and request the Solicitor General to seek certiorari in the Jantzen case.

In her memorandum of April 4, 1966, Miss Jones recommended that, if certiorari is not sought in the matter, the staff be given instructions along the lines of her memorandum.

The Director of the Bureau of Restraint of Trade and the Chief of the Division of Compliance of that Bureau, and the Assistant General Counsel for Appeals, Office of the General Counsel, and Attorney Miles J. Brown of that Office, were called in and consulted regarding this matter.

After consideration, on motion of Mr. MacIntyre, the action herein of March 29, 1966, was reconsidered and rescinded.

The Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment of February 4, 1966, of the United States Court of Appeals for the Ninth Circuit in the above matter, and the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by the General Counsel with memorandum of March 23, 1966, was approved.

As to the foregoing action, Messrs. Dixon, Reilly and MacIntyre voted in the affirmative, and Mr. Elman and Miss Jones voted in the negative. Mr. Elman requested that he be shown, as follows, on the letter to the Solicitor General:

"Commissioner Elman does not concur for reasons he will set forth in a letter to be sent to the Solicitor General."

Mr. Reilly requested that the letter to the Solicitor General be withheld until such time as the several Commissioners have had an opportunity to read Mr. Elman's letter.

The above staff members were excused.

APRIL 13, 1966.

(6) *Federal Trade Commission v. Jantzen, Inc.*, 9th Cir., No. 20,021 (Docket 7247—Jantzen, Inc.)

Pursuant to the action of April 5, 1966, the above matter was considered further by the Commission in the light of the dissenting views of Mr. Elman, as circulated by him to the other Commissioners with informal memorandum dated April 12, 1966.

After consideration, it was directed that the letter to the Solicitor General approved herein under the action of April 5, 1966, be forwarded after signature by the Chairman, and that the statement by Mr. Elman and the statement by Mr. MacIntyre on Mr. Elman's views accompany the letter.

JUNE 21, 1966.

(2) Senate Select Committee on Small Business in re *Federal Trade Commission v. Jantzen, Inc.*, 9th Cir., No. 20,021 (Docket 7247—Jantzen, Inc.)

Special-matter circulation of June 21, 1966, by Mr. Dixon with which he presented, pursuant to the action of June 16, 1966, a proposed draft of letter, as prepared by the Office of the General Counsel, in reply to letter of June 14, 1966, from Hon. John Sparkman, Chairman of the above Committee, with reference to the decision of the United States Court of Appeals for the Ninth Circuit in the above matter.

After consideration the General Counsel was instructed to revise the letter to Chairman Sparkman submitted by Mr. Dixon to advise that copies of Chairman Sparkman's letter of June 14, 1966, and attachments, are being transmitted to the Solicitor General, and that copies of the Commission's reply to the letter of June 14, 1966, are being transmitted to the Solicitor General; to enclose, with the Commission's reply to Chairman Sparkman, copies of the Commission's letter to the Solicitor General requesting that he file a petition for a writ of certiorari to review the Court's decision, and to note Mr. Elman's position as follows on the letter to Chairman Sparkman:

"Commissioner Elman does not concur in this letter and is sending you a separate letter expressing his views in this matter."

It was directed that the revised letter to Chairman Sparkman be forwarded after signature by the Chairman.

In addition to the information indicated above, the reply to Chairman Sparkman included advice that the Commission has not yet been advised whether

the Solicitor General will file the petition for certiorari requested by the Commission: that the Commission does not believe that it will be "as easy and effective" to issue new complaints for violations of pre-amendment orders as by bringing enforcement proceedings, and that, if the question decided by the Court of Appeals in *Jantzen* is ultimately affirmed, the Commission agrees that it will be necessary to give serious consideration to the need for further legislation.

In accordance with the above action, the General Counsel was instructed to send copies of the revised letter in reply to Chairman Sparkman to the Solicitor General.

As to the foregoing action, Mr. Elman, as indicated, did not concur, and Miss Jones, for the minute record only, adhered to the position recorded in the action of April 6, 1966, herein pursuant to which the Solicitor General was requested to petition the Supreme Court for a writ of certiorari to review the opinion and judgment in question.

APRIL 13, 1966.

Re Federal Trade Commission v. Jantzen, Inc., 9th Cir. No. 20,021—FTC Docket 7247.

HON. THURGOOD MARSHALL,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On February 4, 1966, the United States Court of Appeals for the Ninth Circuit issued its opinion and judgment dismissing the Commission's application for affirmance and enforcement of its order to cease and desist in this case. The decision presents a question of statutory interpretation of great importance in enforcing the Clayton Act, and we believe Supreme Court review is warranted.

The facts are not in dispute. The Commission issued its complaint on September 4, 1958, charging *Jantzen, Inc.*, a leading clothing and sportswear manufacturer, with granting discriminatory advertising allowances in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. *Jantzen* entered into an agreement consenting to the entry of an order to cease and desist and waiving all right to challenge or contest the validity of the order. The consent order was issued on January 16, 1959, and modified in a minor respect on March 26, 1959. Later, in July 1964, the Commission directed that an investigational hearing be conducted to determine whether *Jantzen* was complying with the order. In November 1964, at a prehearing conference before an examiner, *Jantzen* stipulated in writing that it had violated the order. Accordingly, in April 1965, the Commission applied for affirmance and enforcement.

In dismissing the Commission's application, the court held that Congress, in enacting the "finality" amendment to Section 11 of the Clayton Act in July 1959, repealed the provisions conferring jurisdiction upon courts of appeals to affirm and enforce orders issued prior to that date. The effect of this ruling is to jeopardize all outstanding unenforced Clayton Act orders issued by the Commission between 1914 and 1959, almost 400 in number.

The court's basic error is plain. It held that when Congress amended the section "to read as follows," and omitted the provisions in question, it "expressly" repealed them for all purposes (Slip Op. 4-5, 7). In so holding, the court failed to realize that the rule it applied, like other technical rules of statutory construction, is not absolute, and must always yield to a contrary underlying intention of Congress in enacting the legislation (see Br. 22, n. 41; Reply Br. 5-7). Thus, only recently the Supreme Court held that, in construing the Clayton Act, "literal wording" must never be permitted to frustrate "basic policy objectives." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320-21 (1965).

The legislative history of the "finality" amendment, Public Law 86-107, is discussed in detail in the Commission's brief (25-33), and will not be repeated here. It is significant that nowhere in the history of the legislation, specifically designed to strengthen Clayton Act order enforcement, did Congress evidence any intention to take the totally incongruous step of nullifying the major part of the Commission's accomplishments under that statute for the first 45 years of its existence.

Apart from the foregoing, the court was unduly influenced by the fact that the only reference to prior orders in the amendment is a provision making the old review and enforcement procedure applicable to pending court proceedings. To the court, this was a "strong indication that the Congress knew, and intended, that [the old procedures were] repealed for other purposes" (Slip Op. 6). But in *Sperry Rand Corp. v. Federal Trade Commission*, 288 F. 2d 403, 406 (D.C. Cir. 1961), it was held that the only reason Congress included such a provision was to remove any doubt as to the application of the old procedure to pending cases. It removed this doubt, the court held, by "explicitly excepting" these orders from the amendment's operation.

The court also thought it "significant," that in *Sperry Rand* the Commission itself took the position that the old Section 11 procedures were no longer applicable. In that case, the Commission's complaint charged violations of Sections 2(a) and 2(d). Just as in this case, the respondent executed a consent agreement, pursuant to which a cease-and-desist order was entered in November 1958, prior to the passage of the "finality" act. As the court's opinion recites, the Commission had issued a "press release" shortly after the date of enactment in which it expressed its interpretation that the new enforcement procedures applied to existing orders not appealed within 60 days thereafter. But the court held that the Commission was in error, and that, unlike the Wheeler-Lea Amendment to the Federal Trade Commission Act, Congress had not made the new procedures "retroactive." But the court did *not* decide that Congress had eliminated the old procedures. Instead, it specifically stated (288 F. 2d at 406):

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered."

Further, this holding received the Supreme Court's express approval in *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360 (1962). There the Court, recognizing that the "finality" amendment did not apply to the Commission's 1957 order against Broch, stated (368 U.S. at 365; emphasis added):

"In considering Broch's challenge to paragraph (2) *it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act*—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—*do not apply to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 477-480."

The Court went on to discuss various "interpretive tools" which could be used in a "future enforcement proceeding," stating (368 U.S. at 367; emphasis added):

"And, we repeat, these various interpretive aids *will have to be brought to bear by a Court of Appeals* upon a particular practice of Broch, and will have to yield the announced result that such practice violates the order, before Broch can be subjected to penalties because of still a second repetition of the violation."

The court in *Jantzen*, however, characterized these holdings as "dicta," stating, "[i]t is perfectly clear that the question here presented was not before the court in either case" (Slip Op. 9-10). But to us it seems perfectly clear that, while the question was not squarely presented, the continued applicability of the old procedures was a necessary predicate underlying both decisions.

The court of appeals further attempted to distinguish *Broch* on the ground that it was a case already in litigation at the time of the passage of the amendment. But this was *not* the reason the Supreme Court deemed the old procedures applicable, for it stated, citing *Sperry Rand* (368 U.S. at 365, n. 53):

"The order herein was entered by the Commission on December 10, 1957. The procedures enacted by the 1959 amendments therefore do not apply to it."

Thus the Court specifically held that the reason the old procedures applied to the *Broch* order was that the Commission's order was issued prior to the date of the amendment.

The court of appeals also erred in interpreting the application of the General Savings Statute, 1 U.S.C. § 109 (1964). As pointed out in our reply brief (p. 8, n. 12), while there is no decided case construing an order of the Federal Trade Commission as a "liability" within the meaning of that provision, there are several precedents in point involving orders of the National Labor Relations Board. See, e.g., *National Labor Relations Board v. National Garment Co.*, 166 F.2d 233 (8th Cir. 1948), *ccrt. denied*, 334 U.S. 845. In this connection it should be noted that there is no basis for the court's assertion that a violation of the Commission's order must have occurred prior to the date of the "finality" amendment as a prerequisite to the applicability of the old procedures under the General Savings Statute.

It is difficult to understand the court's comment that the affected orders, although unenforceable, "are just as authoritative and persuasive as they ever were" (Slip Op. 11). And equally incomprehensible is the court's assumption that "[a]ll that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order" (Slip Op. 12). These points were made by Jantzen in his brief filed in the court of appeals, and were fully answered in the Commission's reply brief (9-13). It is sufficient to note here, we believe, that the ultimate sanction of contempt under the old procedures necessarily constituted a deterrent to the violation of old orders to cease and desist. Under the Ninth Circuit's decision, however, no possible enforceable sanction remains.

According to a study made by the Commission's staff there are some 439 outstanding pre-amendment Clayton Act orders. Twenty-nine of these have been affirmed and enforced by the courts, and 23 affirmed only. This leaves a total of 387 orders directly affected by the *Jantzen* decision. To illustrate the importance of resolving the questions raised, we are attaching a list of many corporate respondents to the outstanding orders. All of the corporations listed, including many of the nation's largest and most important companies, are presently actively engaged in business.

Transmitted herewith are copies of the transcript of the record in the court of appeals, the Commission's application for affirmance and enforcement, the respondent's answer to the application, the briefs and the slip opinion.

By the Commission. The dissenting views of Commissioner Elman and an additional statement of Commissioner MacIntyre are attached.

PAUL RAND DIXON, *Chairman*.

Re: *FTC v. Jantzen*

DISSENTING VIEWS OF COMMISSIONER ELMAN

APRIL 12, 1966.

I cannot agree that the decision of the Ninth Circuit in this case presents a question "of great importance in enforcing the Clayton Act" warranting Supreme Court review, or that it "jeopardizes" the 400 outstanding unenforced Clayton Act orders issued by the Commission between 1914 and 1959.

The case does not appear to fall within the established standards of certiorari jurisdiction. There is no conflict of decisions requiring resolution by the Supreme Court. For the various reasons spelled out in the opinion of the Court of Appeals, the decision will not impose any practical impediments to the enforcement of the Clayton Act. Its alleged adverse effects are theoretical, abstract, and highly exaggerated.

While there are 400 outstanding pre-1959 Clayton Act orders, there have been exceedingly few enforcement proceedings arising from alleged violations of such orders. The enforcement proceedings in the last five years can be counted on the fingers of one hand. So far as the Commission knows, the respondents under such orders are generally obeying them. Another explanation for the paucity of such proceedings is the cumbersome and inadequate (see also the various other adjectives quoted in footnote 11 of the court's opinion) pre-1959 method of enforcement. But like the Court of Appeals, I "cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement."

As the Court of Appeals has pointed out, the full objectives of Clayton Act enforcement against respondents believed to be violating pre-1959 orders can be more effectively and sensibly achieved by the issuance of new complaints, instead of wasting time and money by attempting to enforce the orders through

the old ineffectual method. Under either procedure the Commission must hold an adjudicative hearing to establish a violation. But by proceeding with a new complaint, the Commission avoids all of the messy problems and pitfalls of the pre-1959 procedure. An order entered after a hearing on a *new* complaint becomes final by operation of law, without the Commission's having to go to a Court of Appeals, if the respondent does not seek review in 60 days. On the other hand, a Commission finding of violation in a hearing held under the pre-1959 procedure is not final and self-executing in any case; its enforcement can be obtained only after the Commission goes to the Court of Appeals *and* satisfies the court that respondent has violated the order.

The rules and procedures governing a hearing on a new complaint are established and clear. On the other hand, a "compliance investigation" proceeding under the pre-1959 method of enforcement is so anomalous and extraordinary that the Commission's Rules of Practice provide no specific guidance on how it shall be conducted. In recent years the Commission has in these proceedings established *ad hoc* ground rules designed to assure that the forms of adjudication are satisfied without impairing the investigative character and purpose of the proceeding. The reasons for this hybrid procedure lie in the peculiarities and absurdities of the pre-1959 enforcement scheme.

Under the pre-amendment Clayton Act the Commission, as a prerequisite of going to the Court of Appeals for a decree of enforcement, must satisfy the court that the respondent has violated the order. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470. However, if the Commission's finding of violation "is made as a result of an *ex parte* informal investigation, there are no 'pleadings, evidence, and proceedings' within the meaning of the statute. In this event the court, if it affirms the cease and desist order and if the assertion of violation is disputed, must remand the matter to the Commission for formal proceedings on the question of whether the order has been violated. Indeed, this is the usual practice." *F.T.C. v. Washington Fish & Oyster Co., Inc.*, 271 F.2d 39 (9th Cir. 1959). To avoid such remands, the Commission adopted the practice of conducting "formal" compliance investigations, not *ex parte* but with all the trappings of an adjudicatory proceeding.

It is asserted that the decision of the Ninth Circuit has the effect of "nullifying the major part of the Commission's accomplishments under [the Clayton Act] for the first 45 years of its existence." The implication is that, if the Ninth Circuit's decision stands, the lid will be off and the respondents under the outstanding 400 pre-1959 orders will start violating them with impunity. This seems to be far fetched, to put it mildly. The Commission has never before regarded the pre-1959 method of enforcement as an effective deterrent against violation of Clayton Act orders. In fact, it kept telling Congress the opposite until some action was finally taken in 1959. How can the Commission *now* tell the Supreme Court, for purposes of getting certiorari, that the pre-1959 method of enforcement is so essential and important? If the Commission wanted Congress to preserve the pre-1959 method for enforcement of pre-1959 orders, why did it not propose a provision to that effect in the Finality Act? If, through inadvertence, neglect, or otherwise, such a provision was not included by Congress, why should the Supreme Court be asked to supply the omission? It is empty hyperbole to say that the Ninth Circuit has "wiped out" the 400 pre-1959 orders. It is more accurate to say that it has wiped out an archaic and ridiculous (see footnote 11 again) method of enforcement whose total demise the Commission should be the first to cheer.¹

COMMISSIONER MACINTYRE'S COMMENT ON THE DISSENTING VIEWS OF COMMISSIONER ELMAN

The impossibility of the enforcement of more than 400 outstanding Clayton Act orders issued by the Commission, but not now subject to orders of enforcement by the courts, is perhaps not a matter "of great importance" to Commissioner Elman. Nevertheless, it remains a matter of considerable importance to the Commission and the public. In the closing paragraph of his dissent Commissioner

¹ In any event, the pending *Standard Motor Products* case in the Second Circuit offers the Commission an opportunity to secure a conflict of decisions—assuming it is not the better part of wisdom to accept the Ninth Circuit's interpretation of the Finality Act.

Elman states that the Commission never regarded the method of enforcement of the pre-1959 Clayton Act orders as an effective deterrent. He continues that the Commission had, in fact, "kept telling Congress the opposite [*i.e.*, that it had no effective deterrent] until some action was finally taken in 1959." He is thereby suggesting in effect that the Commission felt the pre-Finality Act orders were unenforceable as a practical matter. He criticizes the Commission for its effort to get Supreme Court review of this question on the basis that the pre-1959 orders and methods of enforcement are ineffective.

What the Commission was really seeking prior to 1959 was a law that would permit imposition of penalties upon proof of the *first violation*. The Commission was of the opinion that the public interest would be better served if an order did not have to await proof of a second or third violation before a court entered its order of enforcement and penalties could be applied. The proof of a post-1959 order violation will probably prove as difficult as the proof of a violation of a pre-1959 order. Under the Finality Act of 1959, you need prove only the one violation and penalties will apply. This was what the Commission felt was needed to make enforcement of Clayton Act orders more effective. This was the objective of the Commission prior to 1959 in seeking the new law. Commissioner Elman's arguments notwithstanding, the Commission at no time prior or subsequent to 1959 was of the opinion that the pre-Finality Act orders which had not been enforced by the courts were unenforceable.

FLOTILL PRODUCTS, INC.

23. *Flotill Products, Inc. v. F.T.C.*, 358 F.2d 224 (9th Cir. 1966), *rev'd and remanded*, 389 U.S. 179 (1967).

(a) *Court Action*: 2(c) order vacated and cause remanded.

(b) *Commission Action*:

1. On September 7, 1966 directed that Solicitor General be requested to file a petition for certiorari. *Vote*: 5-0.

2. On January 23, 1968 on motion that General Counsel be permitted to agree with counsel for Flotill that on remand 9th Circuit may set aside 2(c) portion of order. *Vote*: Commissioners Dixon and Jones voting in affirmative. Commissioners Elman and MacIntyre reserving their vote. Commissioner Nicholson abstaining. It was agreed that the matter would be considered at a further meeting.

3. On January 31, 1968, motion of January 23, 1968 was carried. *Vote*: 4-1, Commissioner Elman voting in the negative.

4. On September 18, 1968, Commission entered modified order to cease and desist. *Vote*: 3-1, Commissioner Elman dissenting. Commissioner Nicholson did not participate.

SEPTEMBER 7, 1966.

(195) *Flotill Products, Inc. v. Federal Trade Commission*, 9th Cir., No. 19,521 (Docket 7226—Flotill Products, Inc., et al.)

Memorandum of August 26, 1966, from J. B. Truly, Acting General Counsel, (a) referring to the decision of August 15, 1966, of the United States Court of Appeals for the Ninth Circuit, modifying the majority opinion of the panel in the above case in two minor respects and, as modified, adhering to the decision of the panel; and (b) recommending, for the reasons set forth in the submitted draft of letter to the Solicitor General, that certiorari be requested on the question of whether the Commission can issue a valid order with the concurrence of only two members of a quorum of three Commissioners.

Mr. Dixon submitted the matter to the Commission with his special-matter circulation of August 26, 1966.

On August 29, 1966, the five Commissioners directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review that portion of the decision in question holding that the Commission lacks authority to issue a valid order to cease and desist without the concurrence of a minimum of three Commissioners.

JANUARY 23, 1968.

(3) *Flotill Products, Inc. v. Federal Trade Commission*, Sup. Ct. No. 20, 9th Cir. No. 19,521 (Docket 7226—Flotill Products, Inc.)

Memorandum of January 15, 1968, from the Assistant General Counsel for Appeals, approved by the General Counsel, recommending, for the reasons recited, that the Commission authorize that office to agree with counsel for Flotill that the Court of Appeals for the Ninth Circuit may set aside that portion of the Commission's order dealing with practices found to be in violation of Section 2(c) of the Clayton Act.

Agenda matter circulation of January 19, 1968, by Mr. Dixon submitting memorandum of the same date in which he reported his further consideration of this matter, and, for the reasons recited, concurred in the staff's recommendation.

After discussion, Mr. Dixon moved that the Assistant General Counsel for Appeals be authorized to agree with counsel for Flotill that, on remand, the Ninth Circuit Court of Appeals may set aside the 2(c) portion of the Commission's order to cease and desist; and that after the court's action, the Commission issue an order dismissing the 2(c) part of the complaint and an opinion explaining why the Commission agreed that the order might be set aside and why the Commission did not, on the same facts, find that Nash-Finch had violated the order in Docket 4589.

The motion was seconded by Miss Jones, with Mr. Dixon and Miss Jones voting in the affirmative, Messrs. Elman and MacIntyre reserving their vote, and Mr. Nicholson abstaining from voting.

It was agreed that the matter be further considered at a later meeting.

JANUARY 31, 1968.

(1) *Flotill Products, Inc. v. Federal Trade Commission*, Sup. Ct. No. 20, 9th Cir. No. 19521 (Docket 7226—Flotill Products, Inc.)

Pursuant to agreement at the meeting of January 23, 1968, this matter was further considered by the Commission, and Commissioner MacIntyre voted in favor of Mr. Dixon's motion as recorded in the minutes of January 23, 1968. The motion was carried and it was so ordered.

As to the motion, Mr. Elman voted in the negative and requested that he be shown as follows on the papers that will be filed in the court: Commissioner Elman believes it would be preferable for the Commission to confess error openly and expressly.

SEPTEMBER 18, 1968.

(3) Docket 7226—Flotill Products, Inc., et al.

With his adjudicative circulation of September 16, 1968, Mr. Dixon submitted memorandum of the same date with which he transmitted draft of modified order to cease and desist to conform with the final decrees of the Court of Appeals for the Ninth Circuit. Mr. Dixon also transmitted for approval draft of opinion of the Commission.

After consideration, on motion of Mr. Dixon, the opinion of the Commission was approved.

The Commission entered its modified order to cease and desist in accordance with the final decrees of the Ninth Circuit Court of Appeals, and referred the same to the Secretary for issuance and service upon the parties together with the opinion of the Commission.

As to the foregoing action, Mr. Elman dissented and requested that he be so shown on the opinion and Mr. Nicholson did not participate and requested to be so shown on the opinion and order.

For the public record, Commissioners Dixon, MacIntyre and Jones voted in the affirmative as to the foregoing action, Commissioner Elman dissented and Commissioner Nicholson did not participate.

AUGUST 29, 1966.

Re *Flotill Products, Inc. v. Federal Trade Commission*, 9th Cir. No. 19,521—FTC Docket 7226.

HON. THURGOOD MARSHALL,
The Solicitor General, Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On August 15, 1966, the United States Court of Appeals for the Ninth Circuit, upon a rehearing *en banc*, upheld, by a vote of 5 to 4, the decision of a three-judge panel of the court reported at 358 F.2d 224. It held that the Federal Trade Commission lacks authority to issue a valid order to cease and desist without the concurrence of a minimum of three Commissioners. The decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Atlantic Refining Co. v. Federal Trade Commission*, 344 F.2d 599 (1965), *cert. denied*, 382 U.S. 939 (1966), and with the decision of the Court of Customs and Patent Appeals in *Frischer v. Bakelite*

Corp., 39 F.2d 247 (1930), *cert. denied*, 282 U.S. 852. Furthermore, the Ninth Circuit's decision places in question the validity of several Commission cases currently pending in the appellate courts. If followed, it will result in undue delay and uncertainty in the performance of the functions not only of the Federal Trade Commission but also of other administrative agencies which may be held to fall within the scope of the decision. For the reasons stated herein, we believe Supreme Court review of the question plainly is warranted.

Flotill Products, a California corporation principally engaged in the processing, canning, and sale of fruits and vegetables, was charged by the Commission with violating Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, by granting discounts "in lieu of brokerage" to Nash-Finch Company, one of its customers, and by granting brokerage to certain direct buyers known as "field brokers." It was further charged with granting discriminatory advertising and promotional allowances to certain favored customers in violation of Section 2(d) of the Act.

Upon cross appeals from the hearing examiner's initial decision, which included an order to cease and desist, oral argument was heard by the full panel of five Commissioners. Two of these, Commissioners Higginbotham and Anderson, had left the Commission prior to the issuance of the Commission's decision and order on June 26, 1964. Commissioner Reilly joined the Commission in the period between argument and decision, but did not participate in the decision because he had not heard oral argument. The remaining seat on the Commission was vacant at the time of the decision, with the result that only three Commissioners participated. On the question of the Section 2(c) charge concerning "field brokers," Chairman Dixon and Commissioner Elman voted for dismissal of the charge and Commissioner MacIntyre dissented. As to the Section 2(c) charge involving Flotill's dealings with Nash-Finch, Chairman Dixon and Commissioner MacIntyre voted for the issuance of an order and Commissioner Elman dissented. As to the Section 2(d) charge, all three Commissioners voted for the issuance of an order.

Subsequent to the date of the decision, Flotill filed a petition for reconsideration by the Commission (R. 119-32) contending, *inter alia*, that an order issued with the concurrence of less than three Commissioners is invalid. The Commission denied the petition in an order and accompanying opinion issued September 3, 1964 (R. 132-34). As to the validity of the 2-1 decision, the Commission cited *Drath v. Federal Trade Commission*, 239 F. 2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957), for the proposition that three Commissioners constitute a quorum in the absence of a controlling statutory provision, and *Frischer v. Bakelite Corp.*, *supra*, for the proposition that a majority of a quorum is sufficient to sustain the validity of the final order of an administrative body. Subsequent to this action, the Court of Appeals for the Sixth Circuit, in the aforementioned *Atlantic Refining* case, ruled that the Commission had authority to issue an order to cease and desist upon the vote of a majority of a quorum of three Commissioners.

On March 16, 1966, a three-judge panel of the Ninth Circuit ruled, with Judge Hamley dissenting, that an order issued by a 2-1 vote of the Commission is invalid. The court modified and, as modified, directed enforcement of the Commission's order pertaining to the 2(d) violations. Because of its ruling on the voting division of the Commission, the court did not reach the merits of the 2(c) question but remanded to the Commission to determine if three Commissioners agreed to the issuance of a 2(c) order.

A Commission petition for rehearing as to the question of the validity of a Commission order issued by a 2-1 vote was granted, and the court of appeals, sitting *en banc*, affirmed the majority ruling of the panel by a 5 to 4 vote. The majority of the court concurred in the majority opinion of the panel with two inconsequential modifications, while the minority concurred in the dissenting opinion of Judge Hamley.

The court held that the question of the validity of a Federal Trade Commission order issued by the vote of a majority of a quorum of the Commission "*relates to the interpretation of the FTC's enabling legislation.*" 358 F.2d at 230 (emphasis is the court's). It noted that the enabling legislation of certain administrative agencies, such as the National Labor Relations Board, the Interstate Commerce Commission and the Federal Power Commission, grants to those agencies authority to sit in panels. The court ruled that the absence of a similar provision in the enabling legislation of the Federal Trade Commission required a ruling that a

final order could issue only with the concurrence of an absolute majority of the Commission. The court referred to the Commission's rule (16 C.F.R. 1.7) that a majority of the members of the Commission constitutes a quorum for the transaction of business, which has been in effect since the inception of the agency, stating (358 F.2d at 229) :

"We could, perhaps, agree that the reasonable construction of such a rule would be that a majority of the quorum would be sufficient to render a decision, but do not find that argument dispositive in the absence of a clear showing that the FTC regulation is within the power of the FTC to adopt tested in the light of the extent of the power conferred upon the FTC by Congress."

The court stated that it did not question the validity of the Commission's practice of conducting hearings before less than the full membership, but was only holding that the concurrence of a minimum of three Commissioners was required to issue an enforceable order (358 F.2d at 230). The court ruled that the Commission was authorized to sit with less than the full membership by Section 1 of the Federal Trade Commission Act ("A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission"). It refused, however, to consider this provision as statutory authority for a quorum rule, and held that the provision was inapplicable to situations involving more than one vacancy.

The court's ruling apparently is unprecedented. No case or secondary authority was cited to support the decision, and the court recognized that its holding is inconsistent not only with the *Atlantic, Frischer* and *Drath* cases, *supra*, but also with the general rule applied to administrative bodies absent statutory provision (358 F.2d at 229). The court attempted to justify its ruling by distinguishing between matters involving "town meetings and city councils" and those involving "a statutorily created administrative tribunal like the Federal Trade Commission."

The court considered the broad rulemaking powers of administrative agencies, as noted in *Schreiber v. Federal Communications Commission*, 381 U.S. 279 (1965), and other cases, as applicable only to questions relating to the expertise of the agency in question and therefore immaterial to the issue here. The lengthy period of time during which the Commission's quorum rule has been in effect with the apparent acquiescence of Congress was not considered controlling by the majority, although the dissent placed great weight upon this. The court made no reference to Reorganization Plan No. 4 of 1961 (15 U.S.C. 41, 75 Stat. 837) in which Congress authorized the Commission to delegate its adjudicatory function to a panel of the Commission or even to a single Commissioner, although the Plan was called to the court's attention at the rehearing. The Commission's quorum rule was not enacted pursuant to the Plan, but the enactment of the Plan shows that Congress contemplated with approval the possibility of adjudicatory action by less than a majority of the Commission.

If the Commission is required to have a minimum of three votes to issue an order, decisions in cases where only three members can participate undoubtedly will be delayed until such time when a larger number can be mustered. Under the Ninth Circuit's rule, the presence of a *valid* quorum would fluctuate with the voting division among the members. As Judge Augustus Hand noted in upholding the validity of a decision rendered upon the vote of majority of a quorum, "Any other method of procedure would be awkward, if not impracticable," *Frischer & Co., Inc. v. Elting*, 60 F. 2d 711, 714-15 (2d Cir. 1932), *cert. denied*, 287 U.S. 649.

As detailed specifically in the papers transmitted herewith, there have been in the past numerous occasions on which the Commission has decided cases upon the participation of only three members. In the five fiscal years from 1962 through 1966, a total of 43 such decisions were rendered and fifteen of these were decided by a 2-1 vote. Vacancies in the Commission, disqualification, illness, and unavoidable absences frequently reduce to three the number of Commissioners participating in certain decisions. At present, there are several 2-1 decisions by the Commission awaiting decision in various courts of appeals. Subsequent to the panel decision in *Flotill*, the question of the validity of these decisions was raised in those cases where it had not already been in issue. In *Purolator Products, Inc. v. Federal Trade Commission*, 352 F. 2d 874 (7th Cir. 1965), Sup. Ct. No. 61, the question has been raised by motion for amendment to Purolator's petition for certiorari. The First Circuit in *Forster Mfg. Co. v. Federal Trade Commission*, 361 F. 2d 340 (1966), indicated, however, that the question must be timely raised. The question was timely raised and is pending

in at least two cases, *Luria Bros. & Co. v. Federal Trade Commission* (3d Cir. No. 14,402 and 14 separate related petitions), argued January 21, 1966, and *Lapeyre v. Federal Trade Commission* (5th Cir. No. 21,787), argued April 19, 1966. Moreover, the Commission is adhering to its interpretation of its authority in this respect, as indicated by the fact that as late as July 28, 1966, the Commission issued a final order against National Dairy Products Corporation by a 2-1 vote (Docket No. 7918).

The decision in this case is important not only to the Federal Trade Commission but to all administrative agencies which do not have specific provisions in their enabling legislation establishing a quorum and, perhaps, to those which have statutory quorum provisions but do not have specific authority to decide cases by a majority of a quorum. Subsequent to the panel decision in this case, inquiries were sent to the general counsels of 13 administrative agencies, in order to learn if they considered the decision applicable to them. Affirmative responses were received from three agencies, the Federal Power Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board. Efforts to file these responses with the Ninth Circuit at the rehearing were unsuccessful. The letters from these agencies reveal that the decision in this case conflicts with their practice and that, at least in the case of the Securities and Exchange Commission, there is judicial language supporting the practice. *Gearhart & Otis, Inc. v. Securities and Exchange Commission*, 348 F. 2d 798, 801 (D.C. Cir. 1964).

In view of the above, an authoritative pronouncement on this question by the Supreme Court is vital to the Federal Trade Commission.

Transmitted herewith are the pertinent documents filed in the court of appeals, slip opinion and relevant court orders, as well as a memorandum brief and supporting affidavits, with attachments, prepared by the Commission, which the court refused to file at the rehearing. Also transmitted are copies of the Commission's proposed decree insofar as the enforcement of the Section 2(d) portion of the order is concerned and Flotill's opposition thereto, which have not been acted upon by the court.

By the Commission.

PAUL RAND DIXON,
Chairman.

FRED MEYER, INC.

24. *Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351 (9th Cir. 1966), *rev'd*, 390 U.S. 341 (1968)

(a) *Court Action*: Commission directed to enter order in conformity with court's opinion

(b) *Commission Action*:

1. On June 15, 1966 General Counsel instructed to prepare draft of letter requesting Solicitor General to file petition for certiorari. *Vote*: 4-1, Commissioner Elman voting in the negative.

2. On July 28, 1966 directed that Solicitor General be requested to file petition for certiorari. *Vote*: 4-1, Commissioner Elman not concurring.

3. On October 6, 1966 authorized Mr. Truly to advise Mr. Friedman of Solicitor General's office that Commission agreed with his proposed recommendations to Solicitor General. *Vote*: 4-0, Commissioner Elman not participating.

JUNE 15, 1966.

(4) *Fred Meyer Inc., et al. v. Federal Trade Commission* 9th Cir. No. 18,903 (Docket 7492—*Fred Meyer, Inc., et al.*)

This matter was considered by the Commission in conjunction with Docket 8647—*Clairol Incorporated*, in which action was taken today.

After consideration, the General Counsel was instructed to prepare and submit to the Commission for consideration a draft of letter requesting the Solicitor General to petition the Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in the above matter.

As to the foregoing action, Mr. Elman voted in the negative and it was directed that he be shown as not concurring on the letter to the Solicitor General, and Mr. Reilly was recorded as in favor.

JULY 28, 1966.

(2) *Fred Meyer, Inc. et al. v. Federal Trade Commission* 9th Cir., No. 18,903 (Docket 7492—*Fred Meyer, Inc., et al.*)

Memorandum of July 27, 1966, from J. B. Truly, Assistant General Counsel for Appeals, approved by the General Counsel, reporting pursuant to the action of June 15, 1966, and transmitting draft of letter to the Solicitor General. The letter bore a notation that Mr. Elman does not concur in the request indicated below.

Mr. Dixon recommended approval of the letter.

After consideration, on motion of Mr. Dixon, the Commission directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to review the decision of March 18, 1966, of the United States Court of Appeals for the Ninth Circuit, and the letter making such request and transmitting pertinent material, as submitted by Mr. Truly, was approved and ordered forwarded after signature by the Chairman.

Mr. Elman did not concur in the foregoing action.

OCTOBER 6, 1966.

(1) *Fred Meyer, Inc., et al v. Federal Trade Commission* 9th Cir., No. 18,903
(Docket 7492—Fred Meyer, Inc., et al.)

Assistant General Counsel Truly was called in and described to the Commission the course of action which Attorney Daniel Friedman, of the Office of the Solicitor General, intends to recommend to the Solicitor General in connection with the petition for certiorari requested by the Commission under its action of July 28, 1966.

After consideration, the Commission agreed with Mr. Friedman's plan for proceeding in this matter, and authorized Mr. Truly to so advise Mr. Friedman.

Mr. Truly was excused.

Mr. Elman was recorded as not participating in the foregoing action.

JULY 29, 1966.

Re *Fred Meyer, Inc., et al. v. Federal Trade Commission*, 9th Cir. No. 18,903
(359 F.2d 351 (9th Cir. 1966)), FTC Docket 7492

Hon. THURGOOD MARSHALL,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On March 29, 1963, the Commission issued its opinion (R. 59-142) and proposed order to cease and desist (R. 56-58), finding that Fred Meyer, Inc., a large retail grocery chain in the Portland, Oregon, area, and two of its officers, had violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain of their suppliers to grant them promotional allowances illegal under Section 2(d) of the Clayton Act, and had violated Section 2(f) of the Clayton Act by knowingly inducing certain of the same suppliers to grant them discriminatory prices illegal under Section 2(a) of the Act. Commissioner Elman filed a separate opinion, concurring in part and dissenting in part (R. 143-147). On July 9, 1963, the Commission, with Commissioner Elman dissenting, issued its further opinion (R. 148-157) denying Fred Meyer's exceptions to the proposed order and issued its final order to cease and desist (Apdx. B, pp. 3b-5b, Commission's brief filed in court of appeals).

On March 18, 1966, the court of appeals decided the case, approving the Commission's decision in several respects but holding, contrary to the ruling of the Commission, that Section 2(d) of the Clayton Act does not apply where the discriminatory promotional allowances are paid to a direct-purchasing retailer but are denied to wholesalers who sell to independent retailers, who in turn compete with the direct-purchasing retailer in sales to consumers, and that Section 5, therefore, does not apply to the inducement by the direct-purchasing retailer of disproportionate promotional allowances. The court directed extensive modifications of the Commission's order, and remanded the case to the Commission to prepare a proposed decree conforming to the opinion. The proposed decrees were submitted by the Commission and by petitioners and, on July 1, 1966, the court entered its final decree, which is the only judgment or decree entered by the court. Petitioners' petition for rehearing *en banc*, addressed to the question of whether the court properly held that the evidence sustained the Commission's finding that petitioners knew or should have known that the concessions they induced were unlawful, was denied by order of the court dated June 8, 1966.

The Commission believes that, under the facts prevailing here, with which the court did not disagree, Section 2(d) requires suppliers, who grant a large grocery chain substantial allowances for the promotion of their products, to grant such allowances on proportionally equal terms to wholesalers whose customers compete with the chain in sales to consumers. In the Commission's view the wholesalers are "customers" of the suppliers "competing in the distribution" of the suppliers' products within the meaning of Section 2(d), and are entitled to the protection afforded by the Robinson-Patman Act. It follows (as the court apparently would have agreed) that if the Commission is correct, Section 5 of the Federal Trade Commission Act prohibits Fred Meyer's knowing inducement of the disproportionate promotional allowances.

If the Robinson-Patman Act is to be interpreted on a basis which will give effect to the intention of Congress, the court's decision on this point would appear to be inconsistent. For the court affirmed the Commission's corresponding determination that in the identical circumstances the suppliers' price differentials between the same direct-purchasing retailers and the same wholesalers are within the coverage of Section 2(a), and are illegal if other required elements of proof under that section are present. The consequence of the court's action is that Section 2(d) does not prohibit certain possible evasions of Section 2(a) which it was intended to prevent.

The Commission's reasons for its views are stated in detail in its opinion (R. 82-93) and in its brief in the court of appeals (57-66), to which you are referred. It is sufficient here to note that the question presented is important to the Commission in the administration of the Robinson-Patman Act, and is one which should be resolved by the Supreme Court. The issue is a recurring one. The same court of appeals decided the question contrary to the Commission's view in *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F. 2d 694, 707-709 (1964), which is now pending with the Commission on remand for the resolution of other issues. As recently as June 24, 1966, after the decision of the court of appeals in *Fred Meyer*, the Commission reaffirmed its interpretation of Section 2(d) in *Clairol Incorporated*, Docket 8647 (Slip Op. pp. 17-19).

In addition to the important question discussed above, the court of appeals committed serious error by substituting its own judgment for that of the Commission as to the remedy necessary to correct the illegal practices found. It rewrote the Commission's order. We do not request certiorari as to many of the court's revisions, such as its limitation of the prohibitions of the order as to the two individuals to their activities in behalf of the corporation. We do request that Supreme Court review be sought of the court's action in modifying the Commission's order in the following respects:

1. The modification of the Section 5 portion of the order so as to permit Fred Meyer to induce promotional allowances not granted to wholesalers who "compete in the distribution" of the suppliers' products, and whose retailer-customers compete with Fred Meyer in the resale of the products to consumers.

2. The modification of the order so as to make it apply only to the coupon aspect of Fred Meyer's business and "any comparable scheme."

3. The modification of the Section 2(f) portion of the order so as to specify the Section 2(a) defenses. The inclusion of these defenses in the order would seem to require the Commission, in a violation proceeding, to prove as a part of its *prima facie* case that Fred Meyer knew or should have known that the defenses would not have been available to its suppliers if they had been charged with violation of Section 2(a). The court's inclusion of these defenses in the order was entirely gratuitous, not having been suggested by Fred Meyer either before the Commission or the court, and is, we believe, contrary to the Supreme Court's decisions in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 475-77, and *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 426.

Transmitted herewith are slip copies of the court's opinion, the printed record, the proposed decrees submitted by the parties to the court, the court's final decree, the order denying Fred Meyer's petition for rehearing, the briefs filed in the court of appeals, and the Commission's opinion in *Clairol Incorporated*.

By the Commission, Commissioner Elman does not concur in this request.

PAUL RAND DIXON,
Chairman.

CALLAWAY MILLS CO.

25. *Callaway Mills Co. and Cabin Crafts, Inc. v. F.T.C.*, 362 F.2d 435
(5th Cir. 1966)

(a) *Court Action*: Order vacated.

(b) *Commission Action*:

1. On August 11, 1966 directed that Solicitor General be requested to file petition for certiorari. *Vote*: 4-0, Commissioner Elman not participating.

2. On October 25, 1966, after receiving letter from Solicitor General that he would not file petition for certiorari, approved letter to Solicitor General stating that Commission adhered to views in letter of August 11, 1966 and did not desire a conference. *Vote*: 4-0, Commissioner Elman not participating.

SEPTEMBER 7, 1966.

(176) *Callaway Mills Company, et al. v. Federal Trade Commission*, 5th Cir., No. 21,499 (Docket 7634—Callaway Mills Company, et al.) Cabin Crafts, Incorporated v. Federal Trade Commission, 5th Cir., No. 21,500 (Docket 7639—Cabin Crafts, Incorporated)

Memorandum of August 4, 1966, from Acting General Counsel Truly with reference to the judgments and consolidated opinion of June 13, 1966, of the United States Court of Appeals for the Fifth Circuit vacating the Commission's orders in Dockets 7634 and 7639.

For the reasons recited, Mr. Truly recommended that the Solicitor General be requested to file petition for writ of certiorari limited to the indicated question; and, in accordance with his recommendation, transmitted draft of letter to the Solicitor General.

In his special-matter circulation of August 10, 1966, Mr. Dixon concurred in Mr. Truly's recommendation, but recommended that the submitted redraft of letter to the Solicitor General be forwarded instead of the draft submitted by Mr. Truly.

On August 11, 1966, Mr. Dixon, Mr. MacIntyre (by direction to Mr. Dixon's office), Mr. Reilly, and Miss Jones (a) directed that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari limited to the indicated question; and (b) approved the letter to the Solicitor General making such request and transmitting pertinent material, as submitted by Mr. Dixon, and ordered the letter forwarded after signature by the Chairman.

Mr. Elman did not participate in the foregoing action.

OCTOBER 25, 1966.

(1) *Callaway Mills Company, et al. v. Federal Trade Commission*, 5th Cir., No. 21,499 (Docket 7634—Callaway Mills Company, et al.)

Draft of letter, prepared by the Office of the General Counsel, addressed to Hon. Thurgood Marshall, The Solicitor General, Department of Justice, in response to his letter of October 19, 1966, stating that Mr. Marshall has concluded not to file a petition for a writ of certiorari in the above matter.

Mr. Dixon presented the letter for consideration by the Commission.

After consideration, on motion of Mr. Dixon, the letter in reply to Mr. Marshall was approved and ordered forwarded after signature by the Chairman.

The letter included advice that the Commission continues to believe that its application of the law to the facts of this case accords with the Supreme Court's decision in *Staley* and the other cases cited in the Commission's letter of Aug

ust 11, 1966, and that the Commission believes that its views, which it still holds, were adequately presented in that letter, and for that reason the Commission does not request a conference.

Mr. Elman did not participate in the foregoing action.

AUGUST 11, 1966.

Re *Callaway Mills Company, et al. v. Federal Trade Commission*, 5th Cir. No. 21,499—FTC Docket 7634; *Cabin Crafts, Incorporated v. Federal Trade Commission*, 5th Cir. No. 21,500—FTC Docket 7639

HON. THURGOOD MARSHALL,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On June 13, 1966, the United States Court of Appeals for the Fifth Circuit rendered its judgments and its consolidated opinion vacating the Commission's order to cease and desist in the above cases. For the reasons stated below the Commission requests that a petition for certiorari be filed in the Supreme Court.

In 1959 the Commission issued complaints under Section 2(a) of the Clayton Act against 12 major carpet manufacturers, including Callaway and Cabin Crafts. On September 8, 1961, the Commission issued an order to cease and desist negotiated by consent against *James Lees and Sons Company*, 59 F.T.C. 418. Eight of the remaining eleven cases were settled by the negotiation of identical consent orders to cease and desist, adopted and approved by the Commission on February 10, 1964 (see 29 Fed. Reg. 3358 (March 13, 1964)). In addition to the instant cases, formal adjudicative hearings were had in *Philadelphia Carpet Co.*, Docket 7635, wherein that respondent offered a "cost justification" defense. The Commission's rejection of this defense was affirmed by the Third Circuit. *Philadelphia Carpet Co. v. Federal Trade Commission*, 342 F.2d 994 (1965).

On April 2, 1964, the Commission issued its superseding orders postponing the time within which the nine respondents who negotiated consent orders shall file reports of compliance until after the latest date of any final judicial determination in the *Philadelphia Carpet Co.*, *Callaway Mills* or *Cabin Crafts* cases. On May 14, 1965, the Commission issued a similar superseding order in the *Philadelphia Carpet Co.* case pending final judicial determination in the instant cases.

All of the above companies are manufacturers of textile products including carpeting, and they sell and distribute carpet products nationwide (Slip Opinion, pp. 2, 8). Carpet products are designed to sell at retail at particular price points, and manufacturers usually will produce more than one carpet product to sell at any one price point. These price points range from \$2.95 to \$49.95 per square yard in progressive increments of \$1.00 per square yard. At each price point there are many different styles of carpeting from which a customer may choose (Slip Opinion, p. 14).

Each manufacturer establishes a list price for each carpet product, which is the base price or billing price at which the carpeting is sold to the retailer. These list prices for carpeting to be resold by retailers at any one price point vary widely, and one manufacturer may offer several carpet products at different list prices for resale at a single price point (see Callaway Record, pp. 27-40).

Callaway and Cabin Crafts entered the carpet market in 1950, introducing a revolutionary and relatively inexpensive tufting process instead of the more expensive weaving process used up to that time by the other so-called "old line" carpet manufacturers (Slip Opinion, p. 2). After 1950, the "old line" carpet manufacturers also began producing tufted carpeting in addition to woven carpeting. Before 1950 and up until the present time, the established or "old line" carpeting manufacturers offered cumulative annual retroactive volume discounts to their purchasers. These discounts ranged from 1 to 5 percent depending on the annual volumes, although the purchase volume required by the manufacturers for a given discount varied (Slip Opinion, p. 3). After these carpet manufacturers also began producing tufted carpeting in addition to woven carpeting in 1950, they included purchases of tufted carpeting in the volumes qualifying for the various discounts. In 1955 and 1956, respectively, Callaway and Cabin Crafts also adopted cumulative annual retroactive discount schedules (Slip Opinion, pp. 4, 8). Thus, the actual net price per unit paid by the retailer to each carpet manufacturer is the list price less any discount received by the retailer from the manufacturer at the end of the year based on the retailer's annual purchases (Slip Opinion, p. 7).

In all of the above cases, the Commission challenged the price discriminations between competing retailers resulting from these discounts. Both Callaway and Cabin Crafts stipulated that such discriminations had the probable effect upon customer competition proscribed by Section 2(a), but defended the discriminations on the ground that the lower prices were made in good faith to meet the equally low prices of a competitor, as provided in Section 2(b) of the Act.

The examiner held that both Callaway and Cabin Crafts had established the Section 2(b) defense. The Commission, with Commissioner Elman dissenting, reversed the examiner and, substituting its findings and conclusions for those of the examiner, held that neither respondent had satisfied the burden of establishing that the discriminations were good faith efforts to meet the equally low prices of competitors. In so doing, the Commission in its Callaway opinion (incorporated by reference into its Cabin Crafts decision) stated (Callaway Record, p. 310) :

"The record here clearly shows that respondents' prices are not responsive to individual competitive situations but are set to be generally attractive to large volume customers. This is not a situation where departures from an otherwise lawful pricing formula are intermittently made to retain a customer being enticed by a competitor's lawful low price or to obtain a new customer by matching the price of the customer's former supplier. As a matter of fact, the net price to be paid on any one purchase is not even determined until a purchaser's year end volume is determined. Respondents are not offering prices to buyers and prospective buyers but a formula permitting them to set their own prices, and such a procedure does not fulfill the requirements of Section 2(b)."

The Commission further held that there was insufficient evidence upon which to base a finding that the products of Callaway's and Cabin Crafts' competitors generated saleability substantially equal to their own products to which the adopted discount schedules were applied and that without such information, proof that their discounts met their competitors' discounts was meaningless. Thus, the Commission concluded that it was impossible to determine whether these sellers had reason to believe that their lower discriminatory prices met the equally low prices of competitors applicable to competitive products within the meaning of Section 2(b). The Commission also held that Callaway, by granting volume discounts on lower purchase volumes than required by its competitors for similar discounts, had in effect undercut its competitors' prices, and that it was impossible to determine whether Cabin Crafts' net prices met or undercut its competitors' prices because Cabin Crafts had not adduced its list prices or the list prices of its competitors.

In reversing the Commission, the court of appeals held that there is nothing wrong *per se* with adopting a volume discount schedule in response to similar schedules of competitors and that the volume discount schedules adopted by Callaway and Cabin Crafts were "... thoughtfully tailored by both petitioners to meet their individual problems in the market" (Slip Opinion, p. 16). As a result of its complete failure to understand the Commission's conclusion that there was insufficient evidence upon which to decide whether the petitioners' products which were subject to the adopted discount schedules were or were not superior in grade and quality and whether, therefore, of more appealing "saleability" than the products of their competitors or not, the court stated (Slip Opinion, p. 13) :

"Moreover, the Commission completely ignored abundant un rebutted testimony in both cases which clearly demonstrated or would support the inference that petitioners' products at the various price levels possessed qualities of 'saleability' comparable to that of its competitors' products."

The court also reversed the Commission's finding that Callaway undercut the prices of competitors and held that the evidence showed that the effect of Callaway's adoption of lower volume levels for similar discounts was to meet rather than undercut competition (Slip Opinion, p. 17). Finally, the court held that Cabin Crafts was not required to introduce in evidence its list prices and those of competitor to "... show facts which would lead a 'reasonable and prudent person' to believe that the granting of lower prices would in fact meet the equally low price of a competitor" (Slip Opinion, p. 18).

The Commission believes that certiorari is warranted on the question of whether a seller who adopts a discriminatory volume discount schedule in response to similar volume discount schedules of competitors is, as a matter of

law, responding to such competitors' prices within the meaning of Section 2(b). The other questions resolved by the court, as to which we do not request certiorari, are essentially factual in nature. Although the court of appeals' substitution of its judgment for that of the Commission on these questions is patently unwarranted, especially on the question of whether the products of petitioners' competitors generated saleability substantially equal to the products of petitioners, the resolution in the Commission's favor of the legal question presented would dispose of the Section 2(b) defenses and justify affirmance of the Commission's orders.

In reversing the Commission's conclusion with respect to the issue in question, the court of appeals held that Callaway and Cabin Crafts had no "workable alternative" other than to adopt a cumulative annual retroactive volume discount schedule, and, since the statute does not place an impossible burden upon sellers, their use of a volume discount schedule as a response to their competitors' volume discount schedules was a "mature and reasoned approach to a very real and difficult competitive problem." Stating that it "found no authority which holds that in all circumstances the allowance of volume discounts according to a plan or 'system' as distinguished from 'individual competitive' responses is condemned per se," and distinguishing the authorities relied upon by the Commission as involving "basing point" systems of pricing, the court held that Callaway and Cabin Crafts had carried their burden of showing "good faith" (Slip Opinion, pp. 14-16).

The Commission believes that the question of the availability of the Section 2(b) defense in the situation where a seller adopts a volume discount schedule as a response to competitors' similar schedules, instead of making a good faith effort to meet the lower prices of competitors on an individual basis, is controlled by the Supreme Court's decisions in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), and *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). In *Staley*, the Court, speaking through the Chief Justice, said (324 U.S. at 753):

"... Thus, it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by Sec. 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound it would seem to follow that even if the competitor's pricing system were wholly in violation of Section 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But sec. 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet the equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. . . ."

The Commission interprets these cases as limiting the Section 2(b) defense to "individual competitive situations," and as not permitting that defense as protection in cases where, as here, a cumulative volume discount schedule is adopted to meet a competitor's similar schedule. The Commission further believes that this interpretation is in accord with both the majority and minority opinions in *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396 (1958). In that case the Court accepted without question the principle that the defense is limited to individual competitive situations and that a discrimination pursuant to a price system would preclude a finding of good faith. The Court did not limit the definition of "system" to a "basing-point" pricing system, as had the Court of Appeals for the Seventh Circuit (see *Standard Oil Co. v. Federal Trade Commission*, 233 F.2d 649, 653 (1956)), but instead sustained the lower court's decision on the ground that "Standard's prices to these four 'jobbers' were reduced as a response to individual competitive situations rather than pursuant to a pricing system."

Several decisions of courts of appeals also support the Commission's interpretation and application of Section 2(b) in the instant cases. See *Standard Motor Products v. Federal Trade Commission*, 265 F.2d 674, 677 (2d Cir. 1959), cert. denied, 361 U.S. 826; *Exquisite Form Brassiere, Inc. v. Federal Trade Commis-*

sion, 360 F.2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966). See also *Forster Mfg. Co. v. Federal Trade Commission*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), *affirmed after remand to Commission*, *Forster Mfg. Co. v. Federal Trade Commission*, — F.2d — (1st Cir., decided May 24, 1966).

The Commission believes that the present cases are an appropriate vehicle for presenting to the Supreme Court for authoritative resolution the question of whether the adoption of a volume discount schedule to meet a competitor's similar discount schedule is outside the protection of Section 2(b). First, with respect to this issue, there is no factual dispute. The method of pricing employed in the carpet industry is substantially uniform; there is no doubt that cumulative annual retroactive volume discounts were adopted by Callaway and Cabin Crafts as a response to the competition of competitors who had used and continued to use similar discount schedules.

Secondly, the court's justification of Callaway's and Cabin Crafts' use of discriminatory volume discount schedules on the theory that there was no reasonable alternative is incorrect. The Commission interprets the previously cited Supreme Court cases as requiring sellers who wish to claim the shelter of the Section 2(b) defense as a minimum to establish nondiscriminatory prices not violative of Section 2(a) of the Act and then to deviate from such prices when necessary for a good faith effort to meet a competitor's prices. The nondiscriminatory prices may be part of a pricing schedule if the seller so desires, but the schedule in operation must not be inherently discriminatory. The fact that such an alternative may be difficult in application does not, according to the Commission's interpretation, justify the adoption of a discriminatory volume discount schedule which is applicable to all sales. If the seller cannot establish such nondiscriminatory prices, either pursuant to a pricing schedule or otherwise, and then deviate from these prices in individual situations when necessary, other possibilities should be considered. Such possibilities would include the initiation of a private treble damage action against the competitor and the filing of a complaint with the Commission. As the Supreme Court noted in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, *supra* (324 U.S. at 754, n. 3):

"The Chairman of the House Conference, in presenting the Conference Report, emphasized with illustrations, that 'this procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violations of the obvious intent of the bill.'" See 80 Cong. Rec. 9418.

Thirdly, the rationale of the court's opinion represents the position of those antitrust commentators who challenge the Commission's limitation of Section 2(b) to individual competitive situations, a position which should be resolved by the Supreme Court as soon as practicable. See, e.g., Rowe, *Price Discrimination Under the Robinson-Patman Act*, 234-238 (1962).

Finally, and perhaps most important, it is undisputed that the volume discounts challenged in these cases are granted in response to the demand of the large buyers (Slip Opinion, pp. 4, 6, 9). This is a classic example of the application of economic leverage by large buyers to obtain price concessions that Congress specifically intended to regulate and curb by means of the Robinson-Patman Act amendments to the Clayton Act. See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 42-43 (1948); *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 55 (1965). Moreover, in *Sun Oil*, the Supreme Court made it abundantly clear that Section 2(b) was to be narrowly interpreted, and the Court rejected the Fifth Circuit's philosophy (again resurrected in these cases) that realities of competitive conditions prevailing in particular industries affect the interpretation and application of the statute.

The Commission is not unmindful of the fact that Callaway and Cabin Crafts are the smaller of the large manufacturers of carpeting, ranking perhaps eleventh and twelfth in an industry comprising from 50 to 60 manufacturers. And the Commission has not overlooked the fact that it has issued cease-and-desist orders against ten of these larger manufacturers, compliance with which will be required at the conclusion of judicial proceedings in the instant cases, or that it can be anticipated that upon cessation of quantity discounts by those ten manufacturers, Callaway and Cabin Crafts will, as they represented to the court of appeals and subsequently to the Commission, cease granting such discounts themselves. Nevertheless, unless the orders against them are reinstated

by the Supreme Court, there will be no compulsion on Callaway or Cabin Crafts to discontinue their price discriminations. Moreover, quantity discounts are employed extensively in many industries. The decision of the Fifth Circuit may seriously hinder future administration of Section 2(a), especially in view of the fact that respondents against whom cease-and-desist orders are issued have the choice of circuits in which to file their petitions for review and probably, if the decision stands, will take their appeals to the Fifth Circuit.

Enclosed are copies of the opinion and judgments of the court of appeals, the printed records, the briefs filed in the court of appeals, and the letters from counsel for Callaway and Cabin Crafts dated July 25 and August 2, 1966.

By the Commission, Commissioner Elman not participating.

PAUL RAND DIXON,
Chairman.

DAYCO CORP.

26. *Dayco Corp. v. F.T.C.*, 362 F.2d 180 (6th Cir. 1966)

(a) *Court Action*: 2(a) aspect of order vacated and cause remanded to Commission.

(b) *Commission Action*:

1. On September 7, 1966 directed that certiorari not be sought. *Vote*: 5-0.

2. On October 12, 1966 price discrimination charge against Dayco was dismissed. *Vote*: 4-1, Commissioner MacIntyre not concurring for the minute record only.

3. On October 26, 1966 Commission entered its modified order to cease and desist. *Vote*: 5-0.

SEPTEMBER 7, 1966.

(92) *Dayco Corporation v. Federal Trade Commission*, 6th Cir. No. 16,215 (Docket 7604—Dayco Corporation) Circulated by Mr. Dixon

August 18, 1966—The Commission (a) directed that certiorari not be sought herein, and (b) agreed that the matter would be returned to Mr. Dixon for further consideration of, and recommendation to the Commission as to, the future course of the proceeding in light of (i) the opinion and judgment of June 17, 1966, of the United States Court of Appeals affirming the Section 5 part of the order in Docket 7604 and vacating the Section 2(a) part, and (ii) the "amended judgment" entered on July 5, 1966, by the Court, adding a provision requested by Commission counsel that provided for remand to the Commission "for further proceedings consistent" with the Court's opinion.

OCTOBER 12, 1966

(1) *Dayco Corporation v. Federal Trade Commission*, 6th Cir., No. 16,215 (Docket 7604—Dayco Corporation)

Agenda-matter circulation of September 30, 1966, by Mr. Dixon with which he submitted, pursuant to the agreement at the meeting of August 18, 1966, a memorandum dated September 30, 1966.

Mr. Dixon recommended, for the reasons given, that the price discrimination charge against Dayco be dismissed; and stated that the Division of Appeals, Office of the General Counsel, should be requested to prepare a modified order consistent with the court's opinion and dismissing the price discrimination charges in the complaint in Docket 7604.

After consideration, on motion of Mr. Dixon, the price discrimination charge against Dayco was dismissed.

The Division of Appeals, Office of the General Counsel, was instructed to prepare and submit to the Commission for approval a draft of modified order consistent with the court's opinion and dismissing the price discrimination charges in the complaint in Docket 7604.

Mr. Elman was recorded as in favor of the foregoing action, and Mr. MacIntyre, for the minute record only, did not concur.

OCTOBER 26, 1966.

Adjudicative matters:

- (1) *Dayco Corporation v. Federal Trade Commission*, 6th Cir., No. 16,215
(Docket 7604—Dayco Corporation)

Draft of modified order to cease and desist in Docket 7604, as submitted by the General Counsel with memorandum of October 14, 1966, pursuant to the action of October 12, 1966.

With his adjudicative-matter circulation of October 21, 1966, Mr. Dixon submitted memorandum of the same date in which he advised that he had altered the order submitted by the General Counsel in several minor respects, and recommended that the revised order be adopted in lieu of the draft submitted by the staff.

After consideration, the Commission entered its modified order to cease and desist in Docket 7604, and referred its modified order, as submitted by Mr. Dixon, to the Secretary for issuance and service upon the parties.

STANDARD MOTOR PRODUCTS, INC.

27. *F.T.C. v. Standard Motor Products, Inc.*, 371 F.2d 613 (2nd Cir. 1967)

(a) *Court Action*: Petition for enforcement of order denied.

(b) *Commission Action*:

1. On March 22, 1967 directed that Solicitor General be requested to file a petition for certiorari. *Vote*: 3-2, Commissioners Reilly and Elman not concurring.

2. On June 28, 1967 ordered that no further enforcement action be taken at this time and that the investigational hearing be terminated. *Vote*: 3-1, Commissioner Dixon voting in the negative, Mr. MacIntyre not participating.

MARCH 22, 1967.

(6) *Federal Trade Commission v. Standard Motor Products, Inc.*, 2d Cir., No. 30,325 (Docket 5721—Standard Motor Products, Inc.)

Memorandum of March 7, 1967, from the Assistant General Counsel for Appeals, Mr. James B. Truly, approved by the General Counsel, advising that the Court of Appeals for the Second Circuit, in its opinion of January 9, 1967, held that it had jurisdiction to enforce the Commission's pre-1959 Section 2(a) order in Docket 5721, and denied the Commission's petition for enforcement because it did not accept the grounds on which the Commission rejected Standard's cost-justification defense. For the reasons recited, Assistant General Counsel Truly expressed the opinion that the Commission should make an effort to obtain certiorari of the above decision.

In his special-matter "Walk-Around" circulation of March 9, 1967, Mr. Dixon concurred in the staff's recommendation.

On March 13, 1967, Messrs. Dixon and MacIntyre, and Miss Jones directed that the Solicitor General be requested to file a petition for certiorari of the above decision in the Supreme Court; and approved and ordered hand-carried after signature by the Chairman a letter to Hon. Thurgood Marshall, The Solicitor General, Department of Justice, as submitted by Mr. Truly, making such request.

Messrs. Elman and Reilly did not concur in the foregoing action, and it was directed that they be so shown on the letter.

JUNE 28, 1967.

(10) *Federal Trade Commission v. Standard Motor Products, Inc.*, 2d Cir., No. 30,325 (Docket 5721—Standard Motor Products, Inc.)

Memorandum of June 21, 1967, from the Bureau of Restraint of Trade reporting pursuant to the action of March 13, 1967, and recommending, since the Solicitor General has advised the Commission of his decision not to file a petition for a writ of certiorari of the January 9, 1967 decision of the Court of Appeals for the Second Circuit in the above matter, that Docket 5721 be remanded to the hearing examiner for reopening of the investigational compliance hearing therein, for reception of evidence and for further proceedings consistent with the opinion and judgment of the above court.

In his agenda-matter circulation of June 23, 1967, Mr. Dixon recommended, for the reasons recited, that this matter be remanded to the hearing examiner for such further proceedings as may be appropriate consistent with the Court's opinion and judgment.

Messrs. Joseph E. Sheehy, Joseph J. Gercke, Bartley T. Garvey, Richard B. Mathias, Francis C. Mayer and John M. Siemien of the Bureau of Restraint of Trade were called in, consulted with regard to this matter, and thereafter excused.

After discussion, Mr. Dixon moved that Docket 5721 be remanded to the hearing examiner for such further proceedings as may be appropriate consistent with the Court's opinion and judgment.

As a substitute motion, Mr. Reilly moved that no further enforcement action be taken in this matter at this time and that the investigational hearing be terminated.

As to Mr. Reilly's motion, Messrs. Elman and Reilly and Miss Jones voted in the affirmative, and Mr. Dixon voted in the negative.

The motion was carried, and it was so ordered.

Mr. MacIntyre did not participate in the foregoing action.

MARCH 13, 1967.

Re Federal Trade Commission v. Standard Motor Products, Inc., 2d Cir. No. 30,325—FTC Docket 5721

HON. THURMOND MARSHALL,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On January 9, 1967, the United States Court of Appeals for the Second Circuit issued its opinion and judgment denying the Commission's petition to enforce a pre-1959 Clayton Act order directing Standard Motor Products, Inc., to cease and desist from charging different net prices to purchasers who compete in the resale of its products. The court refused to accept the Commission's rejection of Standard's cost justification defense; it did not, however, resolve the vital question presented, *i.e.*, whether Standard has made out such a defense.

We believe that the court's decision is erroneous in several respects and presents substantial obstacles to the Commission's enforcement of Section 2(a) of the Robinson-Patman Act. For the reasons stated below the Commission requests that a petition for certiorari be filed in the Supreme Court.

In 1957, having found that Standard's practice of pricing pursuant to a retroactive volume rebate schedule resulted in discriminations in price between competing customers and that, in the circumstances of the automotive replacement parts industry where "competition is keen" and "margins of profit are small," such discriminations may be to substantially lessen competition between such favored and nonfavored customers, the Commission issued its cease and desist order prohibiting Standard from discriminating in price—

" * * * by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of (Standard's) products."¹

This order is substantially similar to those issued in other "second-line" or customer competition cases. The order was affirmed by the Second Circuit on Standard's petition for review (265 F.2d 674 (1959)).

In 1963 the Commission initiated compliance proceedings to ascertain whether Standard had violated the order to cease and desist (Pet. Apdx. 3a-5a). In its report on the compliance investigation (Pet. Apdx. 9a-41a), the Commission found that the cumulative volume discount schedules used by Standard in 1962 created discriminations in price between competing customers substantially similar to those considered in the original proceeding, that the "competitive climate among resellers in the automotive after-market industry has not changed and that [Standard's] price discriminations continue to have substantial competitive effects" (Pet. Apdx. 16a-1a, 27a). Standard had defended its pricing practices in the compliance proceeding on the ground that such discriminations made only due allowance for differences in the cost of selling such products to the different purchasers. "Direct selling," "catalog," "branch warehouse" and "administrative" expenses were chosen by Standard to reflect these cost differences (Pet. Apdx. 16a-17a).

¹ 54 F.T.C. 614.

Standard compiled and developed statistical data designed to show the cost of selling to each of its customers in each of the chosen expense categories. It then totaled the costs attributable to all customers whose purchases placed them in the same pre-established volume bracket, and by dividing the total costs for each volume group by the total rebatable sales to that group, computed a percentage figure representing the average cost of selling the customers in each volume bracket. Standard contended that the differences between these average costs of selling each group justified the differentials in price it afforded its customers in each group (Pet. Apdx. 18a-19a).

The Commission found that "in most brackets the vast majority of customers had computed costs which should have found them placed in another bracket" (Pet. Apdx. 19a). The Commission stated that "a close examination of [the] underlying figures showed that the average were not representative portrayals of the selling costs of customers in any bracket" (Pet. Apdx. 25a). The Commission held: "We find that [such deviations from the average costs for a volume group] demonstrate the impropriety of [Standard's] volume rebate system and provide just cause for us to reject the entire cost study" (Pet. Apdx. 21a).

Although apparently accepting the Commission's statistical analysis of Standard's cost study,² the court stated (Slip Op. 816-81) :

"The Commission has not suggested that any administrable alternative means of classifying customers is available to Standard. Nor has it indicated the conditions under which it might accept volume rebate schedules for the Standard and Hygrade lines. Thus it may well be, as Standard argues, that the Commission has left it no practicable means of cost justification."

The court directed (Slip Op. 819) :

"* * * before rejecting Standard's cost justification studies the Commission should have brought its experience and expertise to bear on the problem of defining practicable standards of customer classification for cost justification purposes which reconcile the objectives of the cost justification proviso and of the Robinson-Patman Act as a whole."

To the contrary of the court's opinion, the Commission did indicate the conditions under which it would accept cost justification of Standard's volume rebate schedules on the basis of average cost figures, *viz.*, where it was demonstrated "that a significant majority of those customers relegated to a particular volume group most likely had costs supporting their inclusion in that group" (Pet. Apdx. 19a; see also Pet. Apdx. 25a). This is consistent with the statutory provision that the differences in price may be justified by differences in cost, and with the standards and conditions explained by the Supreme Court in *United States v. Borden Co.*, 370 U.S. 460, 468-469, as to the use of group averaging.

We submit that the court erred in assuming that Standard's price discriminations could somehow be cost justified on the basis of the average costs of selling groups of customers. The burden of providing that its price discriminations were cost justified upon Standard;³ it wholly failed to meet this burden. Violation of the Commission's order was clearly demonstrated and the discriminations were not cost justified. The Commission, therefore, was entitled to an order of enforcement.

The court also erred in limiting the standards applicable to group averaging set forth by the Supreme Court in *Borden*, *supra*, to the particular facts of the *Borden* case. A reading of that case shows that the standards enunciated by the Supreme Court are of general application, and it is on the basis of such standards that the use of customer classification and averaging is permitted.

Further, the court's concern about reconciling the purpose of the cost justification proviso with the purposes of the Robinson-Patman Act, is completely misplaced. Specifically, the court questioned the statement by the Commission "that the obvious result of (Standard's) discriminatory rebate schedule is that a great number of low-cost customers are burdened with part of the expenses of higher cost purchasers" (Slip Op. 817). In the court's view this must be weighed against what the court considered to be a greater "economic discrimination"⁴ which would result from charging low-cost and high-cost purchasers

² The court stated (Slip Op. 815) : "In most classes * * * the majority of purchasers had costs closer to the average cost of the class above or below * * *"

³ This is well settled. See *United States v. Borden Co.*, 370 U.S. 460, 462 (1962); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Ruberoid Co. v. Federal Trade Commission*, 189 F. 2d 893, 895 (2d Cir. 1951), *Affirmed*, 343 U.S. 470 (1952); *Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44, 47 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

⁴ Slip Op. 817-819, citing Rowe, *Price Discrimination Under the Robinson-Patman Act*, § 2.2 (1962).

the same price. But Congress itself, in enacting the statute, reconciled the existence of this so-called "economic discrimination" with the purposes of the Robinson-Patman Act. By prohibiting differences in price which may have an adverse effect on competition, unless such price differences can be justified as provided by statute, Congress emphasized equality of treatment in terms of price. See *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 519 (1963). Moreover, by limiting the cost justification proviso to "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which * * * commodities are * * * sold or delivered," Congress did not leave open the choice between the statutory and economic concepts of discrimination suggested by the court. It is clear that classification of customers according to the actual costs of selling them is required by the statute; use of classifications based upon volume of purchases unrelated to costs, as was done by Standard in this case, defeats the purpose of the statute in that it promotes the evil which Congress sought to remedy by enacting the Robinson-Patman Act, *viz.*, "that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

The Commission is not unmindful of the fact that the court afforded it the opportunity, in a further compliance proceeding against Standard, to comply with the court's suggestions for reanalyzing the case. But from a practical standpoint we do not foresee how the suggested reanalysis would result in any new standards for classifying customers and, in certain respects, compliance with the court's suggestion would be impractical. As we have pointed out, the Supreme Court has already stated its views as to the standards to be used in customer classification for cost averaging. *United States v. Borden Co.*, *supra*. The Commission accepted these views as being controlling in this case.

Further, any requirement that the Commission make indepth studies of the automotive replacement-parts industry and other industries to determine whether the standards of customer classification applied by the Commission and the Supreme Court can be met in most instances would involve an investigation of monumental proportions. Under the views expressed by the Solicitor General on behalf of the Commission in the recent brief filed in the *Universal-Rundle* case, the Second Circuit had no power in this case to instruct the Commission to survey the entire industry as a condition to enforcing the Commission's order.

The court also appears to direct the Commission to reappraise the economic consequences resulting from Standard's discriminatory pricing practices, by considering Standard's average costs of selling to individual purchasers over a period of several years. But Standard did not supply the Commission with such data: it was Standard's burden to do so. In addition, citing the Seventh Circuit's second decision in *Anheuser-Busch v. Federal Trade Commission*, 289 F.2d 835, 840 (1961),⁵ and the Commission's decision in *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394 (1948), the court suggests that competitive injury is to be considered again in determining whether Standard violated the Commission's order (Slip Op. 818, 821-22, n. 12). This is contrary to the position taken by the Solicitor General on behalf of the Commission in the Supreme Court in the *Jantzen* case.

Finally, the court appears to require the Commission to make available in the instant enforcement proceeding the cost study submitted by Guaranteed Parts Co. as part of its compliance report in another proceeding (F.T.C. Docket 6987). In the court's view, this study is relevant "to the issue whether sellers in general would be able to comply with the Commission's standard for classification of purchasers" (Slip Op. 819, n. 9). Aside from our disagreement as to whether the "issue" referred to by the court is a proper issue, release of such cost studies usually is not practicable because of their highly confidential nature. This is especially true here where Guaranteed Parts Co. is a competitor of Standard.

Quantity discounts are employed extensively in many industries. Very often, when challenged by the Commission under Section 2(a), respondents answer by alleging that their pricing practices are permitted by the cost justification proviso. In only a few cases, however, are these defenses pursued and when pursued they seldom prevail. This is true primarily because the cost studies usually are developed for purposes of the litigation long after the price dis-

⁵ It should be noted that the *Anheuser-Busch* case involved primary line or seller competition. To the contrary of the court's understanding, the effect upon competition at the customer level is to be measured by the effect upon individual competitors. See *Federal Trade Commission v. Morton Salt Co.*, 337 U.S. 37 (1948).

criminations were initiated; few respondents in establishing their prices consider cost differences that are legally acceptable under the cost justification proviso.

The decision of the Second Circuit may seriously hinder future administration of Section 2(a). The court not only has failed to apply established precedent but has injected new and complicated factors into the consideration of the cost justification defense that may prompt many respondents to prosecute defenses which heretofore would be abandoned as legally untenable. By their nature cost defenses are quite involved and consume much trial time. The type of analysis suggested by the court might place an impossible burden on the limited resources of the Commission.

Enclosed are copies of the record, briefs and opinion and judgment of the court of appeals.

By the Commission, Commissioners Elman and Reilly not concurring.

PAUL RAND DIXON,
Chairman.

WILLIAM H. RORER, INC.

28. *William H. Rorer, Inc. v. F.T.C.*, 374 F.2d 622 (2nd Cir. 1967)

(a) *Court Action*: Order enforced as modified.

(b) *Commission Action*:

1. No minutes showing any Commission action.

(486)

BORDEN CO.

29. *Borden Co. v. F.T.C.*, 381 F.2d 175 (5th Cir. 1967)

(a) *Court Action*: Petition to set aside cease and desist order granted.

(b) *Commission Action*:

1. On August 29, 1967 directed General Counsel to request Solicitor General to file petition for certiorari. *Vote*: 4-1, Commissioner Elman dissenting.

2. On November 14, 1967, Chairman Dixon presented a letter at table from Solicitor General that he has decided not to file a petition for certiorari.

SEPTEMBER 19, 1967.

(39) *The Borden Company v. Federal Trade Commission*, 5th Cir., No. 20,463 (Docket 7129—Borden Company)

Memorandum from the Assistant General Counsel for Appeals, dated August 25, 1967, advising that on July 14, 1967, the Court of Appeals for the Fifth Circuit issued its second opinion in the above matter, and again set aside the Commission's order, this time for the reason that in the court's view the Commission had not proved the requisite adverse effect on competition in either the primary or secondary line, and, therefore, the Assistant General Counsel for Appeals and the Bureau of Restraint of Trade (1) recommended that certiorari be requested, and (2) transmitted letter to the Solicitor General to that effect.

On August 29, 1967, Commissioners Dixon, MacIntyre, Reilly and Jones directed that the Solicitor General be requested to seek certiorari in the above entitled matter, and approved and ordered forwarded after signature by the Chairman the letter making such request.

As to the foregoing action, Mr. Elman dissented, and filed a dissenting statement to be attached to the letter to the Solicitor General.

NOVEMBER 14, 1967.

(1) *The Borden Company v. Federal Trade Commission*, 5th Cir., No. 20463 (Docket 7129—Borden Company)

Chairman Dixon presented letter of November 9, 1967, from the Solicitor General advising, in response to the Commission's letter of August 30, 1967, that he has decided not to file a petition for a writ of certiorari in the above case. Copies of the letter were handed to the several Commissioners at the table.

AUGUST 30, 1967.

Re *The Borden Company v. Federal Trade Commission*, 5th Cir. No. 20,463—FTC Docket 7129.

HON. THURGOOD MARSHALL,
The Solicitor General,
Department of Justice, Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On July 14, 1967, the United States Court of Appeals for the Fifth Circuit issued its second opinion and order setting aside the Commission's order requiring The Borden Company to cease and desist from discriminating in price in the sale of private label and Borden brand evaporated milk. In a prior opinion in this same case (339 F. 2d 133), the court of appeals on December 4, 1964, set aside the Commission's order on the ground that private label milk and Borden brand milk are not products of like grade and quality.

The Supreme Court reversed that decision on March 23, 1966 (383 U.S. 637). For the reasons set forth below, the Commission believes that certiorari should again be requested.

Because your office and the Antitrust Division are familiar with the facts, we will only briefly summarize the proceedings leading to the former appeal. The Commission's charge of price discrimination under Section 2(a) of the Clayton Act was based on Borden's practice of selling private label evaporated milk at lower prices than it sold its own advertised brand, even though the products were identical except for the labels on the cans. The Commission found that the difference in price had the prescribed statutory effect on competition at both the primary and secondary levels, and that the difference was not cost justified.

There were four issues before the court of appeals at the time of its 1964 decision: (1) whether private label and Borden brand milk were of like grade and quality; (2) whether the effect of the discriminations may be to injure primary or secondary line competition; (3) whether the discriminations were cost justified; and (4) questions relating to the scope of the order. The court decided only the first issue, and the Supreme Court reversed and remanded for consideration of the remaining questions. In its second decision the court of appeals reached only the question of injury to competition, holding, erroneously we believe, that the Commission had not met its burden of proving that the discriminations threatened competition in either the primary or secondary line. We believe that the effect of the court's opinion is essentially the same as if it had reinstated its prior ruling, and that the court has established impediments to a price discrimination case involving private label and advertised brands that the Commission may not be able to overcome. If this ruling is allowed to stand, the Commission and the public will have derived little benefit from the Supreme Court's decision that Borden's private label milk and its advertised brand are of like grade and quality.

1. *Primary line injury.* As to the effect of Borden's discriminations in price on Borden's competitors, the court of appeals conceded that "some private label business previously held by certain competitors of Borden, relatively small canners located in the Midwest, was diverted to those southern Borden plants which had begun to package private label milk" (slip op. 4). This is indeed an understatement; the record shows that in one year the seven affected small canners lost 7% of their sales (about 242,000 cases of private label milk) to Borden, and that the sales price of this milk was more than 1.2 million dollars (see Comm's Br., Ct. of Apps., 19-22). The court apparently discounted this evidence of injury because it thought it "significant" that these competitors "experienced an increase in absolute sales volume and * * * bettered their market position in approximately the same proportion as * * * Borden" (slip op. 10). But the increases in sales by these competitors were explained by other factors, not the least of which was that several other small companies had discontinued manufacturing evaporated milk and their business to a considerable extent was taken over as a "mere windfall" by the remaining companies (see citations to record in Comm's Br., Ct. of Apps., 6-7).

Moreover, we know of no case holding that positive evidence of injury to competition in the primary line, such as that present here, is offset by the fact that the competitors were able to some extent to increase their overall business. The court cites no such case; certainly the two Commission decisions relied upon, *Purce Corp.*, 51 F.T.C. 100 (1954), and *General Foods Corp.*, 50 F.T.C. 885 (1954), do not so hold. While in each of these cases the increase in sales of competing products was a factor considered, the Commission held in each that there was insufficient additional evidence to establish that injury resulted from the discriminations in price. Further we believe that *Utah Pie Company v. Continental Baking Company*, 386 U.S. 685 (1966), despite the fact that predatory intent was present there and was not found here, is authority for the Commission's position that expansion of sales and continued profitable operation does not preclude a finding of injury to competition in the primary line. There the Court said (p. 702):

"* * * the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit."

As a second reason for deciding that there was no cognizable injury to competition in the primary line, the court held (slip op. 11) that there was an "absence

of the necessary causal relationship between the difference in prices and the alleged competitive injury." It said that because "none of the evidence adduced by the testifying competitors relates to the price difference between the milks marketed by Borden," but only to the fact that Borden "was able to sell private label milk for a lower price than they could" sell it, "the price of Borden brand milk is immaterial in this case." It said that "injury proved in the primary line, if any, is not the effect of the price difference in issue."

If we follow this reasoning, it is difficult to see how a finding of injury could ever be made in a primary line case. In this case, as in all primary line cases, the injury is caused by the low price; the fact that the injured competitors may or may not have referred to the higher price of Borden brand is of little if any significance.

The *existence* of substantial discrimination in price between Borden brand and Borden private label is not even contested. And the Commission of course is not required to prove that the higher prices in some way subsidize the lower prices, because "Congress and the cases assume that the 'higher price to purchasers supports the lower price to others.'" *Lloyd A. Fry Roofing Company v. Federal Trade Commission*, 371 F.2d 277, 285 (7th Cir. 1966).

2. *Secondary line injury.* The court of appeals also erred in finding that "The price difference does not create a competitive advantage by which competition could be injured, and, furthermore, no customer has been favored over another" (slip op. 14). In arriving at this conclusion as to customer competition the court may have been influenced by its apparent misconception that Borden's private label milk was made available to all purchasers of Borden brand. The court emphasized the fact that there was no proof that Borden had refused to sell private label milk to any customer who requested it, at the price charged other customers (slip op. 6, 12). If the court equated these statements with the making "available" of private label milk to all purchasers of Borden brand milk, as it apparently did (slip op. 12, n. 14), it committed serious error, for the injury at the secondary line resulted from the uncontroverted fact that private label milk was not made available to all customers. The record is replete with evidence to this effect (Comm's Br., Ct. of Apps., 7-9, 22-24, 25-26). In the brief filed by your office for the Commission in the Supreme Court, it was stated (p. 4):

There is no evidence in the record that Borden refused to sell private brand evaporated milk to any purchaser who specifically requested it. But Borden never offered the private brand milk to its customers generally. Indeed, its merchandising manager in May, 1957, explained that Borden's policy was that "Our Brokers *should not* bring up the subject [of private label evaporated milk] themselves. * * * We do *not* wish Brokers to solicit such business" (emphasis in original; R. 743). A few months later, he stated that "We certainly don't want to end up by soliciting a bunch of 'peanut' accounts." (R. 827).

And as the Commission conceded in the Supreme Court, insofar as secondary line injury is concerned the order requires only that Borden offer private brand milk to all customers "on terms that would make it actually available to them" (Comm's Br., Sup. Ct., 21, n. 9).

The court of appeals held that "where a price differential between a premium and nonpremium brand reflects no more than a consumer preference for the premium brand, the price difference creates no competitive advantage to the recipient of the cheaper private brand product on which injury could be predicated" (slip op. 14). We do not agree with this ruling of the court. There was a great demand—an increasing demand—for Borden private label milk (Comm's Br., Ct. of Apps., 22-23), and to the extent that Borden private label was not made available to some of its customers they were unable to compete at all for this business. Many wholesale and retail grocers testified that Borden private label was not available (Comm's Br., Sup. Ct., 4-5), and that "they would have purchased respondent's private label evaporated milk had it been made available to them, to enable them to compete more effectively with the large retailers who had such private brand" (*id.* 18). Thus it is contrary to the evidence for the court to say, as it did, that "no customer has been favored over another" (slip op. 14).

Moreover, the court has completely failed to follow the guidelines set forth by the Supreme Court on the former appeal. The Supreme Court said that where a seller markets the identical product under several different brands, the "transactions are too laden with potential discrimination and adverse

competitive effect to be excluded from the reach of § 8(a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal" (slip op., 6-7). The Court also said (*id.* 7):

Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know—that the cheaper product is actually identical with that carrying the more expensive label.

The above statements by the Supreme Court exactly fit the facts of this case.

If the decision of the court of appeals is allowed to stand, the Commission will be greatly hampered in enforcing Section 2(a) of the Clayton Act where the injury results from price discriminations in sales by the same seller of private brands and advertised brands.

Copies of the briefs, the slip opinions and the printed record are forwarded hereinwith.

By the Commission.

Commissioner Elman dissented. His Dissenting Statement is attached.

PAUL RAND DIXON,
Chairman.

DISSENTING STATEMENT OF COMMISSIONER ELMAN

Re Borden Co. v. Federal Trade Commission

I do not concur in the Commission's request that certiorari be sought, principally for the following reasons:

(1) There is ample warrant in the record for the Fifth Circuit's conclusion that the findings of injury to competition are not sustained by the evidence. The issues are primarily factual, and the government could not show that the Court of Appeals did not make a "fair assessment" of the record (*Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 401).

(2) The legal and economic questions raised by private brand selling are exceedingly complex, as is evidenced by the majority and dissenting opinions in the Supreme Court in this case, 383 U.S. 637. These questions have not yet been squarely confronted and analyzed by the Commission in a decided case, including this one. The Commission's decision here was concurred in by only two members. One searches the Commission's opinion in vain for any glimmering of awareness of the difficult economic issues posed by dual branding; the Commission, once it had leapt the hurdle of like grade and quality, drew a virtually automatic inference of competitive injury from the existence of the price differential. Mr. Justice White's opinion quoted with approval the following statement in the Attorney General's Report: "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute." Report of The Attorney General's National Committee to Study the Antitrust Laws 159 (1955). This is, in essence, what the Court of Appeals held on remand. The Commission, whose opinion fails to accord any recognition whatsoever, legal or economic, to "tangible consumer preferences as between branded and unbranded commodities", is hardly in a position to attack the fifth Circuit's holding. In any event, the majority and dissenting opinions of the Supreme Court in *Borden* strongly suggest the desirability of having the Commission take a hard look at dual branding, in all its aspects, before the Court is asked again to review this troublesome area of the law. The Justices are likely to feel that they have already said about as much on this subject as they can, and that the next step should be taken by the Commission.

AUGUST 29, 1967.

UNIVERSAL-RUNDLE CORP.

30. *Universal-Rundle Corp. v. F.T.C.*, 382 F. 2d 285 (7th Cir. 1967)

(a) *Court Action*: Order set aside.

(b) *Commission Action*:

1. On September 28, 1967 directed that certiorari not be sought.

SEPTEMBER 28, 1967.

Nonagenda matters:

(1) *Universal-Rundle Corporation v. Federal Trade Commission*, 7th Cir. No. 14,463 (Docket 8070—Universal-Rundle Corporation, et al.)

Circulated by Mr. Reilly.

September 28, 1967—It was determined that certiorari not be requested in the above proceeding.

AMERICAN MOTORS CORP.

31. *American Motors Corp. v. F.T.C.*, 384 F. 2d 247 (6th Cir. 1967), cert. denied, 390 U.S. 1012 (1968)

(a) *Court Action*: Cause remanded with directions to dismiss complaint.

(b) *Commission Action*:

1. On October 31, 1967 directed that Solicitor General be requested to file petition for certiorari. *Vote*: 4-1, Commissioner Elman not concurring.

2. On May 2, 1968 complaint dismissed. *Vote*: 5-0.

OCTOBER 31, 1967.

- (2) *American Motors Corporation, et al. v. Federal Trade Commission*, 6th Cir. No. 16,841 (Docket 7357—American Motors Corporation, et al.)

Memorandum of October 19, 1967, from Assistant General Counsel Truly recommending that the Solicitor General be requested to petition the Supreme Court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review that Court's decision in the above entitled matter setting aside the Commission's order to cease and desist; and transmitting draft of letter in accordance with his recommendation.

Agenda matter circulation of October 26, 1967, by Miss Jones submitting the matter to the Commission for such action as it wishes to take.

After consideration, on motion of Mr. Dixon, the letter to the Solicitor General requesting him to petition the Supreme Court for a writ of certiorari to the above Court to review that Court's decision in the above matter was amended, and thereafter approved and ordered forwarded after signature by the Chairman.

As to the foregoing action, Mr. Elman did not concur and requested that he be shown on the letter as follows: Commissioner Elman does not concur for the reason that the decision below, even if deemed erroneous, turns on the special facts of this case and presents no questions of law having general importance in the enforcement of Section 2 of the Clayton Act.

MAY 2, 1968.

- (1) *American Motors Corporation, et al. v. Federal Trade Commission*, 6th Cir. No. 16,841 Docket 7357—American Motors Corporation, et al.

Memorandum of April 17, 1968, from Assistant General Counsel Truly, approved by the General Counsel, transmitting draft of order dismissing the complaint herein in compliance with the opinion and order of the above court, the Supreme Court having denied a petition for a writ of certiorari.

Miss Jones submitted this matter to the Commission with her adjudicative circulation of April 25, 1968.

After consideration, on motion of Miss Jones, the Commission dismissed the complaint in this matter, and approved and referred to the Secretary for issuance and service upon the parties, order to that effect.

For the public record, Commissioners Dixon, Elman, MacIntyre, Jones and Nicholson voted in the affirmative as to the foregoing action.

OCTOBER 31, 1967.

Re American Motors Corporation, et al. v. Federal Trade Commission, 6th Cir.
No. 16,841—FTC Docket 7357

HON. ERWIN N. GRISWOLD,
The Solicitor General,
Department of Justice,
Washington, D.C.

DEAR MR. SOLICITOR GENERAL: On September 29, 1967, the United States Court of Appeals for the Sixth Circuit, Judge Battisti dissenting, set aside the Commission's order to cease and desist in the above case, and remanded the proceeding to the Commission "for dismissal of the complaint." The court held that the Commission had improperly rejected American Motors' cost justification defense to a charge of violating Section 2(a) of the Clayton Act. The court's decision is clearly erroneous and will present a substantial obstacle to effective enforcement of the Robinson-Patman Act. For the reasons stated below the Commission requests that a petition for certiorari be filed on its behalf in the Supreme Court.

American Motors Corporation is a major producer of electric household appliances—refrigerators, ranges, home freezers, automatic washers, clothes dryers, and air conditioners—which it markets under the Kelvinator and Leonard brand names. Sales are nationwide and are made to retailers directly and through a sales subsidiary, the American Motor Sales Corporation. Annual volume at the time of hearings was approximately \$77,414,070; \$51,402,942 by the sales corporation, and \$26,011,128 by the parent.

The Commission's order to cease and desist was based upon findings that American Motors Corporation, et al., had discriminated in price in favor of four large buyers, the B. F. Goodrich Company with over 1,500 outlets throughout the United States, two utilities with retail outlets respectively in Michigan (Consumers Power Company) and in Alabama (Alabama Power Company), and a chain of furniture stores doing business in the south, Sterchi Brothers Stores, Inc. The customers against whom American Motors discriminated in price consisted of over 6,000 competing appliance retailers.

The discrimination consisted of regular, established and long continued price differentials. These were effectuated pursuant to a dual pricing system which classified the above four favored buyers as "merchandising distributors" and extended them lower prices, and classified the balance of American Motors' retail customers simply as "regular" dealers who paid higher prices.

Although the price differentials were not large they were competitively significant. It was stipulated at the hearings that retail appliance dealers would testify that the differentials in many instances exceeded the amount of net profit they received on sales of such items. It was also stipulated that independent retail appliance dealers would testify that they had lost sales of electric appliances of like kind to competitors due to price differences no greater than the differentials maintained by American Motors between the "merchandising distributors" and "regular" dealers. The Commission concluded that American Motors discriminations had the proscribed effect upon customer competition, and this portion of the Commission's decision was upheld by the court of appeals. The discriminations were still being practiced at the time of oral argument before the Sixth Circuit (December 16, 1966), and so far as known continue to be in effect.

American Motors defended on the ground that the lower price to the four merchandising distributors was justified by lower costs of selling to these customers than were experienced in selling to the balance of American Motors' 6,000 "regular" dealers. This claimed cost justification was based on the contention that there were six separate selling functions that had to be performed for the disfavored retailers, which were not required for the four merchandising distributors. In support of this contention, American Motors conducted a study of the time spent by its sales personnel with *each* of its four merchandising distributors and with the 6,000 disfavored retailers *treated as a whole*. Grouping all disfavored retail customers together in a single class, American Motors compared the total time spent on them collectively by its sales personnel with the time spent on each of the four favored buyers. Using these comparisons as bases for allocating its selling costs, American Motors arrived at a claimed cost justification. In effect, American Motors averaged the costs of selling

to all its disfavored retail customers for comparison with the cost of selling to each of the four favored "merchandising distributors."

The Commission rejected this cost justification on the ground that American Motors had failed to sustain its threshold burden of establishing sufficient homogeneity and identity of the 6,000 disfavored customers to warrant treating them as a single group for cost averaging purposes (see Pet. appendix, 72a-109a). The Commission's decision was grounded on the rationale of the Supreme Court in *United States v. Borden Co.*, 370 U.S. 460, 468-69 (1962), in which the Court held that for a valid grouping of a large number of customers for cost averaging purposes there must be a close resemblance of the individual members on the essential points determining the costs considered, i.e., the members in the group must be sufficiently alike on the claimed cost distinguishing factors so that the average cost figure for the group validly reflects the cost figure for any specific group member.

The Commission ruled that American Motors' cost justification failed to establish with reasonable certainty two basic factors: first, that the sales functions alleged to be cost differentiating between the 6,000 disfavored "regular" dealers, and the four merchandising distributors, were in fact required for the former and were not required for the latter, and second, proof of a reasonable uniformity among the "regular" dealers of cost (time spent) in the performance of the functions. As to the performance of the functions, the Commission concluded:

We believe that respondent failed to carry its burden of demonstrating that these sales functions (the points that supposedly distinguished the two groups) were substantially performed for all or most of respondent's 6,000 nonfavored dealers, and that therefore it was proper for respondents to average the time spent with these nonfavored dealers.

As to cost (time spent), passing the fundamental threshold question of whether American Motors had adequately demonstrated the performance of the functions for all or most of the 6,000 "regular" dealers, the Commission determined:

According to respondent, contact time was the crux of the alleged savings underlying its lower prices. Yet respondent made no effort by sampling or by any other technique to determine whether the time spent with its regular dealers was in fact similar for each.

The court of appeals "reversed." In the court of appeals' view, American Motors' report "made out a prima facie case of cost justification" (slip opinion, p. 10). In the court's opinion the Commission had rejected this cost justification because of "some departures from the otherwise uniform differences between American Motors' method of dealing with its two classes of customers" (slip opinion, p. 14). Although recognizing that the Supreme Court's decision in *United States v. Borden Co.*, 370 U.S. 460 (1960) had "much in common" with this case, the court of appeals, relying upon certain distinctions between the two cases, held that the "admission of some exceptions did not impair the probative worth of American Motors' cost justification proofs," and further held that the Commission had "applied impermissible standards in attacking it."

The decision of the court of appeals is in error in three respects. First, as pointed out in Judge Battisti's dissent, the court, in holding that a prima facie case of cost justification had been made out, failed completely to consider that the American Motors' cost justification could not possibly be valid without evidence that the cost of performing the alleged differentiating sales functions, assuming they were performed, was reasonably uniform among the "regular" dealer group. There was no proof whatever of this essential requisite by American Motors. As Judge Battisti stated (dissent, slip opinion, p. 31):

Assuming that the record before us demonstrates that as a general practice each of American Motors' regular dealers availed themselves of the six additional categories of services, it must be noted that the record contains not one scintilla of direct evidence, by way of random sample or otherwise, that the cost of providing these services, when expressed in terms of a percentage of sales, was reasonably uniform as to individual members within the regular dealer group.

Obviously, no prima facie case of cost justification could possibly exist in the presence of this fatal defect. Yet, as the case now stands, American Motors' cost justification has been sustained by the court of appeals although deficient in an essential element. In actuality, American Motors' "cost justification," considered by the court as a "prima facie" showing, provides no justification at all for the price differentials systematically maintained between the four favored mer-

chandising distributors and the 6,000 disfavored dealers. As pointed out by Judge Battisti the record:

... not only supports but requires a finding that American Motors failed to establish that members of its regular dealer group possessed "such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member" [citing *Borden*].

Second, in addition to approving a cost study with a fundamental deficiency, the decision of the court of appeals applied an erroneous standard in reviewing the Commission's finding that American Motors had failed to sustain its burden of proving that the alleged cost differentiating functions were in fact required for all or most of the 6,000 retailers in the regular dealer group.

American Motors, of course, had the burden of proving that the 6,000 regular dealers it grouped together for cost averaging purposes possessed sufficient similarity to justify collective treatment. Yet the cost study itself contained no underlying or supporting proof, such as, for example, a customer survey, analysis or sampling, showing that the six allegedly cost differentiating functions were in fact required for all or even most of the disfavored retail dealers. On this basic requisite, the cost study contained only an assertion that "additional sundry functions" performed by the salesmen of American Motors in serving the disfavored dealers were "not required in serving the merchandising distributors." The author of the study, called as a witness by American Motors, merely repeated the unsupported statement in the study itself.

Not only was there no underlying evidence to support the treatment of the "regular" dealers as a single group, but the Commission found affirmative evidence of a *lack* of homogeneity among the 6,000 disfavored retailers. In only two cities visited the testimony of the Commission's investigating attorney revealed that he had found great diversity in size and style of business among the "regular" dealers. As the Commission determined and as the decision of the court of appeals does not question:

Regular dealers include multi-outlet dealers, department stores with multimillion dollar sales volume, dealers who receive delivery in the same manner as merchandising distributors, dealers handling its lines exclusively or semi-exclusively, and dealers whose outlets were both larger and smaller than the outlets of merchandising distributors.

Such substantial variations in the regular dealer group were considered by the Commission to render it unlikely, without some showing by American Motors beyond mere assertions, that the claimed differentiating functions were required for many of the dealers in the "regular" category. Additionally, the Commission noted that the only official of American Motors to appear in support of the cost study did not testify that the claimed functions were performed for all or even most of the "regular" dealers. His testimony consisted only of generalities to the effect that he "would say" that the functions were required, and that "generally speaking" dealers did not staff themselves to perform the functions. The Commission accordingly held that American Motors had:

... failed to carry its burden that its price differentials to its favored customers reflected only due allowance for differences in the cost of sale resulting from the differing methods in which its appliances were sold to these merchandising distributors.

In so holding, the Commission further noted that American Motors had not made the lower prices to the merchandising distributors known to its other retail customers, and had not given them the option of electing to receive such lower prices in lieu of the alleged differentiating services (Pet. appendix, 50a, 105a). The granting of discounts to a few large buyers without letting a multitude of competing retailers, both large and small, know that fact, and without giving such dealers an option to qualify for the discount prices was relevant, in the Commission's view, to the question of whether the claimed functions really had any validity for cost differentiating purposes.

Disregarding the Commission's conclusion based on an analysis of the cost study itself, and disregarding the Commission's analysis of all other evidence in the record on the issue of whether American Motors had sustained its burden of proving that the functions were required for all or most disfavored retailers, the court of appeals erroneously proceeded to make its own appraisal of the weight to be accorded the cost study and the testimony of its author. The court of appeals decided that the study and the testimony "made out a prima facie case of cost justification." The court then, incorrectly treating the Commission's findings as

an attempt to demonstrate exceptions from an otherwise uniform method of American Motors' dealing with its two customer groups, held the Commission's findings to be "clearly erroneous." But the Commission never found any "uniform method" of American Motors in dealing with disfavored dealers and, accordingly, could not find that a "prima facie" cost justification had been made out. Indeed, as we have pointed out, no such finding was even possible on the basis of the cost study submitted to the Commission. Thus, the court has assumed uniform differences in dealing with two classes of customers, a fact which never was established.

This ruling improperly substituted the judgment of the court of appeals for that of the Commission. The matter of cost justification is peculiarly within the area of "expertise" of the Commission, but "even as to matters not requiring expertise" the court of appeals is not to displace the Commission's choice even between two fairly conflicting views, which were not present in this record in any event. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1950). In fact, the court of appeals in this case did precisely what the Supreme Court stated in *Universal Camera* was impermissible in reviewing Commission decisions. It substituted its judgment for that of the Commission where the Commission's unanimous rejection of the cost justification was supported on the record as a whole. See also *Federal Trade Commission v. Consolidated Foods*, 380 U.S. 592, 599-600 (1964).

The court of appeals, moreover, has established a precedent relaxing the standard of proof required to make out a cost justification defense. Under the decision the mere assertion in a cost study that certain enumerated services are required for all members of a large group of disfavored customers, coupled with evidence that higher costs are incurred for the group as a whole, is sufficient to shift to the Commission the burden of disproving the homogeneity of the grouping on the alleged cost determining points. As stated earlier, however, the very statute enacted by Congress places the burden of establishing a cost justification on the party claiming it. And this burden obviously requires probative and substantial evidence as to all elements of the defense.

Third, the court misapplied the principles of *Borden* in this case. The distinctions the court found between the proofs of cost justification in this case and in *Borden* do not make the principles enumerated therein less applicable here. As pointed out by Judge Battisti:

* * * it seems clear under *Borden* it must be demonstrated not only that the members of the group received the services but also that the cost of providing the same was reasonably uniform as to all members of the group.

In addition to what we consider the three basic errors in the court's opinion, the court makes several erroneous assertions about the Commission's position in this case. The Commission most certainly did not rule that the American Motors' cost study was invalid "because it did not demonstrate that as to each regular dealer the cost of selling to it exceeded the price differential or was equal, as to each dealer, to the average of such extra cost" (slip opinion, p. 11). On the contrary, the Commission specifically acknowledged the validity of "class pricing," but insisted in accordance with *Borden*, as already made clear, that American Motors establish as a predicate that the "regular" dealer group possess sufficient homogeneity on the cost distinguishing points to justify class grouping for cost averaging purposes.

The court of appeals, furthermore, completely misinterpreted the Commission's decision where the court charged (slip opinion, p. 22) the Commission in effect with "saying that in an enterprise of the size of American Motors, it is virtually impossible to establish a cost justification it will accept." As already stated, the Commission did not consider the mere assertion, unsupported by any customer survey, analysis, or sampling, that 6,000 customers shown to be characterized by substantial diversity all required certain functions sufficient to discharge the burden of proof on American Motors. However, this provides no justification whatever for suggesting that properly supported customer grouping would have been rejected by the Commission.

The court of appeals states in rejecting the Commission's findings that the Commission attorney investigator pointed to no evidence, when he testified, that any of the 20 to 30 regular dealers, including department stores, "perform for themselves the functions which added to American Motors' cost of doing business with them" (slip opinion, p. 16). Later the court of appeals states (slip opinion, p. 18) that "the Commission failed to point to one individual dealer

who was not enjoying the extra services the cost of which was part of the justification for the price differentials."

The fact is that the Commission's attorney who conducted the investigation, and visited the customers of American Motors, did so long before the American Motors' cost study was undertaken. The cost study was begun by American Motors several months after the Commission's complaint issued challenging the discriminations between the favored large buyers and the remaining dealers. Consequently the Commission's attorney had no knowledge of the alleged functions, or even their claimed existence, when he called on the 20 to 30 disfavored dealers in Youngstown and Akron, Ohio, during this investigation of this case. Of fundamental importance, moreover, in connection with the statements of the court of appeals, is the fact that it was not the Commission's duty to disprove the contentions of American Motors with respect to the functions. It was the burden of American Motors to show with reasonable certainty that the functions were performed.

The court of appeals also states that the cost study in this case surveyed *all* retail outlets and *all* transactions in the particular sales zones during the period of the study (slip opinion, p. 19), and hence was not characterized by reliance on "majorities, estimates or approximations" as the cost study in *Borden*. There is nothing in this record establishing that *all* transactions and *all* dealers were studied. This may not have been the case; the time study merely recorded time spent with "regular" dealers and compared the total amount of such time with the time spent with each "merchandising distributor." But of overriding importance is the fact discussed earlier, that the cost study approved in this case by the court of appeals contained no information whatever as to whether the time required to perform the alleged functions was reasonably uniform as to individual members of the "regular" dealer group. There was no information at all on this vital point, not even the "estimates" or "approximations" the court found significant in distinguishing the cost study in *Borden* from that in this proceeding. Hence, there was no valid basis for the court of appeals to suggest that the cost study of American Motors possessed greater precision than that in *Borden*.

Apart from being an erroneous outcome of this case, the decision of the court of appeals has potentially far-reaching consequences. In addition to American Motors there are, of course, many other national manufacturers who sell consumers goods both to a multitude of independent dealers and to large chain merchandisers. The present decision could well provide a basis for national manufacturers to give chain merchandisers a discount similar to that utilized by American Motors on the ground that additional selling functions or services must be rendered to the independent dealers and are not required for the chain merchandisers. The decision is authority for the proposition that in such a situation there is no requirement that the claimed services be related to any reasonably uniform cost saving among the disfavored group.

This is the second adverse decision this year on questions relative to whether cost justification defenses were made out. See *Federal Trade Commission v. Standard Motor Products*, 371 F.2d 613 (2d Cir.). In both cases it was obvious that the proponent of the cost defense had not sustained its burden. In both cases the courts of appeals ignored the general principles enunciated in *Borden*, and simply substituted their judgment for that of the Commission. Although the Sixth Circuit did not cite the *Standard Motor* decision, it should be noted that the court's incorrect characterization of the effect of the Commission's decision, i.e., to require cost analysis for each customer and thus in effect to eliminate customer classes for pricing purposes, is similar to that expressed by the Second Circuit. Certiorari was not sought by your office in *Standard Motor*, although recommended by the Commission, because it was not deemed an appropriate case for Supreme Court review.

We think that it is most important to obtain Supreme Court review of this case, which is so obviously erroneous, in order to preclude as soon as possible further erosion of what were heretofore considered to be established principles relating to the cost justification defense.

For all of the foregoing reasons we request that a petition for certiorari be filed in this matter. With respect to the order, the Commission representatives handling this proceeding in the Sixth Circuit, on authorization of the Commission, advised the court that the Commission would be willing to withdraw the present order and substitute a somewhat different proscription. The Commission offered to replace the order in this case with an order similar to that issued in the matter of *William H. Rorer, Inc.*, F.T.C. Docket 8599 (see Reply Br., p. 14, n. 5). The

Commission's order in *Rorer* was approved with a slight modification by the Second Circuit in *William H. Rorer, Inc. v. Federal Trade Commission*, 374 F.2d 622 (1967). Consequently, the Commission does not seek to pursue any issues raised by the court of appeals concerning the order in this proceeding. It may be noted, however, that the court of appeals also misconstrued the Commission's order. The Commission did not require advance approval of "any preferential pricing" (slip opinion, p. 22) or of "any system" (slip opinion, p. 23), but of different prices to different groups *where the differences were claimed to be cost justified*. Indeed, the very quotation used by the court of appeals (slip opinion, pp. 22-23) from the Commission's order would seem to demonstrate this beyond any possibility of misunderstanding.

Transmitted herewith are copies of the briefs filed in the court of appeals, copies of the court's opinion and order, and a copy of the printed appendix.

By direction of the Commission.

Commissioner Elman does not concur for the reason that the decision below, even if deemed erroneous, turns on the special facts of this case and presents no questions of law having general importance in the enforcement of Section 2 of the Clayton Act.

PAUL RAND DIXON,
Chairman.

DEAN MILK CO.

32. *Dean Milk Co. v. F.T.C.*, 395 F. 2d 696 (7th Cir. 1968)

(a) *Court Action*: Primary line aspect of order dismissed.

(b) *Commission Action*:

1. On May 14, 1968 directed that certiorari not be sought. *Vote*: 5-0, Commissioner MacIntyre stating that he would have preferred that certiorari be sought.

2. On June 11, 1968, Assistant General Counsel authorized to file the motion for entry of an enforcement decree and final decree in the 7th Circuit. *Vote*: 5-0.

3. On July 2, 1968, directed that final order be entered. *Vote*: 5-0.

MAY 14, 1968.

Agenda matter:

(1) *Dean Milk Co. and Dean Milk Co., Inc. v. Federal Trade Commission*
(7th Cir. No. 15,483)

Docket 8032—*Dean Milk Company, et. al.*

With his special matter circulation of May 7, 1968, Mr. Dixon submitted memorandum of the same date in which he reported his consideration of this matter and recommended that the Commission not ask the Solicitor General to seek certiorari with respect to the primary line portion of this matter; and, as to the secondary line portion, made no recommendation, but submitted the matter for consideration.

After consideration, on motion of Mr. Dixon, it was directed that certiorari not be sought in this matter.

Mr. MacIntyre stated that he would have preferred that certiorari be sought.

JUNE 11, 1968.

(5) *Dean Milk Co. v. Federal Trade Commission* 7th Cir., No. 14,483

Docket 8032—*Dean Milk Company, et. al.*

Circulated by Mr. Dixon.

June 6, 1968—The Assistant General Counsel for Appeals was authorized to file the motion for entry of an enforcement decree and final decree, submitted with memorandum of May 29, 1968, from the Office of the General Counsel, in the Court of Appeals for the 7th Circuit.

JULY 2, 1968.

(18) Docket 8032—*Dean Milk Company, et. al.*

Circulated by Mr. Dixon.

July 2, 1968—The Commission entered its modified order in Docket 8032 in accordance with the judgment of the United States Court of Appeals for the Seventh Circuit on April 1, 1968; and directed that the order be served upon the parties.

For the public record, Commissioners Dixon, Elman, MacIntyre, Jones and Nicholson voted in the affirmative as to the foregoing action.

(499)

NATIONAL DAIRY PRODUCTS CORP.

33. *National Dairy Products Corp. v. F.T.C.* 1969 Trade Reg. Rep. Trans.
Binder ¶ 72,829

(a) *Court Action*: Order affirmed as modified.

(b) *Commission Action*:

1. On July 8, 1969 directed that certiorari not be sought.

JULY 8, 1969.

(10) *National Dairy Products Corp. v. Federal Trade Commission* 7th Cir.
No. 16,455

Docket 8548—National Dairy Products Corporation
Circulated by Mr. Dixon. July 8, 1969—It was directed that certiorari not be
sought
(500)

RESPONSE TO QUESTION 4

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Economic Report on Milk and Bread Prices (October 1966)

Memoranda to Commission from Commissioner Philip Elman, dated January 14, 1969 and May 2, 1969, re Reorganization Plan No. 8 of 1950: Commission Approval of Appointments of Heads of Major Administrative Units. Memorandum to Commission from General Counsel dated May 29, 1969, re "Heads of major administrative units" as contemplated by Reorganization Plan No. 8 of 1950.

Letter to the Honorable John N. Mitchell, Attorney General, from Paul Rand Dixon, Chairman, dated June 12, 1969, attaching copy of his letter to the Chairman, Civil Service Commission and General Counsel memorandum of May 29, 1969; joint letter to Attorney General John N. Mitchell signed by Commissioners Philip Elman, Mary Gardiner Jones and James M. Nicholson, dated June 13, 1969; and letter to Attorney General John N. Mitchell from Commissioner A. Everette MacIntyre, dated June 20, 1969—all pertaining to the authority to make appointments of key staff personnel.

Letter to John N. Wheelock from Richard W. McLaren, Department of Justice, dated March 21, 1969, and miscellaneous correspondence re liaison arrangement with Department of Justice.

Table—Treasury Expenditures By Bureaus—July 1, 1958–June 30, 1968.

Table—Total Program Costs—Fiscal Year 1969 (First Nine Months Only).

Table—Total Program Costs—Fiscal Year 1968

Table—Total Program Costs—Fiscal Year 1967

Table—Total Program Costs—Fiscal year 1966

Table—Total Program Costs—Fiscal Year 1965

Table—Total Program Costs—Fiscal Year 1964

Table—Total Program Costs—Fiscal Year 1963

Table—Summary of Operating Costs—Fiscal Year 1962

Table—Summary of Operating Costs—Fiscal Year 1961

Table—Summary of Operating Costs—Fiscal Years 1959–1960

Table—Obligations By Activity—Fiscal Years 1947 thru 1958

Letter to Robert Skitol, New York University Law School, from John A. Delaney, dated July 22, 1969, re average number of attorneys in Bureaus of Restraint of Trade, Deceptive Practices, and Textiles and Furs, for periods July 1, 1961 to June 30, 1962 and July 1, 1962 to June 30, 1963.

Letter to Robert Skitol, New York University Law School, from John A. Delaney, dated July 11, 1969, responding to letter from Mr. Skitol dated June 24, 1969, attached, transmitting:

Compilation of data with relation to:

- (1) Currently employed economists, statisticians, and accountants who have come to us during last 3 years (23 pages);
- (2) Senior Level Officials (53 pages);
- (3) Résumé of Hearing Examiners' Work—Calendar Year 1968;
- (4) Hearing Examiners (12 pages).

Letter to Robert Skitol from John A. Delaney, dated July 14, 1969 [sic], responding to request letter from Robert Pitofsky dated July 15, 1969, transmitting Selected Casework Statistics for Fiscal Years 1966, 1967, 1968 (3 separate tables).

Letter to Robert Skitol from John A. Delaney, dated August 6, 1969, attaching tables showing:

Complaints and Orders, Fiscal Years 1962, 1963 and 1964;

Assurances of Voluntary Compliance for the Years 1961 through 1969;

Median elapsed time for formal cases for Fiscal Years 1962 through 1966.

¹ See contents, p. VII.

- Letter to Robert Skitol from John A. Delaney, dated August 13, 1969, transmitting tables showing complaints and orders for Fiscal Years 1960 and 1961 and a corrected copy of the same information for 1962.
- Letter to Robert Skitol from John A. Delaney, dated July 2, 1969, transmitting enclosures recited therein.
- Letter to Professor Robert Pitofsky from Paul Rand Dixon, Chairman, dated July 10, 1969, responding to letter from Robert Pitofsky dated July 2, 1969.
- Letter to Robert Skitol from John A. Delaney, dated July 3, 1969, transmitting enclosures recited therein.
- Letter to Professor Robert Pitofsky from John A. Delaney, dated July 29, 1969, transmitting material with relation to advisory opinions and trade regulation rules.

FEDERAL TRADE COMMISSION ECONOMIC REPORT ON MILK AND BREAD PRICES

OCTOBER 1966

PAUL RAND DIXON, Chairman
PHILIP ELMAN, Commissioner
EVERETTE MacINTYRE, Commissioner
JOHN R. REILLY, Commissioner
MARY GARDINER JONES, Commissioner

LETTER OF TRANSMITTAL

FEDERAL TRADE COMMISSION,
October 25, 1966.

HON. ORVILLE L. FREEMAN,
Secretary of Agriculture
Washington, D.C.

DEAR MR. SECRETARY: Transmitted herewith is an *Economic Report on Milk and Bread Prices*. This is a preliminary report prepared in response to your request of August 4, 1966, that the Federal Trade Commission "review immediately the pricing policies and actions for bread and milk, including recent price changes of these food items and their relation to all factors affecting cost and conditions of competition."

The report is based on a limited amount of information compiled in a brief period, but does provide insights into the initial question raised in this inquiry, namely, how widespread price increases have been for bread and fluid milk in various parts of the country and the amounts of these increases which may be attributed to increases in farm-originated ingredient costs, especially wheat and raw milk, as well as the way in which these cost increases ultimately became translated into consumer prices.

The Commission currently has under way in-depth studies of cost and price changes in a number of markets. We will transmit a final report when we have completed the collection and analysis of the information required for these in-depth studies.

By direction of the Commission.

Sincerely yours,

PAUL RAND DIXON,
Chairman.

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SUMMARY OF THE REPORT

The sharp July-August-September increases in retail bread and milk prices carried bread prices to 7.5 percent and milk prices to 7.8 percent above the January 1966 level (Fig. 1). The upward movement in retail prices in both products appeared initially in the latter part of 1965 in certain Midwest cities, but spread

quickly to the East, Mountain States and Far West (Figs. 5 and 9). The more recent advances were widespread, although in isolated areas no increases took place at that time. The pattern of bread and milk prices has been uneven from city to city, but in general the greatest advances occurred where prices were lowest a year earlier (Figs. 6 and 10).

Certain qualitative differences between the price behavior of milk and bread are apparent. Farm ingredients represent a relatively small proportion of the retail price of bread, but a substantial share of the consumer's dollar spent on milk. Supply-demand conditions at the farmer level thus do not exert the same influence on consumer prices for the respective products. Large retailers are partially integrated into the production of both products. Most large grocery chains bake their own bread but also sell wholesale branded bread. There is a substantial differential in the store price for retailers as compared with wholesaler brands. Some of the leading retailers are completely integrated backward into milk processing, selling only their own private brands. Others sell private brands processed for them by dairies as well as processor labeled milk. Typically, however, there is no difference in the retail price charged for processor and retailer brands sold in the same store.

The recent rise in bread prices followed the increases in wheat prices in the spring of the year. The advance in wheat prices, in turn, reflected the twin facts of an expansion in export demand and a smaller than usual wheat crop. But while the subsequent rise in flour prices appeared to trigger the increase in bread prices, the pattern of price increases was very mixed. The greatest increases occurred in cities where prices were lowest in August 1965. For example, Milwaukee, which had the lowest average bread prices in August 1965, experienced an increase of 22.5 percent. At the other extreme, Los Angeles, which had the highest prices in August 1965, experienced a decline in bread prices (Fig. 6).

Retail bread prices rose an average of 1.7 cents between January 1, and August 15, 1966, in the 25 cities studied by the Commission. Farmer ingredient costs accounted for 0.6 cents, bakers for 0.7 cents, and retailers 0.5 cents. There was great variation as among cities, however. At one extreme, in 4 cities where prices rose 3.7 cents, farm ingredient costs accounted for 0.6 cents, bakers 2.1 cents and retailers 1.0 cents. At the other extreme, in 4 cities where wholesale bakers absorbed the entire rise in ingredient costs, retail prices remained unchanged over the period (Fig. 8).

The mixed pattern in retail bread prices cannot be attributed to geographic differences in raw material costs since bakers in all parts of the country have experienced essentially the same increases in ingredient costs. On the average, the greatest price increases occurred in cities where wholesale bakers had the lowest prices in the beginning of the period. It appears that in these cities bakers used the occasion of increased flour costs in June to raise their prices substantially in excess of their increased cost of ingredients. For example, in 4 cities where wholesale bakers had relatively low beginning prices, they increased their prices by an amount four times greater than the rise in ingredient costs. These bakers still had prices slightly below the average of all bakers, however (Table 5). Our analysis suggests that in some cities where wholesale prices rose most, bakers had been earning very low profits, or even incurring losses. Preliminary finding from our in-depth studies seem to confirm this observation.

Retailers not only passed on the increases in wholesale bread prices, but added to them by expanding their own gross profit margins, both absolutely and proportionately. Where wholesale prices increased most, retailer margins registered the largest increases, irrespective of the size of their previous margins. Retailers did not, however, advance the prices of their own brands of bread commensurately with the bakers' brands, but this may be temporary because of the usual lag in retailer brand price increases.

Retailer brands of bread, as indicated, generally sell for less at retail than baker brands. In the cities studied by the Commission the difference between the two averaged 5 cents per pound. There were wide differences among cities, however, ranging from an average of 2.6 cents in one group of 5 cities to an average of 7.8 cents in 6 other cities (Table 9).

In the case of milk, farm prices had been severely depressed for over a decade, particularly in the so-called "surplus" production states in the Midwest. The result was a continued exodus of dairy farmers. Until 1965, increased productivity of the remaining farmers more than kept supply in pace with the demand, but in the latter year the exodus from dairy farming became so great that total milk production fell. The resulting sharp reversal in the supply-demand situation brought rises in raw milk prices which were quickly transmitted to the processors and retailers. It is not surprising, therefore, that the sharpest price

increases came in the traditional "surplus" states. The three cities with the lowest retail milk prices in August 1965 experienced large gains by August 1966: Minneapolis, 18.2 percent; Cleveland, 22.7 percent; and Detroit, 19.6 percent (Fig. 10). About one-half of the overall increases in milk prices may be attributed directly to higher farm prices. In 24 cities studied by the Commission out-of-store milk prices rose an average of 3.9 cents per half-gallon between January and August 15, 1966. On the average, farmers accounted for 2.0 cents, processors 0.9 cents, and retailers 1.0 cents. There was considerable variation as among cities, however. In 9 cities, where prices rose an average of 5.9 cents, farmers accounted for 3.1 cents, processors 1.2 cents and retailers 1.6 cents. On the other hand, in 7 cities, where prices increased an average of 0.8 cents, farmers accounted for 0.4 cents, processors less than 0.05 cents and retailers 0.4 cent (Fig. 11).

It appears that much of the increase in processors' margins occurred in markets where margins had been abnormally low (Table 14), an inference supported by preliminary findings of our in-depth studies. On the other hand, the extent of the increases in retailers' margins appeared to be directly related to advances in the prices which they paid for milk. Where wholesale prices rose most, retailers not only passed on the increase but added to it by expanding their own margins, both absolutely and proportionately. But where wholesale prices increased only slightly, retailers did not widen their margins appreciably (Table 15).

In general, then, it appears that the recent price increases in bread and milk were triggered by changes in the supply situation at the farm level. The actual increases in retail prices were about double the step up in milk prices at the farm level and retail bread prices were about three times greater than the advance in farm ingredient costs to bakers. Part of the amount added by both milk and bread processors in some cities clearly represents an upward adjustment from what had been depressed margins. The increase in retailer gross profit margins, on the other hand, resulted largely because retailers pyramided prices in markets where wholesale prices rose most.

There are notable exceptions to this general pattern of price increases. For this reason, the Commission is studying in depth several markets which experienced especially sharp increases in bread and milk prices. The analysis in these cities will cover factors in addition to ingredient costs which may have contributed to increased processor costs, including wages, packaging and other items. It will also study the level and pattern of profits in these cities.

In conclusion, this preliminary review indicates that recent price increases in bread and milk may be attributed to the following: (1) Farm prices rose because of radically changed supply-demand conditions. In milk, where the greatest farm price increases occurred, farm prices had been severely depressed for over a decade. In bread, the recent rise in wheat prices reflected a sharp reversal in the supply-demand situation with respect to the 1966 wheat crop. (2) Bread and milk processors as a group not only passed on the increases in ingredient costs, but added to their margins as well. Part of these margin increases reflect other cost increases while part may have added to profits which had previously been depressed. (3) Because of the practice of taking a fixed percentage margin, retailers tended to pyramid the price increases generated at the farm and processor levels.

At this time there is reason to believe that the upward price spiral will not be extended. Although the usual seasonal advances in milk prices in the winter months may be anticipated, it is likely that some of the recent advances in bread prices will not "stick" because of the wide differential in some markets between retailer and baker brands. For both bread and milk retailer gross margins have become so wide in some markets that effective competition may exert downward pressures. Finally, there is growing consumer resistance to price increases which may induce retailers to intensify *price competition* and curtail the *promotional* competition which has substantially raised retail distribution costs over the past decade.

I

NATURE AND SCOPE OF STUDY

This preliminary report on bread and milk prices was undertaken by the Federal Trade Commission pursuant to a request on August 4, 1966, from the Secretary of Agriculture that the Commission "review immediately the pricing policies and actions for bread and milk, including recent price changes of these

food items and relation to all factors affecting costs and the conditions of competition."¹

In response to this request, the Commission undertook a two-phase study. The first is designed to determine the amount and pervasiveness of the price increases in various parts of the country, the extent to which they may be attributed to increases in basic ingredient costs, and the manner in which higher ingredient costs ultimately are translated into consumer prices. The second phase involves in-depth studies of a limited number of metropolitan areas to ascertain in some detail the inter-relationships between changes in various cost elements in the production and distribution of these products and the prices the consumers are paying.

This preliminary report covers only the first phase of our inquiry. We are unable to report at this time on the second phase of the study because cost information from some companies is not yet available for the period covering the major price increases occurring in August. A final report will therefore be made which will analyze the cost, price, and profit movements in particular markets experiencing sharp price increases in recent months.

In order to secure the necessary factual foundation for this inquiry, the Commission undertook to gather information from two major sources: (1) the Bureau of Labor Statistics, which supplied special tabulations of unpublished data, and (2) the leading companies in each of the principal phases of the bread and milk industries, namely, the major bread bakers, milk processors, and national grocery chains, which furnished data for many of the markets they serve. For the in-depth studies additional bakers, dairies, and grocery retailers active in the particular markets selected for study were also requested to furnish certain data on prices and costs. Companies in each of these industries have co-operated fully and expeditiously in this inquiry.

For the preparation of this report the Commission studied price developments in 39 cities, and secured directly from leading companies data reflecting their operations in 27 of the largest of these.² Specifically, the Commission obtained wholesale price information for the 27 cities from the 9 largest fluid milk processors and the 8 largest wholesale bakers and it obtained both purchase and resale price information from 9 of the largest food store chains. The surveyed companies represent a substantial portion of the business done in their respective fields, and they are major factors in most of the cities studied.³

Much of the retail price information covered in this report is based on the prices of leading food chains. While the prices of these companies may not portray precisely the *level* of retail prices, they are good indicators of the *trend* in prices.⁴

This report is concerned primarily with measuring the change in bread and milk prices and the manner in which ingredient price increases became reflected in higher wholesale and retail prices. It has not attempted to study the impact of higher costs of other items. This is not to imply that other costs may not also have risen. The extent and significance of other cost components will be dealt with in detail in the in-depth studies of individual markets.

Before turning to an analysis of the recent price developments, it is appropriate to place them in perspective. The following section therefore discusses post-war price, margin and profit trends in the milk, bread, and food retailing industries.

¹ The letters exchanged between Secretary of Agriculture Orville L. Freeman and Chairman Paul Rand Dixon will be found in Appendix A.

² The larger number of cities is the list for which the Bureau of Labor Statistics has compiled retail price data.

³ In 1965 the 8 largest wholesale bakers produced about 40 percent of all commercial bread made and the nine largest grocery chains produced an additional 9.4 percent. These companies manufactured a somewhat higher percentage of all bread sold through food stores. Two or more of the nine largest national bakers operate in all but three of the cities surveyed; four or more bakers and/or chains operated in all but four of the cities. More than two of the largest bakers or chains were represented in all but one city.

The nine dairy companies surveyed, plus the major chains, account for over 30 percent of total U.S. fluid milk production. These companies represent an even larger share of fluid milk sold through grocery stores, because many of the smaller companies sell mainly through home delivery or very minor amounts through grocery stores. Wholesale price information on milk was obtained from chain retailers as well as dairy processors.

The nine food chains surveyed account for about 27 percent of total U.S. grocery store sales. In all cities covered by the Commission survey these chains did more than 10 percent of the grocery store business and in all but 7 cities they did over 20 percent of the business.

⁴ Comparison with Bureau of Labor Statistics data indicates that the bread and milk prices of large chains average about 3 percent less than the average of all food retailers. However, BLS data show that between August 1965 and August 1966 average milk and bread prices of chains increased by about the same percent as all food stores.

II

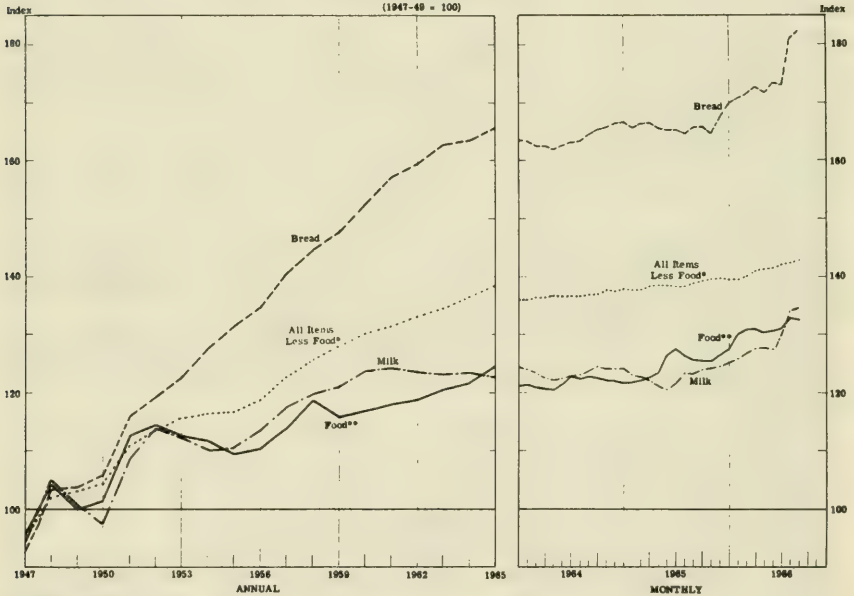
TRENDS IN PRICES, MARGINS, AND PROFITS

POST-WAR PRICE TRENDS IN BREAD AND MILK

Some perspective regarding the long term trends, as well as the more recent changes in bread and milk prices, may be gained by examining retail price changes over the period 1947 to date as depicted in Figure 1. This chart shows the indexes of retail prices of bread, milk, food (except restaurant), and all items contained in the consumer price index except food. The left panel of the chart shows the trends on an annual basis from 1947 through 1965. The panel in the right-hand portion of the chart shows the monthly changes from January 1964 through September 1966. Each of the indexes shown is based on 1947-1949 as 100.

Food prices in general increased rather sharply during the years 1950-51; thereafter they fluctuated somewhat, but as recently as 1960 they were only four points above their 1951 level. In the early 1960's they rose modestly, but

Figure 1
RETAIL PRICE CHANGES, 1947-1966
(1947-49 = 100)



*All items in Consumer Price Index except food.

**Except restaurant.

Source: Bureau of Labor Statistics. (Appendix table 1).

beginning in 1963 an upward movement developed and the food price index crossed the 120 mark (1947-49=100) for the first time in the post-war period. Following a steady upward trend, particularly since the end of 1964, the food index rose in August 1966 to a new post-war high of 132.9—that is, nearly one-third above the base period, but declined to 132.5 in September.

Non-food items in the consumer price index, however, commenced their sharp upward movement earlier, and their rise has been more precipitous. By September 1966 the all-items-less-food index reached a level 42.8 percent above the base period.

As between bread and milk, the former has risen much more sharply, not only over the long pull of the post-war years, but in recent months. Retail bread prices have experienced an uninterrupted rise (on an annual basis) in each of the 18 years, 1947 through 1965, reaching 165.7 in the latter year. In 1966 to date, moreover, the rise has been very steep. In January of this year the retail bread price index stood at 169.9. By September 1966 it had risen to 182.2.

Retail milk prices followed pretty closely the total food price index until the mid-fifties, but since then milk prices have generally risen faster than the average of all food items. During the past two years, milk and total food prices have shown the same general upward movement, and the increases have been quite pronounced in milk since early in 1965. In September 1966 the retail milk price index reached 134.8, a new post-war peak.

RELATIVE CHANGES IN FARM, PROCESSOR AND RETAILER PRICES AND MARGINS

The counterpart to the matter of the extent of price increases at retail is the question of the extent to which these increases have been shared by the various factors in the market. In the case of bread this is a question of whether the increases have flowed to the farmers producing the wheat, the millers producing the flour, other producers of bread ingredients, the bread bakers, or the retailers. In respect to milk there is the question of whether farmers, processors or retailers have been responsible for the price increases.

As shown in Fig. 2, over the two decades which have elapsed since World War II the greatest part of the increase in bread prices can be attributed to bread bakers. Their spread, which is the difference between their selling prices and ingredient costs, represents one-half the cost of bread at retail. The baker's spread rose from a 1947-49 average of 5.7 cents per pound to 12.2 cents a pound in August 1966. This increase is equal to sixty-five percent of the average increase in the retail price of bread over the period. Had it not been for this increase in baker spreads, the price of bread would have increased slightly less than the average of all food prices.

Figure 2
RETAIL BREAD PRICES AND COST COMPONENTS, 1947-1966



Selling and distribution expenses have been the major cause of baker cost increases.¹

Farm ingredient prices, on the other hand, have risen very little in absolute terms. They held at around 3.2 cents per pound of bread over the entire period from 1947-49 to 1965. As recently as January 1965, the farm value of all ingredients used in making one pound of white bread was 3.5 cents per pound. This figure rose by 0.5 cents per pound between January and August 1966. Expressed as a percentage of the consumer dollar, the farm value of ingredients used in making white bread fell from 26.0 percent in 1947-49 to 17.5 percent in August 1966. Prices of processors of farm ingredients (especially flour, milk and sugar) going into bread have risen somewhat, but their share decreased from 14.2 to 11.0 percent. Also, the retailer's spread increased, from 15.0 percent in 1947-49 to 18.0 percent of the retail price in August 1966 (Fig. 2).

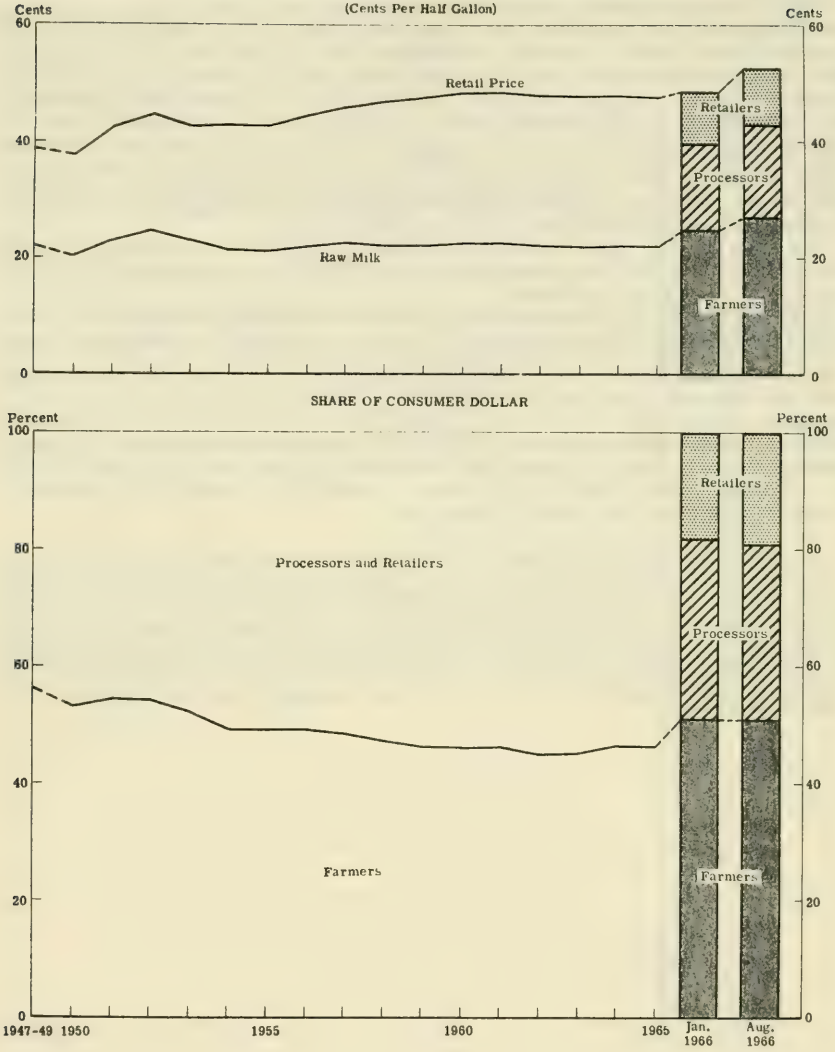
The price of raw milk received by farmers declined after reaching a post-war high in 1952. The recent increases in raw milk prices represented a partial recovery of these previous losses.

The farmer's share of the consumer's dollar spent on fluid milk declined rather steadily after 1952. Although the recent increases stopped the downward trend, the farmer still received a smaller share than in earlier years (Fig. 3.)

The division between processors and retailers of the spread between the raw milk and the retail price cannot be determined through 1965 from available data. However, on the basis of the data collected by the Commission for a number of cities, in August 1966 the farmer's share of the consumer's dollar was 51.0 cents, processor's share was 30.5 cents, and the retailer's margin was 18.5 cents. During the January-August interval, the farmer's share held steady, the processor's share declined, and the retailer's share rose.

¹ Whereas at the end of World War II selling and distribution were 21 percent of wholesale baker total costs, in 1965 they were about 35 percent. Increases in selling and distribution expenses therefore explain about two-thirds of the bakers' spread increases over the period and nearly half of the average retail price increases of bread. Had it not been for the increase in selling and distribution costs pushing up the price of bread, the post-war bread price increases would have been less than the increase in the consumer price index, all other things assumed equal. *Report of the Federal Trade Commission on Wholesale Baking Industry*, 1946, Table 2, p. 23; *Organization and Competition in the Milling and Baking Industries*, Technical Study No. 5, National Commission on Food Marketing, 1966, Table 3-49, p. 106.

Figure 3
FARM AND RETAIL MILK PRICES, 1947-1966



Source: Appendix table 3.

The increase in gross margins of food retailers has not been confined to bread and milk. (Gross profit margins are the difference between the cost of merchandise purchased by a retailer and the price at which the merchandise is sold.) Although gross margins of food retailers have risen continuously over the past decade, the greatest increases occurred among large food chains. Whereas in 1955 large food chains had gross profit margins of 18.1 percent, by 1964 their margins had grown to 22.8 percent (Figure 4). This is in sharp contrast to medium and small food chains, whose margins increased very little over the period.

Several factors contributed to increased gross margins. This matter was studied in depth by the National Commission on Food Marketing during the past two years. The Final Report of that body concluded as follows with respect to the causes of increased margins:

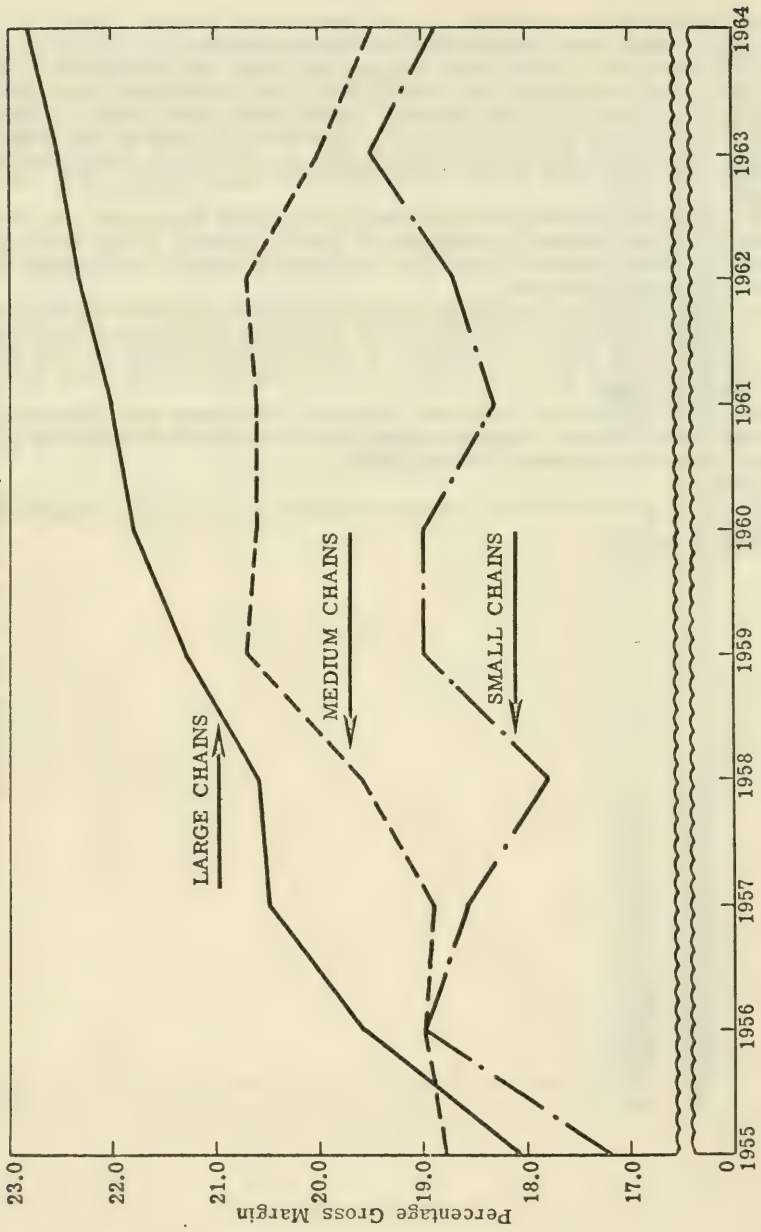
Higher margins for retailers, in general, reflect the cost of trading stamps and other promotions, higher costs of renting or owning store facilities, increased labor costs and advances in other expenses. More services offered by retail stores add to the job to be done and account for some of the increase in costs.¹

The Food Commission found that increased advertising and promotion (including trading stamps) alone accounted for 40.9 percent of the increase in margins of food chains between 1955 and 1964.²

¹ *Food from Farmer to Consumer*, Report of the National Commission on Food Marketing, 1966, p. 78.

² *Ibid.*, p. 78.

Figure 4
GROSS MARGINS OF FOOD CHAINS, 1955-1964



Source: Appendix Table 4.

The Food Commission further found that higher promotional expenditures had become reflected in higher retail prices. On this point the Food Commission concluded:

When stamps were first introduced, retailers giving them frequently attained sufficient additional volume to more than pay for the stamps. Consumers, therefore, did not have to pay higher prices for food but benefited from the stamps and the premiums they obtained for stamps. As more and more of the industry adopted stamps and competing forms of promotion, however, it was no longer possible for retailers as a whole to obtain additional volume by using trading stamp promotion. As a result, the cost of the stamps represented an additional cost of retailing, and prices rose. All too often consumers buying food also were required, in effect, to make tie-in purchases of premiums being offered for trading stamps.¹

Increased promotional costs pushed costs and prices of chains above those of smaller retailers. On the basis of in-depth studies of cost and prices in Portland, Maine, and Topeka, Kansas, the Food Commission concluded: "In the two markets, small local chains and affiliated independents had lower retail prices, lower margins, and lower operating expenses than large chains. Only in procurement costs did the larger chains have an advantage."²

Increased gross profit margins of chains have an important impact on the size of consumer expenditures in food stores. An increase of even one percentage point in the gross margins of food retailers involves \$600 million. Hence, if all food retailers had increased their margins by as much since 1955 as did the largest chains—about 5 percentage points—it would have involved \$3 billion.¹ This \$3 billion would have been paid for by consumers in higher prices or by food store suppliers in lower prices, or would have been shared by the two groups.

PROFIT TRENDS

The trend in profit performance for the period 1948 to date of the three branches of the food business with which we are concerned in this study is shown in Table 1. The data on profits after taxes as a percent of net worth are given for bakeries, dairies, and leading food manufacturers. The table also contains separate profit data for the four largest and other large companies in the bakery and dairy industries.

There has been a steady downward trend in bakery profits over the past decade, with the drop most pronounced for the "other large" group. The top 4 earned 21.2 percent after taxes on net worth in 1948, averaged between 11 and 14 percent in the 1950's but by 1965 fell to 7.5 percent. The other large bakeries did worse, declining to below 10 percent return in every year since 1950 and consistently below 5 percent in the 1960's. Actual losses were registered in the three years 1962-1964 and only a 2.0 percent return was secured in 1965.³

Large dairies, particularly the big 4, have fared better over the years than the bakeries. The 4 largest dairies in 1965 earned 12.4 percent after taxes on net worth, a rate of return exceeded only once since 1950. Because the overall profits of large dairies are influenced heavily by their nondairy operations, they probably overstate the rate of return earned on the fluid milk portion of their business.⁴ The other large dairies earned 9.4 percent in 1965—about the average for the 1960's, but below the 11 percent rate earned in the late 1950's.

Leading food chains in 1965 earned 12.1 percent after taxes, which happened to be the same profit rate for leading food manufacturers.⁵ The earnings' rate of the leading food chains as a group have averaged 11.5 percent during the 1960's, as compared with 13.1 percent during the 1950's. Since 1960 profit rates of large wholesale bakers were well below those of either large food chains or large food manufacturing corporations as a group. Although large dairy processors enjoyed somewhat higher profit rates than did bakers, they very probably earned a lower rate of return on the fluid milk portion of their business than the average rate of return of large chains and food manufacturing corporations.

¹ *Food from Farmer to Consumer*, Report of the National Commission on Food Marketing, p. 77.

² *Ibid.*, p. 79.

³ In 1965 total food store sales came to \$67 billion.

⁴ Preliminary findings of our in-depth studies show that even leading dairies are earning very low rates of return on their fluid milk operations in some cities.

⁵ The cut-off point in the definition of leading food chains is annual sales exceeding \$100 million; for food manufacturers \$100 million or more of assets.

TABLE 1.—PROFITS AFTER TAXES AS A PERCENT OF NET WORTH, LARGE BAKERIES, DAIRIES, FOOD CHAINS, AND FOOD MANUFACTURING COMPANIES, 1948-65

Year	Bakeries		Dairies		Leading food chains ³	Leading food manufacturing companies ⁴
	Top 4	Other large ¹	Top 4	Other large ²		
1948.....	21.2	16.1	14.0	10.2	16.1	12.8
1949.....	14.7	13.9	16.1	11.7	17.5	11.7
1950.....	14.1	12.9	14.8	10.8	15.2	13.2
1951.....	11.1	9.4	11.5	7.7	11.8	9.4
1952.....	11.6	8.3	11.2	7.2	11.7	9.3
1953.....	11.7	9.3	11.8	7.9	12.6	10.0
1954.....	11.9	6.1	13.0	8.2	13.6	9.3
1955.....	⁵ 13.7	6.4	⁵ 12.4	9.8	13.4	10.2
1956.....	13.6	7.1	12.4	11.8	14.1	9.9
1957.....	13.3	7.6	12.2	11.7	14.1	9.8
1958.....	12.1	5.7	12.2	11.3	12.9	10.3
1959.....	11.4	5.7	12.0	11.2	12.0	10.8
1960.....	9.5	4.4	11.6	9.9	11.8	10.7
1961.....	6.8	1.3	10.9	8.4	10.6	10.7
1962.....	6.3	-1.0	10.8	7.8	10.4	11.7
1963.....	7.3	-2.3	10.9	8.8	11.2	11.0
1964.....	7.8	-3.8	11.9	9.7	12.7	11.7
1965.....	7.5	2.0	12.4	9.4	12.1	12.1

¹ Includes: 8 bakers during 1948-54 and 5 thereafter.² Includes 11 dairies during 1948-54 and 8 thereafter.³ All food chains with annual sales exceeding \$100,000,000.⁴ All food manufacturing companies with assets of \$100,000,000 or more.⁵ Change in composition of the top 4 from 7 previous years.

Sources: Federal Trade Commission, "Rates of Return for Identical Companies in Selected Manufacturing Industries," 1940-1947-61 and 1955-64; Leading food chains, National Commission on Food Marketing, "Organization and Competition in Food Marketing, 1965-66", pp. 292-93; Food manufacturing companies, Moody's Industrial Manual.

MARKET CHARACTERISTICS

There are a number of major factors in the organizational structure of the markets for bread and milk which influence their price behavior. For both products there are three levels to be considered, the farm, the manufacturer and the retailer. The relative importance of cost elements at these distribution levels varies significantly as between the two products. In the case of bread, the key ingredient, flour, is intermediate between the farmer's product and the baker's product, and the latter is turned out in a variety of sizes, shapes and types. For milk the process is in some ways simpler, but in other ways more complex. Raw milk is sold to processors, who, in turn, may manufacture several different categories of dairy products: fluid milk, butter, cheese, etc. While farm prices of wheat are subject to Government agricultural controls, the relationship between such influences and the ultimate price of bread is more remote than the relationship between the farmer's price of raw milk and the price the housewife pays for bottled milk at the supermarket.

Industrially, three major groups influence the operations of the respective markets once the raw product has left the farmer's hands, the bakeries (manufacturers), the dairies (processors) and the retailers. The leading bread bakeries serving most local markets are nationally organized. The same may be said for the leading dairies and the supermarket chains, with certain variations in each case in regional influence.

Nevertheless, the markets for both bread and milk are essentially local in character and considerable diversity is found in price behavior from market to market. In the case of both commodities there are processing plants spread throughout the country serving local markets. Consumers also, of course, buy both products at the local level. The ingredient inputs of the two products differ. Wheat and flour are sold on a national basis. Milk is sold on a local basis. In addition, the conditions of supply for milk are not uniform in the various regional markets and there is an overlay of governmental controls that affects the

prices received by farmers, and in the so-called controlled states the prices of processors and retailers also are regulated.¹

In view of the local character of the milk and bread industries, overall national averages obscure what is happening in individual markets. The remainder of this report therefore will analyze price developments in various metropolitan areas.

III

RECENT CHANGES IN THE PRICE OF BREAD

GEOGRAPHIC PATTERN OF RETAIL PRICES

The general price increase in bread, as noted earlier (Fig. 1), got underway around the first of the year. Prices increased steadily until July when they advanced sharply following wheat price increases in June.² Even prior to the first of the year, however, there were bread price increases in certain parts of the country (Fig. 5A-5D). For example, in Kansas City, Dallas, Houston, Philadelphia and Atlanta, store prices increased in the latter months of 1965. In January and February 1966 the increases caught hold in Chicago, Minneapolis, St. Louis, and Cleveland (and had advanced further in Kansas City) among Midwest cities; in Seattle on the West Coast; and Boston and Baltimore in the East. These early increases were modest, and some merely represented rebounds from earlier declines. It was not until mid-summer that price rises became general enough to cause the average national price to increase sharply. In August, increases were registered in Chicago, Minneapolis, Milwaukee, Kansas City, St. Louis, Cleveland, Indianapolis, Detroit, Denver (which had caught up with the rising trend in April), Houston, New York, Boston, Philadelphia, Atlanta, Los Angeles, San Francisco, and Seattle. On the other hand, in a few markets retail bread prices declined in August, notably in Pittsburgh and Portland (where the decline had been under way since May). In Honolulu retail bread prices remained fairly stable throughout 1965-66 at levels considerably below those that prevailed early in 1964.

The extent of recent price increases in 39 cities is shown in Fig 6. Between August 1965 and August 1966 the price of one pound of white bread rose an

STATES WITH AUTHORITY TO REGULATE MILK PRICES AT THE FARM, WHOLESALE, OR RETAIL LEVELS, 1965

State	Farm prices	Wholesale prices	Retail prices
Alabama.....	X	X	X
California.....	X	X	X
Florida.....	X		
Georgia.....	X	X	X
Louisiana.....	X	X	X
Maine.....	X	X	X
Massachusetts.....	X	X ¹	X ¹
Mississippi.....	X	X	X
Montana.....	X	X	X
Nevada.....	X	X	X
New Hampshire.....	X	X	X
New Jersey.....	X	X	X
New York.....	X		
North Carolina.....	X		
Oregon.....	X		
Pennsylvania.....	X	X	X
South Carolina.....	X ²	X	
Vermont.....	X	X	X
Virginia.....	X	X	X
Wyoming.....	X	X	

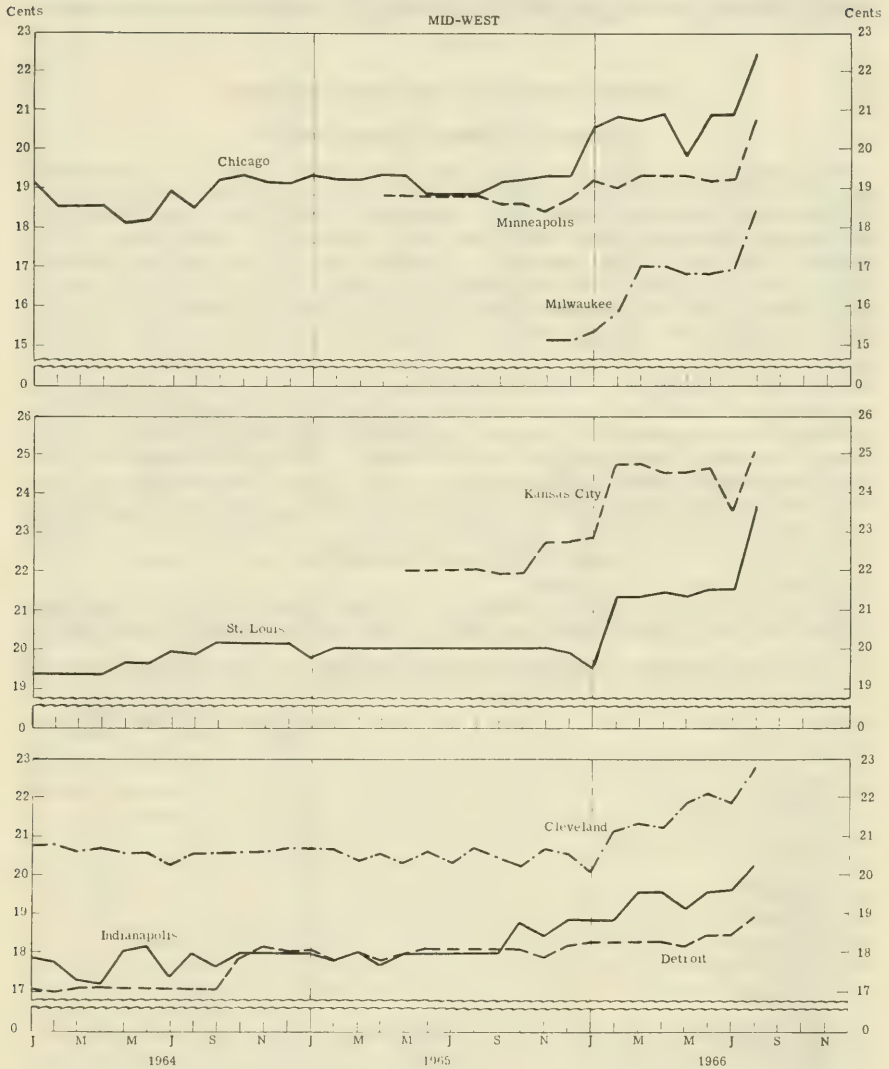
¹ Emergency procedures only.

² By audit and filing.

¹ The following table from the National Commission on Food Marketing technical study of "Organization and Competition in the Dairy Industry" (p. 43), shows the status of regulatory controls in the various states:

² The data upon which this discussion of retail prices is based are those assembled by the Bureau of Labor Statistics. The data cover both wholesale baker brands and private labels. The Bureau gathers prices from corporate chain retail stores and large and small independent food stores. Information obtained independently by the Federal Trade Commission was limited to the largest multi-plant wholesale bakers and the largest national corporate chain grocers. Because the data reflect their different sources, some details necessarily vary from the picture presented here.

Figure 5A
 RETAIL BREAD PRICE TRENDS IN SELECTED CITIES*
 JANUARY 1964 - AUGUST 1966



*City average store price per one-pound loaf of white pan bread.

Source: Prepared from data furnished by the Bureau of Labor Statistics. Appendix table 5.

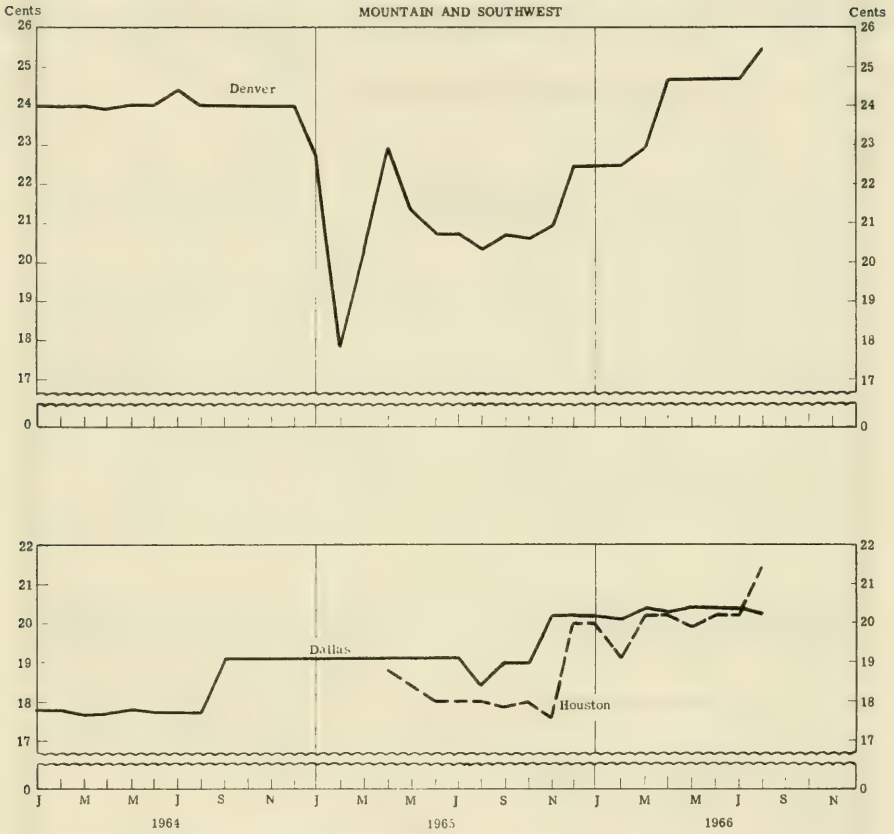
Figure 5B

RETAIL BREAD PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966



Figure 5C

RETAIL BREAD PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966



*City average store price per one-pound loaf of white pan bread.

Source: Prepared from data furnished by the Bureau of Labor Statistics, Appendix table 5.

Figure 5D

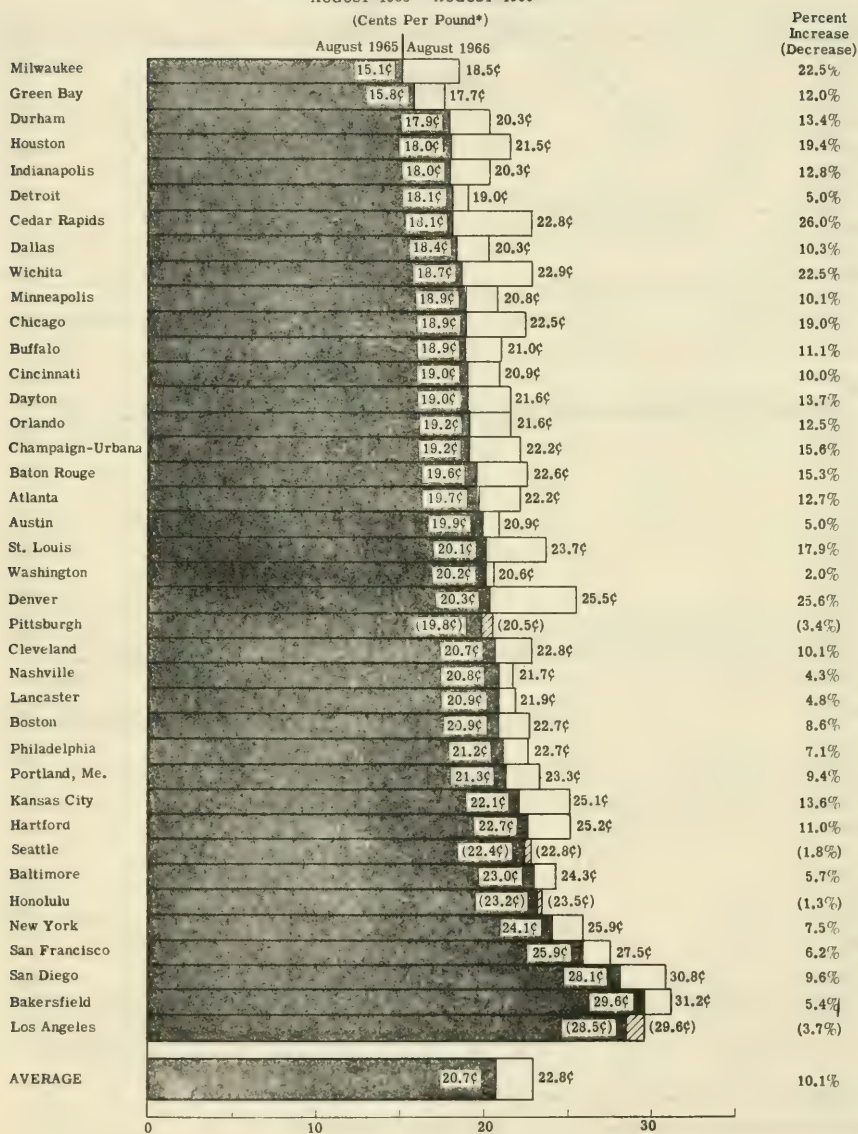
RETAIL BREAD PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966



*City average store price per one-pound loaf of white pan bread.

Source: Prepared from data furnished by the Bureau of Labor Statistics. Appendix table 5.


Figure 6
RETAIL BREAD PRICE CHANGES IN THIRTY-NINE CITIES
AUGUST 1965 - AUGUST 1966
(Cents Per Pound*)




*City average store price for white pan bread.

Source: Based on data supplied to the Federal Trade Commission by the Bureau of Labor Statistics.

Legend:

Increase 

Decrease 

average of 10.1 percent. This represented an average increase of 2.1 cents per loaf—from 20.7 cents to 22.8 cents.

The national average price obscures the diverse movements occurring in various cities. In Milwaukee, for example, prices rose by 22.5 percent, whereas in Los Angeles they declined by 3.7 percent (Fig. 6).

Although there are exceptions, the greatest price increases occurred in cities with the lowest prices in the beginning of the period. Milwaukee is a prominent example. In August 1965 its prices were the lowest of the 39 cities shown in Fig. 6. It also experienced one of the greatest increases over the following 12 months. On the other hand, Los Angeles, which had the highest prices in the beginning of the period, had the greatest decreases.

When cities are grouped by their prices in August 1966, a rather clear overall pattern emerges (Table 2). The 10 cities with the lowest retail prices in August 1965 experienced average price increases of 15.4 percent, or 2.7 cents per pound. At the other extreme, the 9 cities with the highest prices in August 1965 experienced an average increase of only 4.3 percent, or 1.1 cents per pound.

TABLE 2.—CHANGES IN RETAIL BREAD PRICES, AUGUST 1965 TO AUGUST 1966

Number of cities	Average prices for white pan bread (cents per pound)		Average amount of change	Average percent of change
	August 1965	August 1966		
10.....	17.7	20.4	2.7	15.4
10.....	19.3	21.9	2.6	13.8
10.....	20.9	22.6	1.7	8.2
9.....	25.5	26.6	1.1	4.3

Source: Based on data supplied the Federal Trade Commission by the Bureau of Labor Statistics.

RECENT INCREASES IN INGREDIENT COSTS

Flour and other ingredients account for roughly one-third of the bakers total costs of manufacturing and distributing white bread. In addition to flour, the basic ingredients are sugar, nonfat dry milk, lard and yeast.

Table 3 charts the price movements of these products since 1961. Each ingredient is expressed in terms of its cost to bakers per one-pound loaf of white bread.¹

Overall ingredient costs followed a rather steady course during 1961-1965, average 5.6 cents per loaf. The costs of individual ingredients also followed a rather even course.

After remaining virtually unchanged in the first months of 1966, flour prices began rising in May, and by July were 0.7 cents above the price at the beginning of the year. Flour prices declined somewhat in August and September. The only other significant ingredient to rise in price was nonfat dry milk, which rose from around 0.4 cents per loaf in late 1965 to 0.5 in August 1966. Between January and August 1966 the cost to bakers of farm derived ingredients used in manufacturing white bread rose from 5.9 cents to 6.5 cents per loaf.

The rise in ingredient costs is directly traceable to a rise in farm prices of wheat and milk. The farm value of wheat used in flour rose from 2.8 cents per loaf from January 1966 to 3.2 cents per loaf in August 1966. The farm value of all ingredients used in bread rose from 3.5 cents per loaf in January 1966 to 4.0 cents per loaf in August 1966.²

¹ Appendix Table 6 shows the actual prices of the ingredients.

² See Appendix Table 2.

TABLE 3.—COST OF INGREDIENTS PER POUND LOAF OF WHITE BREAD, 1961-66

[Amounts in cents]

Year	All ingredients ¹	Flour	Sugar	Dry milk	Lard	Yeast
1961	5.4	4.0	0.4	0.4	0.3	0.1
1962	5.7	4.3	.5	.4	.2	.1
1963	5.6	4.1	.6	.4	.2	.1
1964	5.6	4.1	.5	.4	.2	.1
1965	5.7	4.2	.5	.4	.3	.1
October 1965	5.8	4.3	.5	.4	.3	.1
November 1965	5.8	4.3	.5	.4	.3	.1
December 1965	5.8	4.3	.5	.4	.3	.1
January 1966	5.9	4.3	.5	.4	.3	.1
February 1966	5.9	4.3	.5	.4	.3	.1
March 1966	5.8	4.2	.5	.4	.3	.1
April 1966	5.8	4.3	.5	.4	.3	.1
May 1966	5.9	4.4	.5	.4	.3	.1
June 1966	6.2	4.7	.5	.4	.3	.1
July 1966	6.5	5.0	.5	.5	.3	.1
August 1966	6.5	4.9	.5	.5	.3	.1
September 1966	(2)	4.9	.5	(2)	.3	.1

¹ Includes minor ingredients not listed in table.² Not available.

Source: Computed from prices shown in appendix table 6.

Hence, between January and August 1966 increased farm prices added .5 cents per pound to the price of white bread. Costs of these ingredients to bakers rose only fractionally more than their increased farm value—.6 cents compared to .5 cents.

The rise in the farm value of flour occurred because of a sharp reversal in the supply-demand situation for wheat in 1966. Whereas total U.S. wheat production rose steadily in recent years, adverse weather reduced the size of the 1966 crop. In July the United States Department of Agriculture forecast a supply of 1,240 million bushels, about 87 million below 1965 production (Appendix Table 7). Total supply for 1966 (including beginning carryover) was 1,777 million bushels, or 368 million below the figure of a year earlier. The decline in carryover resulted from growing export commitments as well as domestic consumption. The tightened supply-demand situation pushed farm wheat prices up from the annual average of \$1.34 per bushel in 1965 to \$1.74 in mid-July 1966.

Because of the changed supply-demand situation, the Secretary of Agriculture raised the wheat allotment for the 1967 crop year 16.6 million acres, or 32 percent. Since U.S. wheat acreage in 1967 will be well above this year's level, wheat prices in 1967 most probably will drop somewhat below current levels.

CHANGES IN WHOLESALE PRICES

The timing of price increases

Retail bread prices increased only moderately (about 1.9 percent) during the first six months of 1966. However, by early September¹ they had risen 7.5 percent (Table 4). The retail price increases were triggered by increases in wholesale prices.

The wholesale price increases were heavily clustered in July and August. Between January 1 and August 15 eight large national makers made a grand total of 98 general² list price increases. Sixty-four of these occurred during July and the first 15 days of August.³

With few exceptions, no significant wholesale price increases happened in the Northeast or the South before mid-July.⁴ There were some substantial increases in wholesale list prices for white bread in Cleveland and Pittsburgh in March and April. However, no such price activity appeared in any of the eastern seaboard or southern cities surveyed.

¹ The Bureau of Labor Statistics collects bread prices the first complete week of each month.

² General price increases are defined as those covering two or more loaf sizes in one city.

³ A number of these increases occurred after the first week in August and therefore are not reflected in the BLS average price for August.

⁴ This discussion is based on information received from the eight largest wholesale bakers.

TABLE 4.—RETAIL BREAD PRICES AND FREQUENCY OF PRICE LIST INCREASES BY THE 8 LARGEST NATIONAL WHOLESALE BAKERS JAN. 1 TO AUG. 15, 1966, 27 CITIES

	Average retail price per 1 pound of bread ¹	Index of prices	Number of gen- eral wholesale list price in- creases during month ²
January.....	21.4	100.0	9
February.....	21.4	100.5	5
March.....	21.6	100.9	10
April.....	21.8	101.9	10
May.....	21.7	101.4	0
June.....	21.8	101.9	0
July.....	21.8	101.9	38
August.....	22.8	106.5	³ 26
September.....	23.0	107.5	.....

¹ Bureau of Labor Statistics, U.S. average price. BLS collects bread prices on the first complete week of each month.

² A general price list increase is considered to have occurred when 1 of the 8 largest national wholesale bakers increases list prices on at least 2 sizes of its own brand of white bread in 1 of the 27 cities surveyed. If in any 1 month each of the 8 largest national wholesale bakers increased their list prices in each city in which it operated (of the 27 cities surveyed), there would have been a total of 77 general price increases for that month.

³ Up to Aug. 15.

Source: Federal Trade Commission.

General wholesale list price increases by the largest bakers took place in January in only the three cities of St. Louis and Kansas City, Missouri, and Memphis, Tennessee. All except one of these price rises occurred in the former two. These price rises began in St. Louis on January 17 and in Kansas City on January 26. All important price rises in February happened in Memphis and Milwaukee.¹ The price increases in Memphis took place in the first few days of February and appear to have been a continuation of the activity started at the end of the previous month. Milwaukee price increases occurred in the middle of February. Thus, important increases in the wholesale list price of bread had not spread beyond these four cities at the close of February.

Price increases occurred in a number of cities during March and April. On the second day of March, two wholesale bakers raised their prices in Indianapolis. A few days later, a third wholesale baker raised his prices there.² Substantial price increases also took place during March in Pittsburgh, Cleveland, Denver and San Francisco. Price rises again occurred in Cleveland in the middle of April. Two large wholesale bakers raised list prices in Chicago early in April. The only other price increases reported in April took place in Los Angeles at mid-month and in Portland, Oregon, at the month's end.³

No important increases in wholesale list prices for white bread were noted in either May or June. In fact, no substantial increases in white bread wholesale list prices were initiated by the large wholesale bakers between the end of April and July 11.⁴ On that date, a price rise was announced for Minneapolis; then another rise was announced for that city on the 16th of July. On July 18 increases in wholesale prices were announced for nine cities—Los Angeles, San Francisco, Denver, Kansas City, St. Louis, Memphis, Chicago, Milwaukee and Detroit. All of these cities were objects of further price increases during July. Later in the month price increases occurred in Buffalo and New York City.

There is little point in distinguishing July from August dates, since the announced price rise occurred steadily. The northeastern and southern cities, not subject to substantial changes in bread wholesale list prices until August, became the foci of such increases. By mid-August, substantial increases in the wholesale list prices for white bread had taken place in every region of the United States. After mid-July, each of the eight largest wholesale bakers of white bread raised its list prices in more than one large city.

¹ These wholesale changes were quickly passed on in the form of increased retail bread prices. (See Fig. 5B.)

² In Indianapolis, Denver and San Francisco, these wholesale price rises were reflected in higher city average retail bread prices. In Cleveland, the wholesale changes were either anticipated or absorbed by retailers. In Pittsburgh those wholesale rises are probably first reflected in BLS figures for April. (See Figs. 5A and 5B.)

³ See Fig. 5D.

⁴ Although some cities display slight upward movements of retail bread prices during this period (Fig. 5A, Pittsburgh; Fig. 5B, Cleveland and Indianapolis; Fig. 5C, Houston), those small rises apparently were not the result of any general wholesale price pressure.

As the above discussion indicates, price increases were made by the largest bakers principally on a city-by-city basis. Only one of the largest bakers announced a price increase effective simultaneously in all of the markets in which it operates. Even that company had previously made its price increases city by city.

In summary, no widespread increases in wholesale bread prices occurred until July. Retail prices in early July were only 1.9 percent above the January level (Table 4). But shortly following the increases in wheat prices in June, which became reflected in flour costs to bakers by July 1, bakers in many markets increased their wholesale prices of bread. In nearly all cases, these increases exceeded by varying amounts the rise in flour costs per loaf of bread. Further increases occurred during August. Between the first week in July and the first week in September retail prices rose an additional 5.6 percent above the January level.

Private-label bread sales by bakers

Six of the eight largest wholesale bread bakers reported prices for private-label bread. Generally, those prices were below the wholesale list prices for their own brands. Private-label bread baked by wholesale bakers was available in 22 of the 27 cities surveyed. Although this bread was sold in many loaf sizes, all wholesale bakers making private-label bread offered a one-pound loaf. As with the wholesale bakers' own brands, the most usual price change was 1.5 cents per loaf. If the range be extended from 1.3 to 1.7 cents per loaf difference, about one-half (16 out of 31) of the price increases are included. Broadly, the price of private-label bread made by the largest wholesale bakers increased by about the same amount as did the price of their own brands for a one-pound loaf.

Brand names for private-label bread were not reported by all of the largest bakers surveyed. From those brand names that were reported, it appears that the largest wholesale bakers are making private-label bread for grocer associations such as IGA rather than for corporate chains. However, at least two of the largest corporate chain grocers were buying their private-label bread in one city from two of the largest wholesale bakers.

Inter-city patterns in wholesale bread prices

Between January 1 and August 15, 1966, wholesale bread prices increased in most of the cities studied by the Federal Trade Commission. The extent of the increases was very uneven, however.

Although there was considerable variation among cities, as a general rule prices rose most in cities with the lowest prices at the beginning of the period. Cities with average prices of less than 19 cents per loaf on January 1 experienced average price increases of 11 percent, or 2.0 cents per loaf (Table 5). In fact, the 5 cities with average prices of 18 cents or less in January experienced price increases of 14.8 percent or 2.6 cents per loaf. At the other extreme, cities with January prices exceeding 20 cents per loaf had increases of about 5.5 percent, or 1.2 cents per loaf.

TABLE 5.—AVERAGE WHOLESALE LIST PRICE OF A 1-POUND LOAF OF WHITE BREAD, JANUARY AND AUGUST 1966, 25 CITIES

January price range ¹ (cents per loaf)	Number of cities	Average price (cents per loaf)		Average amount of change	Average percent of change
		January 1966	August 1966		
Under 19.....	9	18.0	20.0	2.0	11.0
19 and 20.....	9	19.4	20.3	0.9	4.8
Over 20.....	7	22.6	23.8	1.2	5.5
City average ²	25	19.8	21.2	1.4	7.3

¹ Arrayed by January prices.

² An average price of a 1-pound loaf of white bread could not be computed for 2 of the 27 cities surveyed.

Source: Federal Trade Commission Survey.

CHANGES IN MARGINS OF LARGE FOOD CHAINS

Wholesale baker brands

A survey of wholesale prices paid and retail prices charged for regular white plain bread in 25 cities by the 8 largest national grocery chains during the period January through August 15, 1966, shows that these chains generally passed on not only the full amount of the wholesale bread bakers' price increases, but also increased their retail markups as well (Fig. 7).¹ In 19 of the 21 cities where wholesale price increases were recorded, the 8 chains increased their retail markups not only absolutely but also as a percent of retail selling prices. Retail price increases were exactly equal to the wholesale cost increases in the other two cities.

The most frequent retail margin increase was one-half cent. This occurred in about half of the cities. The city having the greatest increase showed the largest national chains added 1.4 cents to their margins in addition to passing along the wholesale price increase.

The most frequent increase in percentage margins was four-tenths of a percentage point. At the end of the period, August 15, the average retail margin in the 25 cities was 19.7 percent whereas it had been 19.5 percent in January.²

Table 6 compares the average changes in retailers' margins associated with changes in the prices which they paid for bread. For example, in cities where wholesale prices paid rose an average of 2.7 cents per pound, retailers not only passed on this increase, but added an additional .9 cent. At the other extreme, where there was no increase in wholesale prices, retailers did not change their prices or margins.

TABLE 6.—CHANGES IN PRICES PAID AND GROSS MARGINS OF LARGE GROCERY CHAINS, WHOLESALE BAKER BRANDS OF WHITE BREAD, JANUARY TO AUGUST 1966

Range of change in price paid per pound	Number of cities	Average change in price paid (cents per pound)	Average change in gross margins of chains (cents per pound)	Average percentage point change in gross margins
2 cents and over.....	4	2.7	0.9	0.5
1.5 cents to 2 cents.....	9	1.5	.5	.5
Less than 1.5 cents.....	8	1.1	.3	.0
No change.....	4	0	0	0
25-city average.....		1.3	.4	.3

¹ Less than 0.1 percentage point.

Source: Federal Trade Commission Survey.

The retail margin increases of the large chains might be described as a "pyramiding" of price increases. In nearly every city where wholesale prices increased, retailers used the occasion to increase their retail margins and to pass both on in a single retail price increase. Although this coincidence in timing of wholesale price and retail margin increases is not conclusive evidence that the chains would not have raised their retail margins in the absence of a wholesale price increase, it is significant that the chains did not increase their retail margins in any of the four cities where wholesale bakers' prices did not increase.

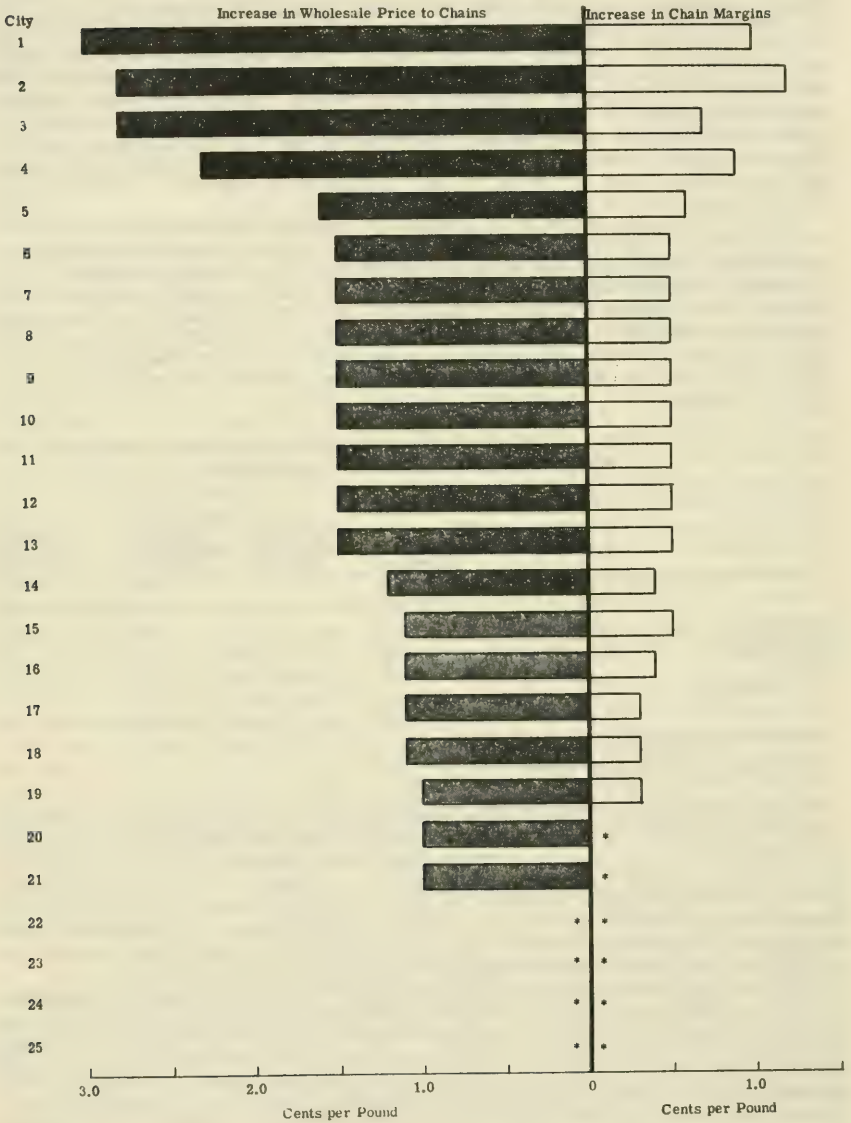
Moreover, as shown in Table 7, the increase in retailers' gross profit margins was not related to the size of margins at the beginning of the period. Rather, retailers were just as apt to pass on increases in markets where they already had high gross profit margins as in those where the reverse was true. The main determinant of the size of their increase was the magnitude of the increase in wholesale prices. This is in sharp contrast to the experience of wholesale bakers, where there was an inverse relation between increases in wholesale baker prices and the level of their prices in January.

¹ Two of the 27 cities listed in Appendix B are not included in Fig. 7. A retail gross profit margin for bread could not be computed from the data submitted by the chains operation in one while the other was excluded because the data submitted by the single large chain operating in it was considered unrepresented.

² See Table 7.

Figure 7

CHANGES IN PRICES PAID AND GROSS MARGINS OF LARGE GROCERY CHAINS,
WHOLESALE BAKER BRANDS OF WHITE BREAD, JANUARY TO AUGUST 1966



*No Change

Source: Federal Trade Commission Survey.

TABLE 7.—CHANGE IN GROSS PROFIT MARGINS FOR WHITE BAKER BRAND BREAD, 9 LARGE GROCERY CHAINS, JANUARY TO AUGUST 1966; 25 CITIES

Range of gross profit margins, January 1966	Number of cities ¹	Average gross profit margins				
		Cents per pound, January	Change, January– August (cents)	Percent of sales		Percentage point change
				January	August	
Over 5 cents.....	9	5.6	0.5	22.1	22.3	0.2
4.1 through 5 cents.....	9	4.7	.5	19.2	19.6	.4
4 cents or less.....	7	3.7	.3	16.4	16.7	.3
City average.....	25	4.7	.4	19.3	19.6	.3

¹ Cities grouped according to gross profit margins in January 1966.

Source: Federal Trade Commission survey.

Private label price increases.—Prices of bread sold under the private labels of the largest national grocery chains increased much less than the prices of wholesale baker brands sold by these chains. From January 1 to August 15, 1966, private label bread prices of chains in 17 of 25 cities where comparisons could be made¹ increased either not at all or by amounts smaller than those of wholesale bakers' brands (Table 8). In five of the remaining eight cities, private label prices and wholesale baker brand prices increased by the same amounts², and in only three cities were the private label price increases greater than the wholesale baker brand increases. The average private label price increase in the 25 cities was .8 cents, slightly less than half as great as the average wholesale baker brand price increase. In only two cities did the average private label price increase as much as 2 cents.

Private label price increases of different chains tended to occur independently of each other as well as independently of the price increases of wholesale bakers' brands. This was particularly evident for the period January through June. Since July, however, the increased frequency of price increases of both wholesale baker brands and private labels has made it more difficult to eliminate the possibility of associated increases.

TABLE 8.—PRIVATE LABEL AND BAKER BRAND RETAIL PRICE INCREASES OF LARGE CHAINS, JANUARY-AUGUST 1966

Cities in which private label prices increased	Number of cities	Average price change (cents per pound of bread)		
		Wholesale baker brands	Chain store private labels	Difference (baker brand price minus private label price)
Less than wholesale baker brands.....	17	2.3	.9	1.4
The same amount as baker brands ¹	5	1.0	1.0	.0
More than baker brands.....	3	.7	1.9	-1.2
City average.....	25	1.8	1.0	.8

¹ Includes 2 cities in which there were no changes in either private label or baker brand prices.

Source: Federal Trade Commission Survey.

The lower increase in private label prices is, in part, a result of the period of time for which price data were collected and the tendency of private label price increases to follow wholesale baker brand price increases. In about two-thirds of the cities, the wholesale baker brand price increases occurred after July 15. By August 15, the end of the period for which data were collected, private label prices may not have had time to adjust fully to the wholesale baker brand increases.

¹ Adequate data were not available to make comparisons in two cities listed in Appendix B.

² Including two cities where there were no changes in either private label prices or retail prices of wholesale baker brands.

Average private label prices in the cities surveyed were fairly equal. The averages for most cities fell within $1\frac{1}{2}$ cents of the average for all cities. The price increases from January to August 1966 affected this equality very little. Of all of the cities surveyed, only the large chains in Los Angeles and San Francisco reported significantly higher private label prices. The average private label prices in these cities were about 6 cents higher than the average for all cities.

The relative equality of private label prices among the cities surveyed contrasts with the relative disparity of average wholesale baker brand prices. Table 9 shows average wholesale baker brand prices and private label prices in 23 cities in which data are available. The cities are arrayed and grouped by level of wholesale baker brand prices. The difference between the average baker brand price of the lowest and highest group was over 8 cents whereas, in the case of the private label brands, prices differed by only 3 cents between the high and low groups.

TABLE 9.—AVERAGE RETAIL PRICES CHARGED BY LARGE GROCERY CHAINS FOR WHOLESALE BAKER BRANDS AND PRIVATE LABELS IN 23 LARGE CITIES

City group ¹	Number of cities	Wholesale brand price ²		Private-label price ²		Differential
		Range	Average	Range	Average	
I.....	6	28.2-33.2	30.6	19.5-26.7	22.8	7.8
II.....	6	25.6-28.0	26.9	18.1-22.5	20.3	6.6
III.....	6	24.0-25.0	24.5	19.5-22.0	20.9	3.6
IV.....	5	21.0-23.3	22.3	18.0-21.0	19.7	2.6
All cities.....	³ 23	21.0-33.2	26.2	18.0-26.7	21.0	5.2

¹ Cities were arranged in declining order by the average wholesale baker brand price charged by chains on Aug. 15, 1966, and divided into 4 groups of equal numbers of cities except for the bottom group.

² Cents per pound.

³ 2 cities for which the change in price over time of wholesale baker brands and private labels were included in table 8 were not included in this table because of differences in loaf sizes of baker's brands and private labels in these cities. This made comparisons of price levels unreliable.

Source: Federal Trade Commission Survey.

SUMMARY OF PRICE INCREASES

Fig. 8 summarizes changes between January and August in the retail price of baker brand white bread by four groups of cities, and further subdivides these changes by the amount attributable to increased ingredient costs, baker margins and retailer margins.¹ For the 25 cities studied by the Commission, prices increased an average of 1.7 cents per pound. Increased ingredient costs accounted for 0.6 cent, increased baker margins 0.7 cent, and increased retailer margins 0.4 cent.

There was considerable variation among cities, however. In the four cities where wholesaler prices increased most—an average of 2.7 cents—retailers passed on this increase and added an additional 1.0 cent.

In a second group of nine cities, wholesale bakers raised prices 1.5 cents and retailers added another 0.5 cents. In the third group, the respective amounts were 1.1 cents and 0.3 cents. In the four cities where wholesalers did not raise prices, retailers' prices were unchanged.

Ingredient costs to bakers rose by 0.6 cents over the period. Hence, bakers in the first group of cities increased their prices more than quadruple ingredient costs, and retailers added to their margins as well. As a result, in these cities retail prices rose 6 times as rapidly as ingredient costs. At the other extreme, in four cities wholesale bakers absorbed the full amount of the increased ingredient costs; retailers did not increase prices in these cities.

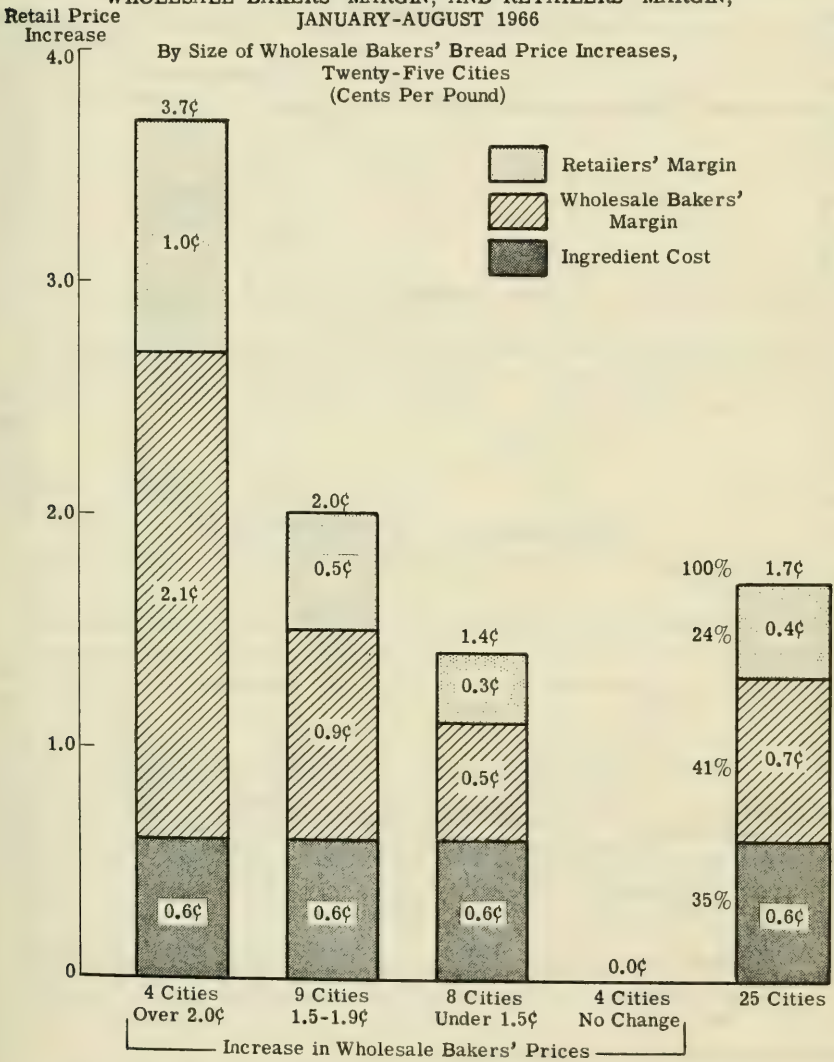
Whereas many wholesale bakers used the occasion of increased flour costs in June to increase their prices, we have seen that the greatest increase occurred in markets where baker margins were abnormally low.² In some cities at least,

¹ The estimates in this figure are based on information as to prices paid and charged by large food chains.

² This is not to imply that wholesale bread price differences among cities are due solely to differences in profitability of bakers. Bakers in different cities frequently have different labor and other costs. Bakers on the West Coast generally have higher costs, especially distribution costs, than bakers in other parts of the country. See *Organization and Competition in the Milling and Baking Industries*, Technical Study No. 5, National Commission on Food Marketing, June 1966, p. 105. The Commission is developing information regarding the impact of changes of non-ingredient costs in its in-depth studies.

Figure 8

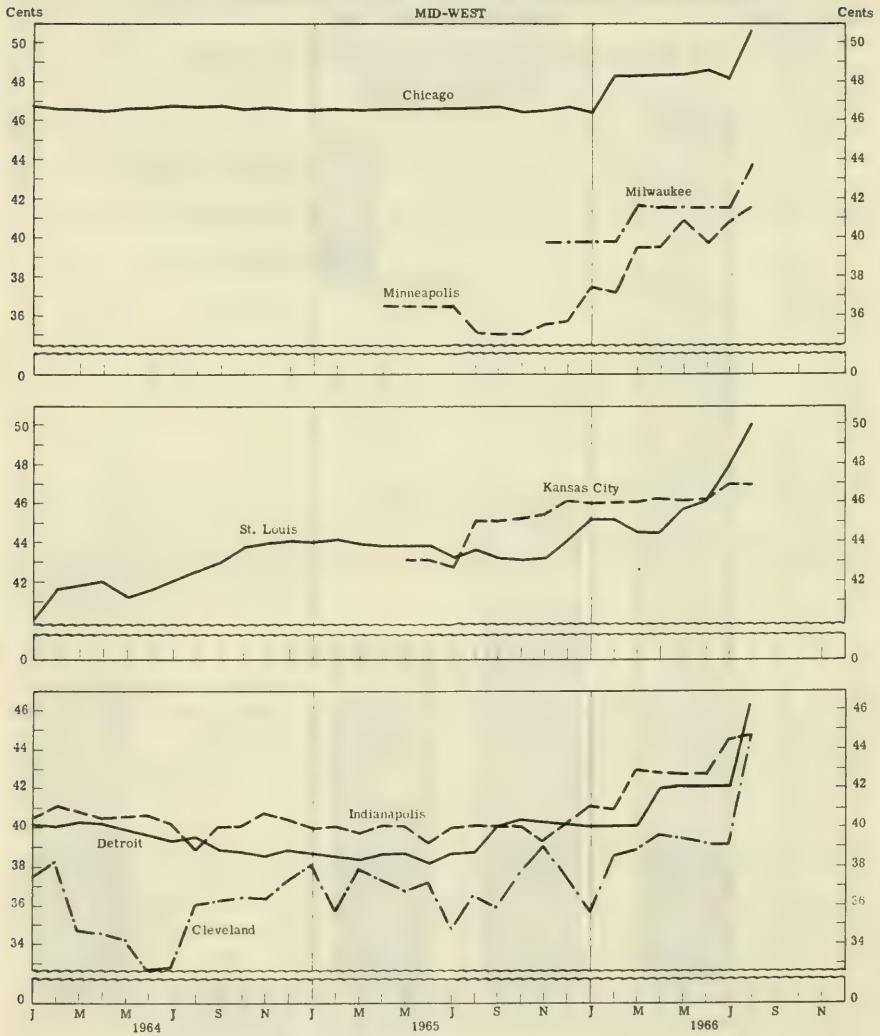
DISTRIBUTION OF RETAIL BREAD PRICE INCREASES TO INGREDIENT COST,
WHOLESALE BAKERS' MARGIN, AND RETAILERS' MARGIN,
JANUARY-AUGUST 1966



Note: Price increases shown are as reported by 9 leading retail food chains.

Source: Federal Trade Commission.

Figure 9A
RETAIL MILK PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966

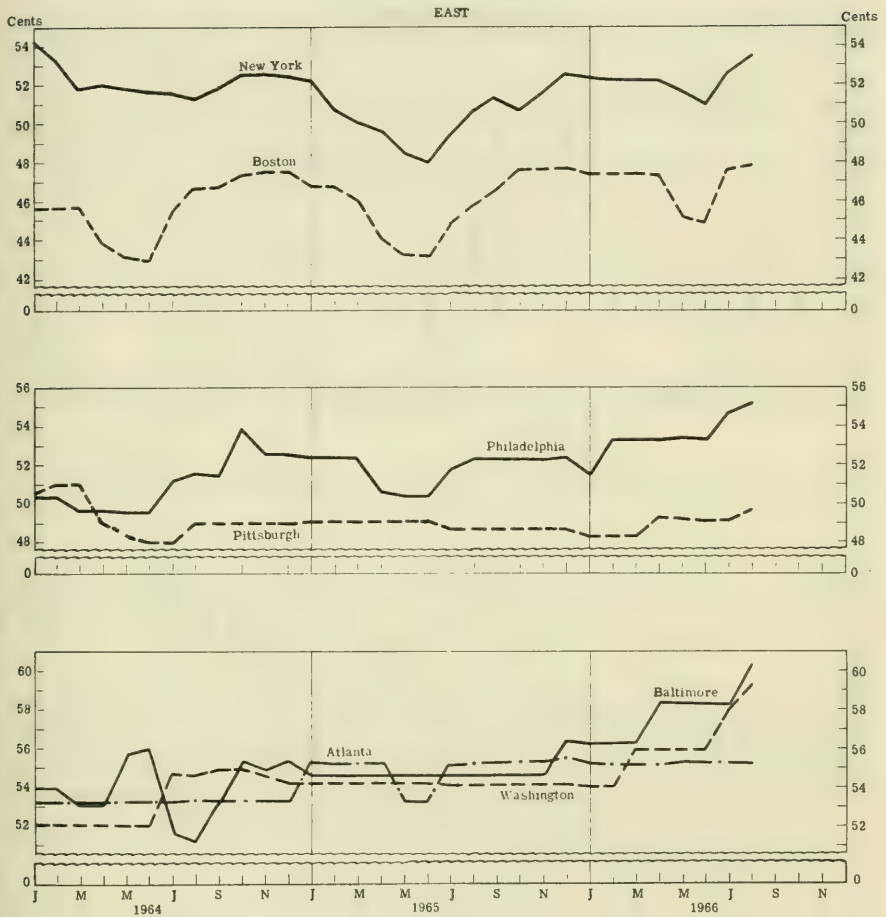


*City average store price per half-gallon in paper carton.

Source: Prepared from data furnished by the Bureau of Labor Statistics, Appendix table 8.

Figure 9B

RETAIL MILK PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966

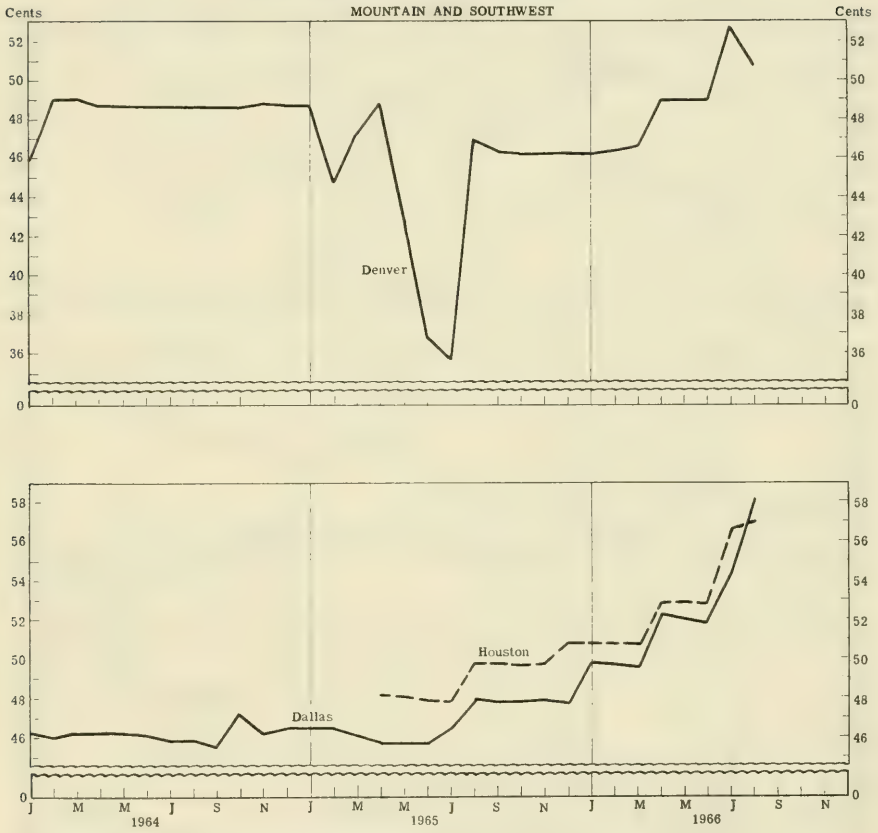


*City average store price per half-gallon in paper carton.

Source: Prepared from data furnished by the Bureau of Labor Statistics, Appendix table 8.

Figure 9C

RETAIL MILK PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966

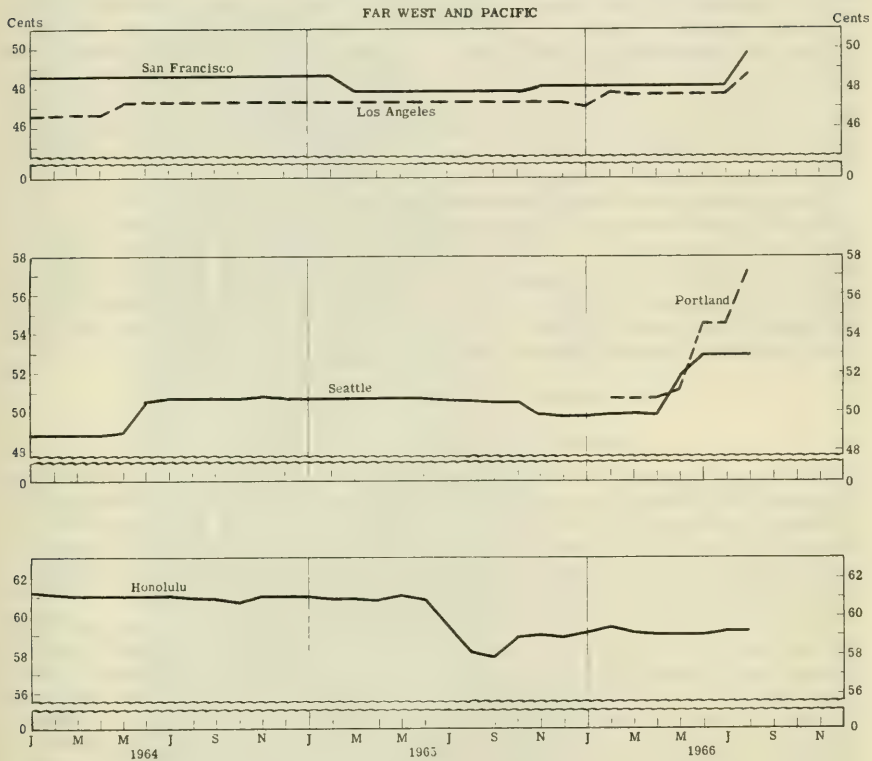


*City average store price per half-gallon in paper carton.

Source: Prepared from data furnished by the Bureau of Labor Statistics, Appendix table 8.

Figure 9D

RETAIL MILK PRICE TRENDS IN SELECTED CITIES*
JANUARY 1964 - AUGUST 1966



*City average store price per half-gallon in paper carton.

Source: Prepared from data furnished by the Bureau of Labor Statistics, Appendix table 8.

past price wars had pushed prices to unusually low levels. Where this was true, recent increases of bakers' prices may be considered as involving a "catching up" process.

The price markup behavior of food retailers has tended to pyramid the price increases of wholesale bakers. The increases in retail margins depended largely on the size of wholesale price increases, irrespective of the size of the margins already enjoyed by the retailer. Although this resulted largely because of the retailers' practice of charging a fixed markup, retailers also increased their percentage markups slightly. Pyramiding by retailers accounted for about one-fourth of the increase in baker brand bread prices. The effects on consumer prices of pyramiding is illustrated by the extreme cases. In four cities where bakers did not raise prices to retailers, retailers left their prices unchanged. In four cities where bakers increased prices by 2.7 cents a loaf, retailers passed on the increase and added an additional 1 cent. In these markets retailer pyramiding alone added 4 percent to consumer bread prices.

The preceding discussion related entirely to wholesale baker brands of white bread. All large chains sell bread under their own brand as well. Analysis indicates that prices of retailer brand bread have risen less rapidly than prices of baker brand bread. This may reflect, in part, the tendency of price increases for retailer brands to lag those of wholesale baker brands. But if prices of retailers' brands do not rise in some markets, they may well erode partially recent increases in the prices of baker brand bread, particularly where wide price gaps have developed between baker brands and retailer brands.

IV.—RECENT CHANGES IN MILK PRICES

GEOGRAPHIC PATTERN OF RETAIL PRICES

The recent increases in retail milk prices got under way in mid-1965 and registered the sharpest advances in July and August of this year. There were, however, significant variations in the timing and scope of price increases in various sections of the country. In part, the magnitude of the price increases is explained by the underlying factors responsible for raw milk price increases. Before examining this question and changes in processor and retailer margins, we first review the geographic pattern of retail price changes.

The earliest price increases occurred in the Midwest, the largest milk producing area of the country. As shown in Fig. 9, retail milk prices increased in Kansas City as early as the summer of 1965. In Cleveland milk prices were relatively low in the middle of 1964 but have increased steadily since that time and "caught up" with prices in two other cities in the same part of the country—Indianapolis and Detroit. In Chicago and Minneapolis prices were fairly stable or on the low side through 1964 and 1965, but increases occurred early in 1966 and have continued. Prices in Milwaukee rose substantially in 1966.

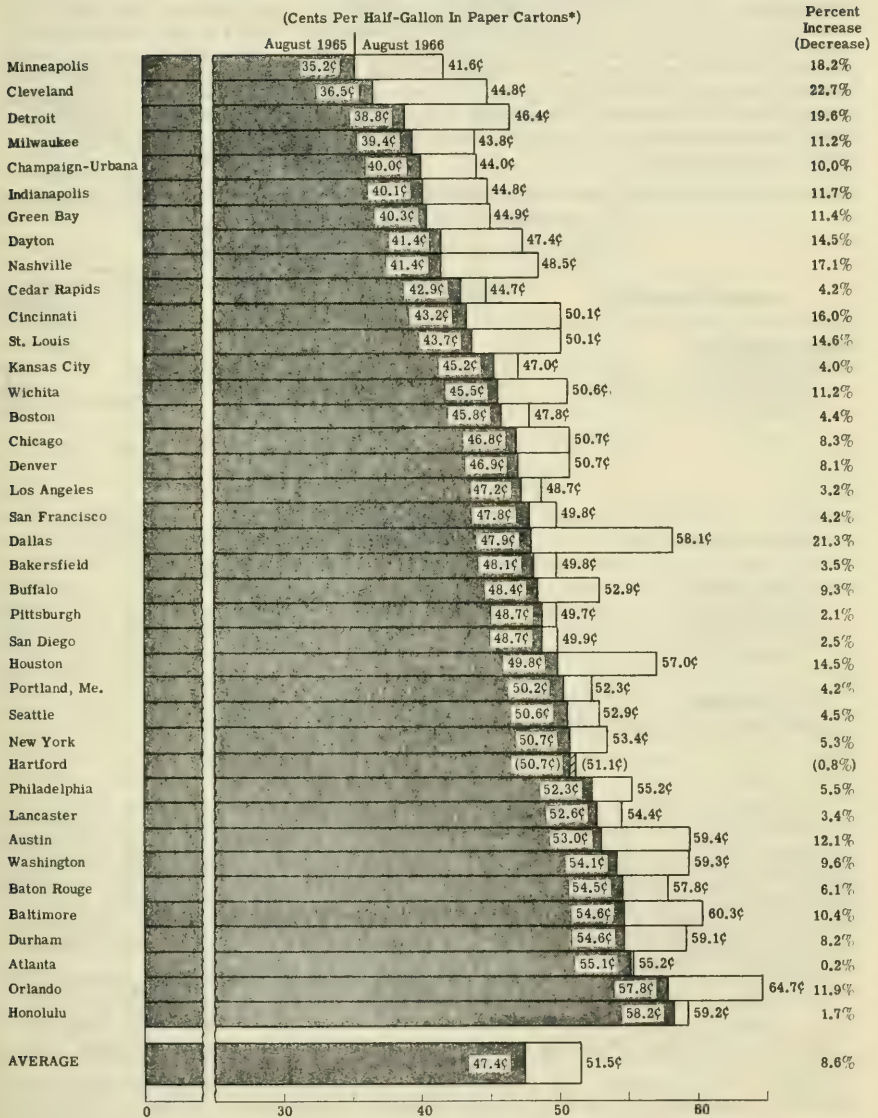
In the East, milk prices in New York, Boston, and Philadelphia apparently have considerable seasonal variation, being high in the winter months and low in the summer months. For these three cities, it would appear that the price increases began in the summer of 1965 but have continued through 1966 to date, rising contrary to the usual seasonal pattern. In three other cities—Pittsburgh, Baltimore, and Washington, D.C.—the upward movement began early in 1966, but the increases were much more marked in Washington and Baltimore than in Pittsburgh.

In Denver milk prices fell sharply in mid-1965, apparently as a result of a price war. They recovered quickly, however, and remained very stable until the summer of this year when they rose sharply. In two Texas cities, Dallas and Houston, there has been a very sharp rise since mid-1965.

In the Far West milk prices remained fairly stable in both San Francisco and Los Angeles until August 1966 when they rose substantially. In Portland, Oregon, and Seattle sharp increases occurred during the summer months of 1966. In Honolulu milk prices have been and still are the highest of all cities surveyed, but prices tended to decline since mid-1965.

Changes in out-of-store milk prices from August 1965–August 1966 in a longer list of cities throughout the country are depicted in Fig. 10. The cities are arranged in ascending order according to the retail prices prevailing in the earlier period. On the average, retail prices for these 39 cities increased from

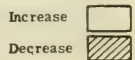
Figure 10
RETAIL MILK PRICE CHANGES IN THIRTY-NINE CITIES
AUGUST 1965 - AUGUST 1966
(Cents Per Half-Gallon In Paper Cartons*)



*City average store price.

Source: Based on data supplied to the Federal Trade Commission by the Bureau of Labor Statistics.

Legend:



47.4 cents per half gallon to 51.5 cents, a rise of 4.1 cents or 8.6 percent. The range in price changes has been wide—from an increase of 10.2 cents per half gallon (in Dallas) to an actual decline of 0.4 cents (in Hartford). It would appear, however, that the greatest increases occurred where prices were lowest previously. Two comparisons are made in Table 10—one covering the full year interval and the other the period January–August 1966. In both time periods, substantially greater increases occurred in the cities where the prices had been lowest. Over the year the increases in the 12 cities where prices had been lowest were almost twice as great as in the others. A similar picture emerges in respect to the January–August 1966 changes, although the margin of difference had narrowed somewhat between those cities that previously had lowest prices and the other cities.

TABLE 10.—CHANGES IN RETAIL MILK PRICES ¹ IN 39 CITIES, DISTRIBUTED ACCORDING TO PRICES AT BEGINNING OF PERIOD AUGUST 1965–AUGUST 1966

Price groups (August 1965)	Number of cities	Average price		Increase	
		August 1965	August 1966	Cents	Percent
Cents per half gallon:					
35.0 to 44.9 cents.....	12	40.2	45.9	5.7	12.2
45.0 to 49.9 cents.....	13	47.4	51.0	3.6	7.6
50.0 cents and over.....	14	53.5	56.7	3.2	6.0
Average.....	39	47.4	51.5	4.1	8.6
JANUARY 1966–AUGUST 1966					
Price groups August 1965	Number of cities	Average price		Increase	
		January 1966	August 1966	Cents	Percent
Cents per half gallon:					
35.0 to 44.9 cents.....	10	40.6	45.1	4.5	11.1
45.0 to 49.9 cents.....	16	47.6	51.5	3.9	8.2
50.0 cents and over.....	13	53.7	56.4	2.7	5.0
Average.....	36	47.8	51.5	3.7	7.7

¹ Out-of-store prices.

Source: Based on data supplied by Bureau of Labor Statistics.

CHANGES IN RAW MILK PRICES

In order to get at the sources of retail milk prices it is necessary to explore the vertical flow of the product from the farmer to the processor and on to the retailer. Raw milk is, of course, the predominant cost ingredient of fluid milk purchased at retail grocery stores by the housewife. Moreover, changes in raw milk prices have a great influence on the ultimate retail price. Thus, it is informative to review changes in demand-supply conditions at the farm level and their relationship to processor and retailer margins. First, we shall examine raw milk price changes.

For 35 cities for which we have data both on the cost of raw milk and on retail milk prices as of August 1966, the average cost of milk to milk bottlers per half gallon was 26.2 cents (Table 11). This represented over half (50.7 percent) of the average retail price of milk per half gallon sold in the same cities (Table 13).

Between August 1965 and August 1966, raw milk prices in the 35 cities rose, on the average, from 23.6 cents to 26.2 cents per half gallon, an increase of 11.0 percent. (Table 11) There was, of course, considerable diversity among these cities, both in the absolute level of raw milk prices and in the increases over the past year. A number of factors influence the level of raw milk prices but most important are the demand-supply conditions in the various producing areas.

TABLE 11.—CHANGES IN RAW MILK PRICES IN 35 CITIES, AUGUST 1965–AUGUST 1966,
ACCORDING TO PERCENT OF TOTAL SUPPLY USED FOR FLUID MILK

	Number of cities	Average raw milk price per ½ gallon ¹ (cents)		Increase, 1965–66	
		August 1965	August 1966	Cents	Percent
Percent of total milk used for fluid milk, 1965:					
Under 50: East North Central and West North Central States.....	12	20.0	23.5	3.5	17.5
51–90: South Central and Western States.....	11	23.7	26.2	2.5	10.5
91 and over: North Atlantic and South Atlantic States.....	12	27.2	28.8	1.6	5.9
35-city average.....		23.6	26.2	2.6	11.0

ACCORDING TO PRICES IN AUGUST 1965 (PER ½ GALLON)

Average price, August 1965:					
17.0–20.9.....	9	19.3	23.2	3.9	20.2
21.0–23.9.....	11	22.7	24.7	2.0	8.8
24.0–26.9.....	10	25.4	28.2	2.8	11.0
27.0–37.9.....	5	30.1	31.0	.9	3.0
35-city average.....		23.6	26.2	2.6	11.0

¹ Farmer's price based on the butterfat content of milk most commonly sold in the market.

Source: U.S. Department of Agriculture.

Generally speaking, raw milk prices are lowest in the principal milk-producing states which have a surplus above local fluid milk consumption needs. A proxy indicator for the degree of surplus or deficit of various geographical areas is the percentage of total milk sold to processors used as fluid milk. In the surplus areas, in other words, there is milk left over beyond the needs for bottled milk; this excess production is used for manufactured products (butter, cheese, etc.).

The proportion of milk used for fluid milk purposes in the regions where the 35 cities are located varies significantly (Table 11). In 12 of the 35 cities located in regions ¹ where less than half of the milk goes into fluid milk use, the average price of raw milk in August 1965 was 20.0 cents, compared with 23.7 cents for the 11 cities where 51–90 percent of the supply went to bottled milk and 27.2 cents for the remaining 12 cities, where 91 percent or more went to fluid milk.

During the past year, the greatest price increases occurred in the high milk production areas: 3.5 cents or 17.5 percent for the first group and 1.6 cents or 5.9 percent for the third. Thus the disparity among the areas was narrowed somewhat by August 1966.

Also shown in Table 11 is the relationship between the previous level of raw milk prices and the increases that have occurred during the year among the 35 cities. This shows that the 9 cities which had the lowest prices in August 1965 registered an average increase from 19.3 to 23.2 cents per half gallon—3.9 cents, or 20.2 percent. This was a substantially greater increase both in unit price and in percentage than in all the other groups. At the upper end of the distribution, 5 cities which had the highest prices a year ago showed the least increase, only .9 cents per half gallon, or 3.0 percent.

These price changes reflect recent changes in the supply of fluid milk. Throughout the 1950's and the early 1960's there was a strong downward pressure from excess supplies on price.

A recently published technical study of the National Commission on Food Marketing summarized these developments as follows:

Dairy farmers found that although milk prices declined or remained relatively steady, the price of many items they purchased continued to increase. Meanwhile, farmers were adopting labor saving techniques. Farmers who first adopted new techniques and thereby lowered production costs often realized increased income which more than offset the added investment, but adoption of the techniques by more farmers increased total production and added to the downward pressure on price. As new technology was created

¹ This grouping is based on the proportion of milk used as fluid in the region as a whole rather than for individual cities.

and adopted, the process was repeated. Dairy farmers like many other farmers, found they were on a treadmill, where the only way to get ahead was to adopt new methods, usually output-increasing ones, faster than other farmers adopted them.¹

As a result dairy farmers' income was held below that of other types of farming as well as below income of workers in manufacturing industries.

The Food Commission Report concluded on this point:

In 1964, the hourly return in five dairy farming areas ranged from 30 cents an hour among Grade B dairy farmers in western Wisconsin to 84 cents an hour among Grade A farmers in eastern Wisconsin. The highest farm return was on cash grain farms in the Corn Belt, \$2.13 an hour. In 1964, hourly earnings of dairy plant employees ranged from \$2.20 to \$3.84. For all manufacturing industries, the hourly earnings of employees averaged \$2.53.²

TABLE 12.—TOTAL MILK PRODUCTION, BY GEOGRAPHIC REGIONS, 1964 AND 1965
[In millions of pounds]

Region	Milk production		Absolute change, 1964-65	Change, 1964-65 (percent)
	1964	1965		
New England.....	4,810	4,783	-27	-0.56
Middle Atlantic.....	20,850	20,879	29	.14
Total Northeast.....	25,660	25,662	2	.01
Lake States.....	35,969	35,294	-675	-1.88
Corn Belt.....	22,443	21,385	-1,058	-4.71
Northern Plains.....	6,840	6,554	-286	-4.18
Appalachian.....	8,840	8,861	21	.24
Southeast.....	3,722	3,810	88	2.36
Delta States.....	2,904	2,955	51	1.76
Southern Plains.....	4,310	4,346	36	.84
Mountain.....	4,612	4,568	-44	-.95
Pacific.....	11,541	11,453	-88	-.76
Total, 48 States.....	126,841	124,888	-1,953	-1.54
Alaska and Hawaii.....	159	173	14	8.77
Total, 50 States.....	127,000	125,061	-1,939	-1.53

Source: Organization and Competition in the Dairy Industry, Technical Study No. 3, National Commission on Food Marketing, June 1966, p. 29.

As a result of these low incomes increasing numbers of dairy farmers left farming or changed to other types of farming. By 1965 the exodus became so great that total milk production declined. The greatest declines occurred in the traditional surplus states of the Midwest (Table 11). Milk production for the first seven months of 1966 was 4.2 percent below last year.

The Food Commission Report observed that as a result of these developments, "Many dairy products were in short supply, and some overseas commitments were in danger of curtailment. A temporary increase in the import quota on cheese was ordered. The Government-held surpluses of recent years had almost completely disappeared."³

The recent changes in supply explain why raw milk prices have risen and why they have increased most in the "surplus" states. It seems unlikely that raw milk prices will decline in the near future. Although the recent increases have raised dairy farmer incomes, they are still well below those of many other areas of agriculture. The recent price increases may therefore be viewed as essential to maintaining an adequate supply of milk in the future, and to bringing income of dairy farmers in closer balance with those of other segments of the economy.

¹ *Organization and Competition in the Dairy Industry*, Technical Study No. 3, National Commission on Food Marketing, June 1966, p. 30.

² *Ibid.*, pp. 30-31.

³ *Ibid.*, pp. 31-33.

PROCESSOR-RETAILER MARGINS

As was shown by Figure 10, retail milk prices rose an average 4.1 cents per gallon in 39 cities between August 1965 and August 1966. Most of this increase occurred since January 1966 (Table 13). The Commission therefore undertook to analyze in more detail the increases which occurred between January and August 1966.

As a first step in this analysis information was developed to show where the price increases had occurred and to isolate in a general way the amount which could be attributed to increased farm prices and that which resulted because of increases in processor-distributor margins. Table 13 shows for 35 cities the retail price, farm price, and processor-retailer margins.¹

Between early ² January and early August 1966, processor-retailer margins on the average rose from 23.9 cents to 25.5 cents per half gallon in the 35 cities studied. Thus processors and retailers added an additional 1.6 cents to the 2.1 cents increase in raw milk prices.

TABLE 13.—RETAIL PRICES OUT OF STORE, FARMER PRICES, AND PROCESSOR RETAILER MARGINS, JANUARY 1966 AND AUGUST 1966

[In cents per ½ gallon, 35 cities]

Cities	Retail price ¹		Farmer price ²		Processor-retailer margin		
	January 1966	August 1966	January 1966	August 1966	January 1966	August 1966	Change
Cleveland.....	35.7	44.8	22.9	26.5	12.8	18.3	5.5
Detroit.....	40.2	46.4	22.2	26.5	18.0	19.9	1.9
Boston.....	47.4	47.8	29.3	29.2	18.1	18.6	.5
Minneapolis.....	37.5	41.6	19.2	21.6	18.3	20.0	1.7
Nashville.....	42.6	48.5	23.3	26.1	19.3	22.4	3.1
Milwaukee.....	39.8	43.8	18.8	21.9	21.0	21.9	.9
Dayton.....	42.6	47.4	21.4	25.2	21.2	22.2	1.0
Honolulu ³	59.1	59.2	37.4	37.4	21.7	21.8	.1
Indianapolis.....	41.1	44.8	19.3	22.0	21.8	22.8	1.0
Wichita.....	44.4	50.6	22.2	24.4	22.2	26.2	4.0
Dallas.....	49.8	58.1	27.4	31.0	22.4	27.1	4.7
Portland, Maine.....	51.9	52.3	28.8	28.9	23.1	23.4	.3
Green Bay.....	41.6	44.9	18.4	21.4	23.2	23.5	.3
Buffalo.....	49.5	52.9	26.3	27.6	23.2	25.3	2.1
Cincinnati.....	45.2	50.1	21.8	24.3	23.4	25.8	2.4
Houston.....	50.8	57.0	27.1	30.5	23.7	26.5	2.8
Pittsburgh.....	48.4	49.7	23.5	24.3	24.9	25.4	.5
Los Angeles.....	47.0	48.7	22.1	23.1	24.9	25.6	.7
Hartford.....	52.8	51.1	27.8	27.8	25.0	23.3	-1.7
Kansas City.....	46.1	47.0	21.0	23.3	25.1	23.7	-1.4
New York City.....	52.3	53.4	27.2	27.7	25.1	25.7	.6
Philadelphia.....	51.5	55.2	26.1	27.8	25.4	27.4	2.0
San Francisco.....	48.1	49.8	22.4	23.4	25.7	26.4	.7
St. Louis.....	45.2	50.1	19.5	22.7	25.7	27.4	1.7
San Diego.....	48.7	49.9	22.6	23.7	26.1	26.2	.1
Atlanta.....	55.2	55.2	29.1	29.0	26.1	26.2	.1
Portland, Oreg.....	50.1	57.3	24.5	26.7	25.6	30.6	5.0
Durham.....	54.9	59.1	28.6	31.0	26.3	28.1	1.8
Austin.....	52.4	59.4	25.6	29.0	26.8	30.4	3.6
Seattle.....	49.8	52.9	23.0	25.0	26.8	27.9	1.1
Baton Rouge.....	54.5	57.8	26.9	28.9	27.6	28.9	1.3
Chicago.....	46.4	50.7	18.7	21.8	27.7	28.9	1.2
Denver.....	46.2	50.7	18.3	21.2	27.9	29.5	1.6
Washington, D.C.....	54.0	59.3	24.8	27.8	29.2	31.5	2.3
Baltimore.....	56.3	60.3	27.4	27.3	28.9	33.0	4.1
Average of 35 cities.....	48.0	51.7	14.1	26.2	23.9	25.5	1.6

¹ City-average price reported by Bureau of Labor Statistics.

² Farmer's price based on the butterfat content of milk most commonly sold in the market. See January and August 1966 Fluid Milk and Cream Reports S.R.S., Crop Reporting Board, USDA.

³ Farmer's price was obtained from FTC survey.

Source: Bureau of Labor Statistics and U.S. Department of Agriculture.

¹ Information was developed for all cities for which the Bureau of Labor Statistics gathers price information and for which farm milk price information is available.

² The Bureau of Labor Statistics collects price information for the first complete week of each month.

The change in processor-retailer margins among the cities was mixed, varying from an actual decline of 1.7 cents in Hartford, Connecticut to an increase of 5.5 cents in Cleveland, Ohio. In only two cities, however, did the combined processor-retailer margin actually decline. This means, of course, that in all other cities retail prices increased by more than the amount by which farm milk prices had risen.

This then raises the questions of how the increases in the processor-retailer margins was distributed among processors and retailers. To answer this question the Commission obtained price information from leading dairy processors and food chains in 27 cities.¹ Sufficient information was obtained for 24 of these cities to make the necessary breakdown as between processor and retailer margins.

Processor margins

In the 24 cities studied by the Commission, processors increased their gross margins by .9 cents per half gallon between January 15 and August 15, 1966.² The pattern of change in processor margins was mixed among the 24 cities. There was a strong tendency, however, for processor margins to increase most in those cities where margins were lowest in January (Table 14). The 8 cities which had processor margins of less than 13 cents per half gallon in January enjoyed an average increase of 1.3 cents by August 15. This was over three times the average increase in gross margins in cities where processor margins averaged 18 cents and over in January. Thus, it appears the largest increases in processor margins occurred in those cities where margins were low and probably deflated prior to recent price increases. Preliminary findings of some of the Commission's in-depth studies suggest that in some markets where processor margins increased most, they had been experiencing abnormally low margins.

Retailer margins

In the above 24 cities, retailers passed on the average increase in wholesale prices of 2.8 cents and added an additional 1.0 cents to the retail margin.³ When the cities are arrayed by the size of wholesale price increases, it is apparent that retailers increased their own margins most in cities where their wholesale prices increased most (Table 15). Where wholesale prices increased 2 cents or less per half-gallon, retailers gross margin increased an average of only .4 cents per half-gallon.

TABLE 14.—AVERAGE PROCESSOR MARGINS FOR HALF GALLONS OF FLUID MILK, 24 CITIES, JAN. 15, 1966, AND AUG. 15, 1966

Processors' margin, Jan. 15, 1966	Number of cities	Average processor margin (cents)		Average increase in processor margin	
		Jan. 15, 1966	Aug. 15, 1966	Amount (cents)	Percent
Cents per half gallon:					
9.0 to 12.9.....	8	11.7	13.0	1.3	11.1
13.0 to 17.9.....	11	15.4	16.2	.8	5.2
18.0 and over.....	5	20.0	20.4	.4	2.0
24-city average.....	24	15.1	16.0	.9	5.3

Source: Federal Trade Commission.

¹ See Appendix B for a list of these cities.

² This is an average of both packer label and the chain label milk purchased from processors. In the 12 markets where both were purchased, the margin generally is higher for the processor on milk packaged in his own label.

³ The retailer margin is an average of both packer and private-labeled milk purchased from processors. On the average, in the 12 markets where both were purchased, the retailer margin was higher on milk purchased under his own label. During the January 15 to August 15 period, margin on private-label milk increased slightly relative to that purchased under the processor's label.

TABLE 15.—CHANGES IN PRICES PAID AND GROSS MARGINS OF LARGE GROCERY CHAINS, JAN. 15 TO AUG. 15, 1966, IN 24 CITIES

Range of change in wholesale costs to chains ¹	Number of cities	Average change in price paid ¹	Average change in gross margins of chains ¹	Retailers' gross margin as a percent of retail price		
				Jan. 15, 1966	Aug. 15, 1966	Change
-0.2 to 1.9	7	0.5	0.4	13.9	14.5	0.6
2.0 to 3.9	11	3.1	1.4	19.2	20.2	1.0
4.0 to 6.0	6	5.2	1.0	20.5	20.0	-.5
Average, 24 cities		2.8	1.0	17.9	18.5	.6

¹ Cents per half-gallon.

Source: Federal Trade Commission.

TABLE 16.—CHANGE IN GROSS PROFIT MARGINS FOR MILK SOLD BY LARGE GROCERY CHAINS, JAN. 15 TO AUG. 15, 1966, IN 24 CITIES

Range of gross profit margins, January 1966 ¹	Number of cities			Change January–August	Percent of sales		Change in margins (percent)
		Jan. 15 ¹	Aug. 15 ¹		Jan. 15	Aug. 15	
3.3 to 6.0	6	4.8	5.4	0.6	9.4	10.2	0.8
6.1 to 9.0	5	7.3	8.3	1.0	16.8	17.6	.8
9.1 to 11.0	7	9.8	11.2	1.4	20.3	21.1	.8
11.1 to 13.0	6	12.6	13.6	1.0	24.9	24.7	-.2
Average, 24 cities		8.7	9.7	1.0	17.9	18.5	.6

¹ Cents per half gallon.

Source: Federal Trade Commission.

In these cities retailer margin increased 0.6 of a percentage point. On the other hand, where wholesale prices increased from 2 to 4 cents, retailers not only passed on the wholesale price increases but added 1.4 cents to their margin and gained one full percentage point in their percent of the retail price. As a result, in these markets retailers increased both their absolute and percentage margins.

The increase in retailer margins do not bear any significant relationship to their previous level (Table 16). In fact, their margins increased least in low margin markets. In 12 markets where they averaged 6.1 cents to 11.0 cents per half-gallon in January, both the absolute and relative margins of chains increased. Only in the highest margin group (11.1–13.0 cents per half gallon) did the chain percentage margin drop, from 24.9 to 24.7 percent. However, the absolute increase was the same as the average for all markets.

SUMMARY OF PRICE CHANGES

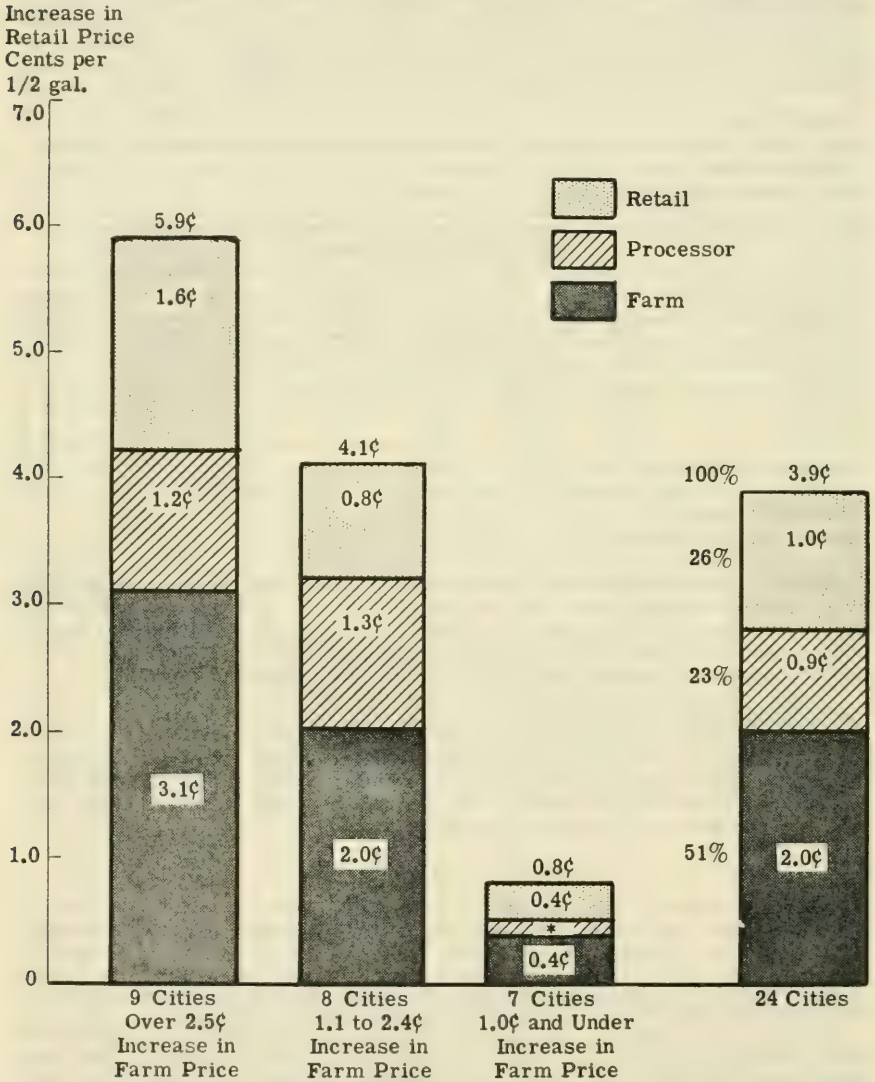
Between January 15 and August 15, 1966, retail milk prices rose an average of 3.9 cents ¹ per half gallon, or 7.9 percent, in 24 cities studied by the Commission. On the average, farmers accounted for 2 cents of this increase, processors 0.9 cents, and food retailers 1.0 cents. There was considerable variation as among cities, however. The greatest increases occurred in the midwestern cities, where raw fluid milk prices were the lowest in the beginning of the period.

Figure 11 subdivides the 24 cities according to the magnitude of recent farm price increases. The first bar shows the distribution of the increase in the nine cities where raw fluid milk prices to processors rose by over 2.5 cents per half gallon. In these market farmers received an additional 3.1 cents, processors an additional 1.2 cents, and retailer gross profit margins rose an additional 1.6 cents. As a result, retail prices in these cities rose by 5.9 cents per half gallon.

¹ This figure differs from that in Table 13 primarily because of differences in the cities covered and the time period covered. The latter difference is important because some price increases occurred between the first week in August (the period which B.L.S. used to measure August retail prices) and August 15 (the date used by the Commission).

Figure 11

**DISTRIBUTION OF RETAIL MILK PRICE INCREASES TO FARM,
PROCESSOR AND RETAIL LEVELS, JANUARY-AUGUST 1966
BY SIZE OF RAW MILK PRICE INCREASES, TWENTY-FOUR CITIES**



* Less than 0.05¢

Source: Federal Trade Commission.

In the second group of cities, where farm prices rose 1.1 cents to 2.4 cents, the respective shares in the increase were, farmers 2.0 cents, processors 1.3 cents and retailers .8 cents. In the group of cities where farm prices rose by less than 1 cent per half gallon, the combined processor and retailer share grew by only .4 cents.

This summary reflects the point developed previously, namely, that retailers tend to pyramid price increases, raising their margins roughly proportional to the increase in their purchase prices. Processor margins did not show a similar pattern of pyramiding. They enjoyed about the same increase in the first two groups of cities and practically no increase in the third. As explained above, it appears that a major determinant of the amount by which processor margins rose over the period was the size of their margin at the beginning of the period. Hence, many milk processors, like some wholesale bakers, appeared to use the recent price increases as an occasion to adjust upward what had been abnormally low margins.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., August 4, 1966.

HON. P. RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: Higher food prices in recent weeks have been a subject of deep concern to many people. I have received many letters asking why food prices, particularly for bread and milk, have been going up. In addition, several members and committees of the Congress have asked for studies to find the causes of these increases.

One essential task facing all Americans today is to maintain a stable and healthy economy. To discharge this responsibility, we must all work together to avoid price increases other than those necessary to protect against shortages.

I believe the public interest will be served best if the facts in this current situation are developed by an independent agency. Thus, I am asking the Federal Trade Commission to review immediately the pricing policies and actions for bread and fluid milk, including recent price changes of these food items and their relation to all factors affecting costs and the conditions of competition.

I hope the Commission can undertake such a study, and will make its findings available as soon as possible.

Sincerely yours,

ORVILLE L. FREEMAN.

FEDERAL TRADE COMMISSION,
Washington, D.C., August 4, 1966.

HON. ORVILLE L. FREEMAN,
Secretary of Agriculture,
Washington, D.C.

DEAR MR. FREEMAN: In accordance with your request of August 4, the Federal Trade Commission will immediately undertake to study the pricing of bread and fluid milk, including recent price changes of these food items and the relationship of recent changes to cost factors and the conditions of competition.

The Federal Trade Commission has also received reports of bread and fluid milk price increases from various parts of the country. We believe that a study of the situation is in order because unfortunately there does not appear to be sufficient definitive information at the time as to how widespread these increases have been and the extent to which they may have been brought about by cost increases, or whether they have been responsive to normal competitive pressures.

We hope that we can make the results of our study available to you in the very near future.

By direction of the Commission.

Sincerely yours,

PAUL RAND DIXON, *Chairman.*

APPENDIX B.—LIST OF CITIES SURVEYED BY THE FEDERAL TRADE COMMISSION

Atlanta, Georgia	Memphis, Tennessee
Baltimore, Maryland	Miami, Florida
Boston, Massachusetts	Milwaukee, Wisconsin
Buffalo, New York	Minneapolis-St. Paul, Minnesota
Chicago, Illinois	New York, New York
Cleveland, Ohio	New Orleans, Louisiana
Dallas, Texas	Philadelphia, Pennsylvania
Denver, Colorado	Pittsburgh, Pennsylvania
Detroit, Michigan	Portland, Oregon
Honolulu, Hawaii	St. Louis, Missouri
Houston, Texas	San Francisco-Oakland, California
Indianapolis, Indiana	Seattle, Washington
Kansas City, Missouri	Washington, D.C.
Los Angeles-Long Beach, California	

APPENDIX TABLE 1.—RETAIL PRICE CHANGES 1947-1966, 1947-49=100

	Bread, white	Milk, fresh (grocery)	Food at home (except restaurant)	All items in consumer price index except food
Annual Average Index Numbers:				
1947.....	92.9	94.4	95.9	95.1
1948.....	103.2	105.0	104.1	102.0
1949.....	103.8	100.6	100.0	103.0
1950.....	105.9	97.7	101.2	104.3
1951.....	116.0	108.4	112.6	110.9
1952.....	119.2	113.7	114.6	113.6
1953.....	122.7	112.4	112.5	115.8
1954.....	127.7	110.0	111.9	116.4
1955.....	131.5	110.3	109.7	116.8
1956.....	134.7	113.6	110.2	118.8
1957.....	140.9	117.6	113.8	122.8
1958.....	144.9	119.8	118.8	125.6
1959.....	147.8	121.0	115.9	128.0
1960.....	152.4	123.9	116.9	130.1
1961.....	157.1	124.2	118.0	131.5
1962.....	159.4	123.7	118.8	133.1
1963.....	162.9	123.1	120.3	134.8
1964.....	163.7	123.4	121.7	136.6
1965.....	165.7	122.8	124.6	138.5
Monthly Indices:				
1964:				
January.....	163.4	124.4	121.1	136.0
February.....	163.3	124.0	121.3	136.0
March.....	162.6	123.3	120.9	136.3
April.....	162.6	122.6	120.7	136.3
May.....	162.0	122.2	120.5	136.4
June.....	162.6	122.5	121.3	136.5
July.....	163.1	122.9	122.9	136.5
August.....	163.4	123.1	122.4	136.6
September.....	164.6	123.7	122.8	136.8
October.....	165.3	124.5	122.4	137.0
November.....	165.7	124.2	122.1	137.4
December.....	166.3	124.1	122.1	137.5
1965:				
January.....	166.5	124.1	121.8	137.8
February.....	165.7	123.1	121.8	137.8
March.....	166.3	122.7	122.0	137.8
April.....	166.6	122.0	122.7	138.1
May.....	165.6	121.0	123.5	138.4
June.....	165.2	120.5	126.4	138.4
July.....	165.2	121.6	127.5	138.3
August.....	164.7	123.2	126.2	138.3
September.....	165.2	123.2	125.5	138.8
October.....	165.9	123.9	125.3	139.1
November.....	164.7	124.2	125.3	139.5
December.....	167.3	124.6	126.5	139.6
1966:				
January.....	169.9	125.1	127.6	139.4
February.....	170.0	125.9	130.0	139.6
March.....	171.4	126.8	130.9	140.0
April.....	172.7	127.6	131.0	140.8
May.....	171.8	127.8	130.2	141.2
June.....	173.3	127.6	130.5	141.5
July.....	173.0	130.0	131.0	142.0
August.....	180.9	134.0	132.9	142.3
September.....	182.2	134.8	132.5	142.8

Source: Prepared from data furnished by the Bureau of Labor Statistics.

APPENDIX TABLE 2.—WHITE PAN BREAD: ESTIMATED RETAIL AND WHOLESALE PRICES OF A 1-POUND LOAF, RETAILER'S, BAKER-WHOLESALE'S, MILLER'S AND OTHER SPREADS, AND ESTIMATED FARM VALUE OF INGREDIENTS, YEARS 1950-64, AND MONTHS 1964-66¹

[Amounts in cents]

Year and month	Cost to baker				Miller's flour spread ⁹	Cost of wheat to miller ¹⁰	other spreads ¹¹	Farm value	
	Retail price ²	Retail spread ³	Wholesale price ⁴	Baker-wholesaler spread ⁵				Wheat ¹²	All ingredients ¹³
				All ingredients ⁶	Flour ⁷				
1950	13.5	2.1	11.4	6.7	4.7	3.4	1.7	2.5	3.0
1951	14.9	2.2	12.7	7.5	5.2	3.6	1.9	2.8	3.2
1952	15.1	2.4	12.7	7.8	4.9	3.5	1.7	2.6	3.2
1953	15.5	2.3	13.2	8.1	5.1	3.7	2.0	2.5	3.1
1954	16.3	2.2	14.1	8.6	5.5	4.0	2.2	2.7	3.3
1955	16.8	2.2	14.6	9.2	5.4	4.0	2.2	2.7	3.2
1956	17.1	2.1	15.0	9.7	5.3	3.9	2.1	2.6	3.2
1957	18.0	2.7	15.3	9.9	5.4	3.9	2.2	2.6	3.2
1958	18.5	2.7	15.8	10.3	5.3	3.8	2.3	2.3	2.9
1959	18.9	2.5	16.4	11.2	5.1	3.8	2.3	2.7	2.8
1960	19.5	3.0	16.5	11.5	5.3	3.9	2.3	2.3	2.9
1961	20.0	3.3	16.7	11.3	5.4	4.0	1.0	2.4	3.0
1962	20.3	3.5	16.8	11.1	5.7	4.3	1.0	2.6	3.1
1963	20.7	3.7	17.0	11.4	5.6	4.1	1.0	2.5	3.2
1964 ¹⁴	20.7	3.7	17.0	11.4	5.6	4.1	.9	2.5	3.1
1965 ¹⁴	20.9	3.8	17.1	11.4	5.7	4.2	.9	2.7	3.3
1964 ¹⁴									
January	20.7	3.7	17.0	11.4	5.6	4.0	2.8	2.6	3.2
February	20.6	3.6	17.0	11.4	5.6	4.0	1.0	2.6	3.2
March	20.6	3.6	17.0	11.6	5.4	3.9	1.9	2.4	3.0
April	20.6	3.6	17.0	11.4	5.6	4.1	1.0	2.4	3.1
May	20.5	3.5	17.0	11.6	5.4	4.0	1.9	2.5	3.1
June	20.6	3.5	17.0	11.4	5.6	4.2	1.9	2.5	3.1
July	20.6	3.5	17.0	11.3	5.7	4.2	1.1	1.8	2.5
August	20.7	3.7	17.0	11.4	5.6	4.3	1.1	2.7	3.3
September	20.8	3.8	17.0	11.4	5.6	4.1	.9	2.7	3.3
October	20.9	3.9	17.0	11.4	5.6	4.2	.8	2.7	3.3
November	20.9	3.9	17.0	11.4	5.6	4.2	.8	2.7	3.3
December	21.0	4.0	17.0	11.5	5.5	4.1	.9	2.6	3.3
1965 ¹⁴									
January	21.0	4.0	17.0	11.4	5.6	4.1	0.8	2.7	3.3
February	20.9	3.9	17.0	11.5	5.5	4.1	.8	2.7	3.3
March	21.0	4.0	17.0	11.5	5.5	4.0	.8	2.7	3.3
April	21.0	4.0	17.0	11.5	5.5	4.0	.8	2.6	3.2
May	20.9	3.9	17.0	11.5	5.5	4.0	.8	2.6	3.2
June	20.9	3.9	17.0	11.4	5.6	4.1	.9	2.6	3.2
July	20.8	3.8	17.0	11.2	5.8	4.3	1.0	2.7	3.4
August	20.8	3.9	16.9	11.1	5.8	4.3	.9	2.7	3.4
September	20.8	3.9	16.9	11.1	5.8	4.2	.8	2.7	3.4
October	20.9	3.8	17.1	11.3	5.8	4.3	.9	2.7	3.4
November	20.8	3.4	17.4	11.6	5.8	4.0	.9	2.7	3.4
December	21.1	3.6	17.5	11.7	5.8	4.3	.9	2.8	3.4

APPENDIX TABLE 2.—WHITE PAN BREAD: ESTIMATED RETAIL AND WHOLESAL PRICES OF A 1-POUND LOAF, RETAILER'S, BAKER-WHOLESALE'S, MILLER'S AND OTHER SPREADS, AND ESTIMATED FARM VALUE OF INGREDIENTS, YEARS 1950-64, AND MONTHS 1964-66¹—Continued

Year and month	[Amounts in cents]										
	Retail price ²	Retail spread ³	Wholesale price ⁴	Baker- wholesaler spread ⁵	Cost to baker		Mill sales value of flour ⁸	Miller's flour spread ⁹	Cost of wheat to miller ¹⁰	Farm value	
					All ingre- dients ⁶	Flour ⁷				other spreads ¹¹	All ingre- dients ¹²
1966:											
January.....	21.4	3.9	17.5	11.6	2.9	4.3	4.0	.9	3.1	1.5	2.8
February.....	21.5	3.7	17.8	11.9	5.9	4.3	4.0	.9	3.1	1.5	2.8
March.....	21.6	3.8	17.8	12.0	5.8	4.2	3.9	.8	3.1	1.5	2.8
April.....	21.8	4.0	17.8	12.0	5.8	4.3	4.0	.9	3.2	1.5	2.8
May.....	21.7	3.9	17.8	11.9	5.9	4.4	4.1	.9	3.2	1.5	2.8
June.....	21.8	4.0	17.8	11.6	6.2	4.7	4.4	1.0	3.4	1.4	3.1
July.....	21.8	4.0	17.8	11.3	6.5	5.0	4.7	1.1	3.6	1.5	3.2
August.....	22.8	3.9	18.9	12.4	6.5	4.9	4.6	1.1	3.5	1.4	3.2
September.....	(¹⁵)	(¹⁵)	18.9	(¹⁵)	(¹⁵)	4.9	4.6	1.0	3.6	(¹⁵)	3.2

¹ Some of these data have been revised since the table was published in *Spreads in Farm-Retail Prices of White Bread*, U.S. Department of Agriculture, misc. pub. 969, September 1964.

² Average of retail prices in urban areas reported by Bureau of Labor Statistics, prices 1947-63 have been adjusted to a level comparable with prices reported for 1964.

³ Spread between retail and wholesale prices.

⁴ Derived from wholesale prices published by the Bureau of Labor Statistics and trade data.

⁵ Spread between wholesale price and cost to the baker of all ingredients.

⁶ Cost of flour, shortening, nonfat dry milk, sugar, and other ingredients in a pound of bread, adjusted to level of cost to baker as reported in the census of manufactures.

⁷ Weighted average wholesale value of 0.641 pound of several types of bread flour in 3 markets, adjusted to the level of cost to baker as reported in the census of manufactures.

⁸ Weighted average wholesale value of 0.641 pound of several types of bread flour in 3 markets, adjusted to mill sales level as reported in the census of manufactures.

⁹ Spread between sales value of flour and cost of wheat to miller.

¹⁰ Weighted average wholesale value in 6 markets of major classes and grades of wheat used for milling bread flour adjusted to level of cost to miller as reported in the census of manufactures and further adjusted to eliminate imputed value of millfeed products.

¹¹ Spread or charges for transporting, handling, and storing all ingredients and for processing ingredients other than flour. This spread is a residual figure.

¹² Returns to farmers for wheat less imputed value of millfeed byproducts, based on average local market prices received by farmers for all wheat; return for 0.894 pound before July 1957, 0.882 pound from July 1957-December 1963, and 0.877 pound beginning January 1964.

¹³ Value at prices received by farmers, less byproduct allowances, for the quantity of wheat and other farm products yielding ingredients used in a pound loaf of white bread.

¹⁴ Starting July 1964, the cost of wheat to millers is based on market prices paid by millers plus cost of the domestic marketing certificate—70 cents from July 1964 through June 1965 and 75 cents beginning with July 1965. The farm value is based on market prices of wheat received by farmers plus the value of the domestic marketing certificates received by farmers complying fully with the Federal wheat program—70 cents from July 1964 through July 1965 and 75 cents beginning with July 1965.

¹⁵ Not available.

APPENDIX TABLE 3.—FARM AND RETAIL MILK PRICES 1947-66

Year	Cents per half gallon			Percent of retail price		
	Farmer's price	Processor-retailer spread	Retail price	Farmer's share	Processor-retailer share	Retail price
1947-49.....	21.7	17.0	38.7	56.1	43.9	100.0
1950.....	20.0	17.8	37.8	52.9	47.1	-----
1951.....	22.8	19.7	42.5	53.6	46.4	-----
1952.....	24.2	20.5	44.7	54.1	45.9	-----
1953.....	22.6	21.1	43.7	51.7	48.3	-----
1954.....	21.0	21.9	42.9	49.0	51.0	-----
1955.....	20.9	22.0	42.9	48.7	51.3	-----
1956.....	21.6	22.7	44.3	48.8	51.2	-----
1957.....	22.1	23.8	45.9	48.1	51.9	-----
1958.....	21.8	24.9	46.7	46.7	53.3	-----
1959.....	21.8	25.4	47.2	46.2	53.8	-----
1960.....	22.1	26.2	48.3	45.8	54.2	-----
1961.....	22.1	26.1	48.2	45.9	54.1	-----
1962.....	21.7	26.1	47.8	45.4	54.6	-----
1963.....	21.5	26.1	47.6	45.2	54.8	-----
1964.....	21.7	26.0	47.7	45.5	54.5	-----
1965.....	21.8	25.5	47.3	46.1	53.9	-----

Year	Farmer's price	Processor spread	Retail price	Retail price	Farm share	Processor share	Retailer share
January 1966.....	24.7	15.1	8.7	48.5	51.0	31.1	17.9
August 1966.....	26.7	16.0	9.7	52.4	51.0	30.5	18.5

Source: Organization and Competition in the Dairy Industry, Technical Study No. 3, National Commission on Food Marketing, June 1966, p. 200, Farm-Retail Spreads for Food Products 1947-65, ERS-226, USDA, January and August 1966 figures based on information received from a Federal Trade Commission Survey of 24 cities.

APPENDIX TABLE 4.—GROSS MARGINS OF FOOD CHAINS, 1955-64

Year	All chains reporting ¹		By sales size groups ²		
	Number of chains reporting	Gross margin (percent)	Small chains (percent)	Medium-sized chains (percent)	Large chains (percent)
1955.....	49	18.1	17.2	18.8	18.1
1956.....	55	19.5	19.0	19.0	19.6
1957.....	60	20.4	18.6	18.9	20.5
1958.....	56	20.5	17.8	19.6	20.6
1959.....	50	21.2	19.0	20.7	21.3
1960.....	53	21.6	19.0	20.6	21.8
1961.....	51	21.8	18.3	20.6	22.0
1962.....	52	22.1	18.7	20.7	22.3
1963.....	67	22.2	19.5	20.0	22.5
1964.....	58	22.5	18.9	19.5	22.8

¹ The data series is not strictly comparable due to changes in the size of samples of reporting chains, as indicated in the "number of chains reporting" column.

² For 1959-63, the size groups were: Small—less than \$20,000,000 sales; medium—\$20 to \$100,000,000; and large—over \$100,000,000 sales. Size groups varied for earlier years.

Sources: "Operating Results of Food Chains," 1955 to 1961, Harvard University, Graduate School of Business Administration; and other years, "Operating Results of Food Chains," Cornell University.

APPENDIX TABLE 5.—RETAIL BREAD PRICE TRENDS IN SELECTED CITIES¹ JANUARY 1964—AUGUST 1966
MID-WEST
[Amounts in cents]

	Chicago	Milwaukee	Minneapolis	St. Louis	Kansas City	Indianapolis	Detroit	Cleveland
1964:								
January.....	19.2			19.4		17.9	17.1	20.8
February.....	18.6			19.4		17.8	17.0	20.8
March.....	18.6			19.4		17.3	17.1	20.6
April.....	18.6			19.4		17.2	17.1	20.7
May.....	18.2			19.7		18.1	17.1	20.6
June.....	18.3			19.7		18.2	17.1	20.6
July.....	19.0			20.0		17.4	17.1	20.3
August.....	18.6			19.9		18.0	17.1	20.6
September.....	19.3			20.3		17.7	17.1	20.6
October.....	19.4			20.3		18.0	17.9	20.6
November.....	19.2			20.3		18.0	18.2	20.6
December.....	19.2			20.3		18.0	18.1	20.7
1965:								
January.....	19.4			19.8		18.0	18.1	20.7
February.....	19.3			20.1		17.8	17.8	20.7
March.....	19.3			20.1		18.0	18.1	20.4
April.....	19.4		18.9¢	20.1		17.7	17.8	20.6
May.....	19.4		18.9	20.1	22.1	18.0	18.0	20.4
June.....	18.9		18.9	20.1	22.1	18.0	18.1	20.6
July.....	18.9		18.9	20.1	22.1	18.0	18.1	20.4
August.....	18.9		18.9	20.1	22.1	18.0	18.1	20.7
September.....	19.2		18.7	20.1	22.0	18.0	18.1	20.5
October.....	19.3		18.7	20.1	22.0	18.8	18.1	20.2
November.....	19.4	15.2	18.5	20.1	22.8	18.5	17.9	20.7
December.....	19.4	15.2	18.8	19.9	22.8	18.9	18.2	20.6
1966:								
January.....	20.6	15.4	19.3	19.6	22.9	18.9	18.3	20.1
February.....	20.9	15.9	19.1	21.4	24.8	18.9	18.3	21.2
March.....	20.8	17.1	19.4	21.4	24.8	19.6	18.3	21.4
April.....	21.0	17.1	19.4	21.5	24.6	19.6	18.3	21.3
May.....	19.9	16.9	19.4	21.4	24.6	19.2	18.2	21.9
June.....	21.0	16.9	19.3	21.6	24.7	19.6	18.5	22.1
July.....	21.0	17.0	19.3	21.6	23.6	19.7	18.5	21.9
August.....	22.5	18.5	20.8	23.7	25.1	20.3	19.0	22.8

¹ City average store price per 1-pound loaf of white pan bread.

Source: Prepared from data furnished by the Bureau of Labor Statistics.

EAST
[Amount in cents]

	New York	Boston	Philadelphia	Pittsburgh	Baltimore	Atlanta	Washington
1964:							
January.....	24.2	20.4	20.6	19.9	22.5	19.3	20.1
February.....	24.2	20.4	20.5	20.4	23.0	19.3	20.1
March.....	24.1	20.4	20.5	20.4	22.5	19.3	20.1
April.....	24.0	20.4	20.6	20.4	22.5	19.3	20.1
May.....	24.1	20.1	20.6	20.4	23.7	19.3	20.1
June.....	24.1	20.3	20.5	20.4	23.7	19.4	20.1
July.....	24.1	20.4	20.5	20.3	23.4	19.4	20.1
August.....	24.1	20.5	20.5	20.4	23.2	19.4	20.1
September.....	24.1	20.5	21.4	19.9	23.4	19.4	20.1
October.....	24.1	20.4	21.5	20.3	23.4	19.4	20.1
November.....	24.1	20.5	21.1	20.5	23.4	19.4	20.1
December.....	24.1	20.5	21.1	20.5	22.9	19.4	20.1
1965:							
January.....	24.1	20.6	21.1	20.1	22.9	19.4	20.1
February.....	24.1	20.8	21.1	20.5	22.9	19.4	20.1
March.....	24.2	21.1	21.1	20.5	22.9	19.7	20.1
April.....	24.2	21.2	21.1	20.5	22.9	19.7	20.1
May.....	24.2	21.0	21.1	20.4	22.9	19.7	20.1
June.....	24.0	21.2	21.1	20.5	23.0	19.7	19.6
July.....	24.1	21.2	21.1	20.5	23.0	19.8	20.2
August.....	24.1	20.9	21.2	20.5	23.0	19.7	20.2
September.....	24.1	20.5	21.2	20.5	23.0	19.7	20.2
October.....	24.0	20.3	21.2	20.5	23.0	19.7	20.2
November.....	24.1	20.2	21.2	20.5	23.0	19.7	20.2
December.....	24.8	19.8	21.9	20.4	23.0	21.2	19.8
1966:							
January.....	24.8	21.0	22.1	20.4	24.2	21.2	20.4
February.....	24.9	21.3	22.0	20.6	24.3	21.2	20.4
March.....	25.0	21.3	22.0	20.0	24.3	21.2	20.4
April.....	24.9	21.3	22.0	20.9	24.3	21.2	20.4
May.....	24.7	21.3	21.8	20.3	24.3	21.2	20.4
June.....	24.7	21.3	21.9	20.9	24.3	21.1	20.2
July.....	24.7	21.5	21.7	21.4	24.3	21.1	20.2
August.....	25.9	22.7	22.7	19.8	24.3	22.2	20.6

APPENDIX TABLE 5.—RETAIL BREAD PRICE TRENDS IN SELECTED CITIES¹ JANUARY 1954—AUGUST 1966
MOUNTAIN AND SOUTHWEST; FAR WEST AND PACIFIC

[Amount in cents]

	Denver	Dallas	Houston	Los Angeles	San Francisco	Portland	Seattle	Honolulu
1964:								
January.....	24.0	17.8	-----	28.5	26.5	-----	24.7	27.1
February.....	24.0	17.8	-----	28.5	26.5	-----	24.6	26.8
March.....	24.0	17.7	-----	28.5	26.5	-----	24.7	26.9
April.....	23.9	17.7	-----	28.5	26.5	-----	24.6	26.8
May.....	24.0	17.8	-----	28.5	26.5	-----	24.6	27.0
June.....	24.0	17.7	-----	27.5	26.5	-----	24.7	28.3
July.....	24.4	17.7	-----	28.5	26.4	-----	24.7	28.0
August.....	24.0	17.7	-----	28.5	26.4	-----	24.7	27.0
September.....	24.0	19.1	-----	28.5	26.4	-----	24.6	27.0
October.....	24.0	19.1	-----	28.4	26.4	-----	24.6	26.4
November.....	24.0	19.1	-----	29.6	26.4	-----	24.6	25.6
December.....	24.0	19.1	-----	30.4	26.4	-----	24.6	25.5
1965:								
January.....	22.8	19.1	-----	30.3	26.3	-----	24.6	23.5
February.....	17.8	19.1	-----	30.2	26.3	-----	24.5	23.3
March.....	20.2	19.1	-----	29.8	26.2	-----	24.5	24.3
April.....	22.9	19.1	18.8	29.5	26.2	-----	24.3	23.8
May.....	21.3	19.1	18.4	29.7	26.1	-----	22.8	23.8
June.....	20.7	19.1	18.0	29.7	26.0	-----	22.8	23.8
July.....	20.7	19.1	18.0	29.6	26.0	-----	22.8	23.0
August.....	20.3	18.4	18.0	29.6	25.9	-----	22.8	23.5
September.....	20.7	19.0	17.9	29.2	25.9	-----	22.8	23.2
October.....	20.6	19.0	18.0	28.9	26.0	-----	22.9	23.4
November.....	20.9	20.2	17.6	28.5	26.3	-----	19.5	23.3
December.....	22.5	20.2	20.0	27.8	26.3	-----	19.3	23.5
1966:								
January.....	22.5	20.2	20.0	27.6	26.2	-----	21.4	22.5
February.....	22.5	20.1	19.1	27.6	26.2	23.9	21.8	23.1
March.....	22.9	20.4	20.2	27.3	26.3	23.9	22.1	22.9
April.....	24.7	20.3	20.2	27.5	26.3	23.9	22.1	22.8
May.....	24.7	20.4	19.9	28.2	26.3	25.2	22.1	23.2
June.....	24.7	20.4	20.2	28.0	26.2	24.9	21.7	23.2
July.....	24.7	20.4	20.2	27.7	26.2	24.9	21.4	23.3
August.....	25.5	20.3	21.5	28.5	27.5	24.5	22.4	23.2

APPENDIX TABLE 6.—AVERAGE PRICES OF PRINCIPAL INGREDIENTS USED IN BREAD, 1960-SEPTEMBER-1966

Year	Flour ¹ (dollars per hundred- weight)	Sugar ² (cents per pound)	Dry milk ³ (cents per pound)	Lard ⁴ (cents per pound)	Yeast (cents per pound)
1960.....	6.02	9.32	14.34	11.28	7.10
1961.....	6.19	9.25	16.22	11.86	7.10
1962.....	6.65	9.47	15.53	10.21	7.10
1963.....	6.38	11.78	15.15	10.12	7.10
1964.....	6.40	10.62	15.35	11.29	7.10
1965.....	6.51	10.08	15.40	13.61	7.10
October 1965.....	6.70	10.11	15.59	14.56	7.10
November 1965.....	6.71	10.21	15.69	13.72	7.10
December 1965.....	6.70	10.21	15.75	13.63	7.10
January 1966.....	6.71	10.21	15.89	15.01	7.10
February 1966.....	6.69	10.41	15.99	15.28	7.10
March 1966.....	6.63	10.41	16.35	14.29	7.10
April 1966.....	6.66	10.11	17.71	13.33	7.10
May 1966.....	6.85	10.11	18.10	12.48	7.10
June 1966.....	7.27	10.11	18.30	11.94	7.10
July 1966.....	7.73	10.11	20.49	11.79	7.10
August 1966.....	7.64	10.21	21.26	13.11	7.10
September 1966.....	7.60	10.31	(⁵)	14.42	7.10

¹ BLS prices of bread-type flour in several cities adjusted (1) to make series comparable before and after specification changes in 1960, (2) to Census of Manufacturers data, and (3) to reflect prices of bagged flour.² BLS prices to include 0.5-cent excise tax and adjusted to census data.³ "Evaporated Dry Milk Reports," SRS U.S. Department of Agriculture adjusted to census data.⁴ Chicago wholesale price reported by Market News Service adjusted to census data.⁵ Trade data unadjusted.⁶ Not available.

APPENDIX TABLE 7.—WHEAT: SUPPLY AND DISTRIBUTION AND PRICES, AVERAGE 1959-63, ANNUAL 1963-66

Item	Year beginning July 1—				
	Average 1959-63	1963	1964	¹ 1965	² 1966
Millions of bushels					
Supply:					
Beginning carryover.....	1,307.3	1,194.9	901.2	817.7	536
Production.....	1,189.8	1,142.0	1,290.7	1,326.7	1,240
Imports ³	6.1	4.0	1.1	1.0	1
Total supply.....	2,503.2	2,340.9	2,193.0	2,145.4	1,777
Domestic disappearance:					
Food ⁴	500.9	510.0	518.6	525.0	525
Seed.....	61.4	63.4	65.2	61.1	72
Industry.....	.1	.1	.1		
Feed (residual) ⁵	34.1	10.1	66.4	156.1	60
On farms where grown.....	(25.1)	(19.9)	(38.2)	(50.1)	
Total.....	596.5	583.6	650.3	742.2	657
Available for export and carryover.....	1,906.7	1,757.3	1,542.7	1,403.2	1,120
Exports ³	678.1	856.1	725.0	867.2	720-745
For dollars.....	(215.0)	(352.7)	(159.1)	(280.0)	
Total disappearance.....	1,274.6	1,439.7	1,375.3	1,609.4	1,377-1,402
Ending carryover.....	1,228.6	901.2	817.7	536.0	375-400
Privately owned—"Free".....	(44.9)	(19.7)	(97.0)	(53.0)	
Dollars per bushel					
National average loan rate.....	\$1.84	\$1.82	\$1.30	\$1.25	\$1.25
Received by farmers: Average farm price.....	1.84	1.85	1.37	1.34	
Average total return ⁶	1.84	1.92	1.67	1.70	

¹ Preliminary.² Projected.³ Imports and exports are of wheat, including flour and other products in terms of wheat.⁴ Used for food in the United States and U.S. territories, and by the military both at home and abroad.⁵ Assumed to roughly approximate total amount used for feed, including amount used in mixed and processed feed.⁶ Includes price support payment in 1963 and marketing certificates in later years; excludes acreage diversion and soil bank payments.

Source: "Wheat Situation," Economic Research Service, U.S. Department of Agriculture, July 1966.

APPENDIX TABLE 8.—RETAIL MILK PRICE TRENDS IN SELECTED CITIES JANUARY 1964–AUGUST 1966

MIDWEST								
[City average store price per ½ gallon in paper cartons]								
	Chicago	Milwaukee	Minneapolis	St. Louis	Kansas City	Indianapolis	Detroit	Cleveland
1964:								
January.....	46.8			40.1		40.5	40.2	37.5
February.....	46.7			41.7		41.1	40.1	38.2
March.....	46.6			41.9		40.9	40.3	34.7
April.....	46.5			42.1		40.5	40.2	34.6
May.....	46.6			41.3		40.6	39.9	34.2
June.....	46.7			41.6		40.6	39.6	32.7
July.....	46.8			42.1		40.2	39.3	32.8
August.....	46.7			42.6		38.9	39.0	36.0
September.....	46.8			43.0		40.1	38.9	36.3
October.....	46.6			43.8		40.1	38.8	36.4
November.....	46.7			44.0		40.8	38.6	36.4
December.....	46.6			44.1		40.5	38.8	37.3
1965:								
January.....	46.6			44.1		40.0	38.7	38.1
February.....	46.7			44.2		40.1	38.5	35.8
March.....	46.6			44.0		39.8	38.4	37.9
April.....	46.7		36.5	43.9		40.1	38.7	37.4
May.....	46.7		36.5	43.9	43.1	40.1	38.7	36.7
June.....	46.7		36.5	43.9	43.1	39.3	38.3	37.8
July.....	46.7		36.5	43.3	42.8	40.0	38.7	34.8
August.....	46.8		35.2	43.7	45.2	40.1	38.8	36.5
September.....	46.8		35.1	43.3	45.2	40.1	40.1	35.9
October.....	46.5		35.1	43.2	45.3	40.1	40.4	37.7
November.....	46.6	39.8	35.6	43.3	45.5	39.4	40.3	39.1
December.....	46.8	39.8	35.8	44.2	46.3	40.3	40.3	37.5
1966:								
January.....	46.4	39.8	37.5	45.2	46.1	41.1	40.1	35.7
February.....	48.4	39.8	37.3	45.2	46.1	41.0	40.1	38.6
March.....	48.4	41.7	39.6	44.5	46.1	43.0	40.1	38.6
April.....	48.4	41.6	39.6	44.5	46.3	42.9	42.0	39.6
May.....	48.4	41.6	41.0	45.7	46.2	42.8	42.1	39.5
June.....	48.6	41.6	39.8	46.1	46.2	42.8	42.1	39.3
July.....	48.2	41.6	40.9	48.0	47.0	44.5	42.1	39.3
August.....	50.7	43.8	41.6	50.1	47.0	44.8	46.4	44.8

EAST							
[In cents per ½ gallon]							
	New York	Boston	Philadelphia	Pittsburgh	Baltimore	Atlanta	Washington
1964:							
January.....	54.3	45.7	50.4	50.6	53.9	53.2	52.0
February.....	53.3	45.7	50.4	51.0	53.9	53.2	52.0
March.....	51.8	45.7	49.7	51.0	53.1	53.2	52.0
April.....	52.0	43.9	49.7	49.0	53.1	53.2	52.0
May.....	51.8	43.1	49.6	48.4	55.7	53.2	52.0
June.....	51.7	42.9	49.6	48.0	55.9	53.2	52.0
July.....	51.6	45.5	51.2	48.0	51.6	53.2	54.7
August.....	51.3	46.6	51.6	49.0	51.2	53.3	54.6
September.....	51.8	46.7	51.5	49.0	53.1	53.3	54.9
October.....	52.5	47.4	53.9	49.0	55.4	53.3	54.9
November.....	52.6	47.5	52.6	49.0	55.0	53.3	54.6
December.....	52.5	47.5	52.6	49.0	55.4	53.3	54.2
1965:							
January.....	52.3	46.8	52.4	49.1	54.6	55.3	54.2
February.....	50.7	46.8	52.4	49.1	54.6	55.2	54.2
March.....	50.1	46.0	52.4	49.1	54.6	55.2	54.2
April.....	49.6	44.0	50.6	49.1	54.6	55.2	54.2
May.....	48.4	43.2	50.4	49.1	54.6	53.2	54.2
June.....	48.1	43.1	50.4	49.1	54.6	53.2	54.2
July.....	49.4	44.8	51.8	48.7	54.6	55.1	54.1
August.....	50.7	45.8	52.3	48.7	54.6	55.2	54.1
September.....	51.3	46.6	52.3	48.7	54.6	55.2	54.1
October.....	50.8	47.6	52.3	48.7	54.6	55.2	54.1
November.....	51.6	47.6	52.3	48.7	54.6	55.2	54.1
December.....	52.6	47.6	52.4	48.7	56.4	55.4	54.1
1966:							
January.....	52.3	47.4	51.5	48.3	56.2	55.2	54.0
February.....	52.2	47.4	53.3	48.3	56.2	55.1	54.0
March.....	52.3	47.4	53.3	48.3	56.2	55.1	55.9
April.....	52.3	47.3	53.3	49.3	58.3	55.1	55.9
May.....	51.7	45.2	53.4	49.2	58.3	55.2	55.9
June.....	51.0	44.9	53.3	49.1	58.3	55.2	55.9
July.....	52.6	47.6	54.7	49.1	58.3	55.2	58.0
August.....	53.4	47.8	55.2	49.7	60.3	55.2	59.3

APPENDIX TABLE 8.—RETAIL MILK PRICE TRENDS IN SELECTED CITIES JANUARY 1964—AUGUST 1966
[In cents per $\frac{1}{2}$ gallon]

	Mountain and Southwest			Far West and Pacific				
	Denver	Dallas	Houston	Los Angeles	San Francisco	Portland	Seattle	Honolulu
1964:								
January.....	45.9	46.3	-----	46.6	48.6	-----	48.8	61.2
February.....	49.0	46.1	-----	46.6	48.6	-----	48.8	61.1
March.....	49.0	46.2	-----	46.6	48.6	-----	48.8	61.0
April.....	48.7	46.2	-----	46.6	48.6	-----	48.8	61.0
May.....	48.7	46.2	-----	47.2	48.6	-----	49.0	61.0
June.....	48.7	46.1	-----	47.2	48.6	-----	50.5	61.0
July.....	48.7	45.9	-----	47.2	48.6	-----	50.7	61.0
August.....	48.7	45.9	-----	47.2	48.6	-----	50.7	60.9
September.....	48.7	45.5	-----	47.2	48.6	-----	50.7	60.9
October.....	48.7	47.3	-----	47.2	48.6	-----	50.7	60.7
November.....	48.8	46.3	-----	47.2	48.6	-----	50.8	61.0
December.....	48.7	46.5	-----	47.2	48.6	-----	50.7	61.0
1965:								
January.....	48.7	46.5	-----	47.2	48.6	-----	50.7	61.0
February.....	44.7	46.5	-----	47.2	48.6	-----	50.7	60.9
March.....	47.2	46.1	-----	47.2	47.8	-----	50.7	60.9
April.....	48.7	45.7	48.2	47.2	47.8	-----	50.7	60.8
May.....	42.7	45.7	48.1	47.2	47.8	-----	50.7	61.0
June.....	36.8	45.7	47.9	47.2	47.8	-----	50.7	60.8
July.....	35.7	46.4	47.9	47.2	47.8	-----	50.6	59.5
August.....	46.9	47.9	49.8	47.2	47.8	-----	50.6	58.1
September.....	46.2	47.8	49.8	47.2	47.8	-----	50.5	57.9
October.....	46.1	47.9	49.7	47.2	47.8	-----	50.5	58.9
November.....	46.2	47.9	49.8	47.2	48.1	-----	49.9	59.0
December.....	46.2	47.8	50.8	47.2	48.1	-----	49.8	58.9
1966:								
January.....	46.2	49.8	50.8	47.0	48.1	-----	49.8	59.1
February.....	46.4	49.7	50.8	47.7	48.1	50.7	49.9	59.4
March.....	46.6	49.6	50.8	47.6	48.1	50.7	49.9	59.1
April.....	48.9	52.2	52.9	47.6	48.1	50.7	49.8	59.0
May.....	48.9	52.1	52.9	47.6	48.1	51.1	51.9	59.0
June.....	48.9	51.9	52.8	47.6	48.1	54.6	52.9	59.0
July.....	52.7	54.3	56.7	47.6	48.1	54.6	52.9	59.2
August.....	50.7	58.1	57.0	48.7	49.8	57.3	52.9	59.2

Source: Prepared from data furnished by the Bureau of Labor Statistics.

APPENDIX TABLE 9.—FARMER, PROCESSOR, AND RETAILER MARGINS OF MILK SOLD BY LARGE FOOD CHAINS IN 24 CITIES. JAN. 15 AND AUG. 15, 1966

	Jan. 15 ¹	Aug. 15 ¹	Change ¹	Percent of retail prices		
				January	August	Change
Retailers.....	8.7	9.7	1.0	17.9	18.5	0.6
Processors.....	15.1	16.0	.9	31.1	30.5	-.6
Farmers.....	24.7	26.7	2.0	51.0	51.0	0
Average retail selling price.....	48.5	52.4	3.9	100.0	100.0	-----

¹ In cents per $\frac{1}{2}$ gallon.

Source: Federal Trade Commission.

APPENDIX TABLE 10.—FARMERS, MILLERS AND OTHER INGREDIENT PROCESSORS, BAKERS, AND RETAILERS MARGINS OF WHOLESALE BAKER BRAND BREAD SOLD BY LARGE FOOD CHAINS, JANUARY AND AUGUST 1966

	Jan. 1 ¹	Aug. 15 ¹	Change ¹	Percent of retail prices		
				January	August	Change
Retailers.....	4.7	5.1	0.4	19.3	19.6	+0.3
Bakers.....	13.7	14.4	.7	56.4	55.4	-1.0
Millers, etc.....	2.4	2.5	.1	9.9	9.6	-.3
Farmers.....	3.5	4.0	.5	14.4	15.4	+1.0
Average retail selling price.....	24.3	26.0	1.7	100.0	100.0	-----

¹ Cents per pound.

Source: Federal Trade Commission.

FEDERAL TRADE COMMISSION,
Washington, D.C., July 2, 1969.

Prof. ROBERT PITOFSKY,
Vanderbilt Hall, New York University Law School, Washington Square South,
New York, N.Y.

DEAR PROFESSOR PITOFSKY: In response to your requests of June 20, I am forwarding with this letter: (1) copies of memoranda prepared by Commissioner Elman and the undersigned, and letters to the Attorney General by the Chairman and the individual Commissioners, dealing with the question of authority to make appointments of key staff personnel; and (2) a series of staff memoranda concerning projects proposed by the Commission's bureaus and offices for fiscal 1971.

In accordance with our recent phone conversation, I have deleted all particular references to pending and projected investigations and enforcement actions.

Sincerely,

JOHN V. BUFFINGTON, *General Counsel.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill., June 20, 1969.

JOHN V. BUFFINGTON, Esq.
Office of the General Counsel,
Federal Trade Commission,
Washington, D.C.

DEAR MR. BUFFINGTON: In the course of our Commission's work, some additional items of information have come to our attention and we would appreciate it if you would furnish these to us. The items are:

(1) A memorandum of law, prepared by you, dealing with the question of whether the Chairman of the FTC has independent authority to make appointments of key staff personnel. In addition, we would like any memoranda which would explain exactly which positions within the Commission are involved in the difference of view as to the powers of the Chairman. (If your own memorandum of law spells this out, no additional documents would be needed).

(2) A series of memoranda, addressed to the Executive Director and/or the Chairman of the Commission, dealing with program evaluation and projects proposed by various bureaus and offices for fiscal 1971.

I assure you, as with our earlier requests for information, that these materials will be treated as confidential by our Commission.

Very truly yours,

ROBERT PITOFSKY.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., June 20, 1969.

Hon. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR RAND: This is written to confirm arrangements previously discussed with you in connection with the meetings of the ABA Commission to Study the FTC which will be held in Washington, D.C. on Monday, June 30 and Tuesday, July 1.

We are most anxious to receive your views on the matters that are under consideration by the ABA Commission and we have invited you to sit down with us and discuss those matters during our meetings. I understand that you will be available to meet with us on Monday, June 30, at 10 a.m. and we look forward to seeing you at that time. If not inconvenient for you, we would be very appreciative if you would join us at our meeting room in the Madison Hotel in Washington, D.C.

In connection with our forthcoming discussions, we have prepared and enclose a list of questions which suggest the areas which we believe to be pertinent to our inquiry. You may think of other areas, and we would welcome suggestions from you in that regard since it is our desire to have as full a discussion as possible of all matters that reasonably come with the very broad mandate under which we are operating.

As you know, it is our plan to invite the five Commissioners to join us for luncheon on June 30 and we hope that you are free to join us at 12:15 p.m. at that occasion.

We very much appreciate the courteous cooperation that you and the Commission staff continue to extend to us.

Sincerely yours,

MILES W. KIRKPATRICK.

ABA COMMISSION TO STUDY THE FTC

1. What techniques of control are used and what criteria followed by the FTC in the selection of cases and the selection among possible enforcement devices? Are there ways in which policy planning in these areas can be improved?

2. Do you feel that the combining of prosecutorial, adjudicative, and policy making functions at the FTC generates problems? If so, in what ways might existing difficulties be minimized? Do you believe it would be useful to delegate additional authority to staff personnel to file or amend complaints, particularly after over-all Commission policy has been established? Where the FTC seeks a preliminary injunction (either under present authority, or under a bill like S. 3065), do you feel in that particular situation that the determination whether to seek the injunction should be made by members of the staff?

3. Are you satisfied with the existing coordination arrangements and alleviation of responsibility between the FTC and the Antitrust Division of the Department of Justice, and between the FTC and the many governmental units (FDA, Department of Agriculture, etc.) charged with protection of consumer interests? If not, what changes would you recommend?

4. Do you feel the FTC has devoted sufficient resources in recent years to efforts to cope with consumer fraud and deception (e.g., bait-and-switch advertising and abuse by sellers of the "holder in due course" defense)? Are there special problems where the violations are essentially local?

5. In your view, are the resources of state and local enforcement agencies reasonably adequate to cope with these fraudulent and deceptive practices against consumers? What is the FTC doing now to assist local units in this area? What might it do?

6. If a decision were made that the FTC ought to expand its efforts in protecting consumers against fraud and deception, what approach do you think ought to be emphasized (for example, additional enforcement proceedings, expanded use of rule-making powers, added emphasis on consumer education or cooperation with and training of local authorities, etc.)? To what extent and in what ways has the FTC recently expanded its efforts along each of these lines? What additional legislation would you regard as necessary to carry forward a satisfactory program?

7. What were the benefits and what were the failings of the FTC's consumer protection project in the District of Columbia?

8. What do you regard as the major difficulties the FTC encounters in attempting to cope with fraudulent and deceptive advertising—especially as it appears in national media? Do you believe the FTC should play a larger role in this area? Are the procedures being used to "monitor" or detect current violations adequate? Is additional legislation needed to assist the FTC's efforts in this area?

9. Is the FTC presently conducting, or planning to conduct, any studies in the area of so-called "motivational" or "subliminal" advertising? Would expanded activities in this area be advisable?

10. Do you believe the FTC's commitment of money and manpower to its Bureau of Textiles and Furs is worthwhile in terms of results achieved? Are there ways in which present operations of that Bureau can be improved? Would you recommend any changes in this area, either by way of legislation modification or alteration of enforcement tactics?

11. What advantages do you see in (1) concurrent enforcement of various antitrust laws by the FTC and Antitrust Division of the Department of Justice, (2) regulation of drug advertising by the FTC and labeling by the FDA and (3) enforcement of FTLA as to food, drugs and cosmetics by the FDA and as to other consumer commodities by the FTC?

12. Do you feel on balance that the FTC's increased reliance in recent years on voluntary compliance techniques has been a success? Are you satisfied that compliance orders are being followed up adequately to insure the illegal practices in fact have been abandoned?

13. Do you agree with the "Neal Task Force Report," "The Nixon Task Force Report", the "Johnson Council of Economic Advisory Report", and others who have recommended that it is time for legislative changes of the Robinson-Patman

Act? If so, how can the FTC contribute to efforts to initiate consideration of revision?

14. Do you believe procedures should be adopted, in addition to those adopted in recent months, to permit greater access to data underlying administrative action by the FTC? How should this be done?

15. Would you recommend any changes in existing FTC rules of procedure to facilitate the work of the Commission?

16. Have changes been instituted in the last few years to improve recruitment by the FTC of young lawyers and economists, and to slow the turnover rate among the younger staff? What else might be done in this area?

17. Is the present organization of Commission staff and the allocation of staff responsibilities capable of improvement and, if so, how?

18. Can the contribution of the hearing examiners to the Commission's objectives be improved and, if so, how?

19. Can industry-wide cooperation with the Commission facilitate the work of the Commission and, if so, how?

MEMORANDA TO COMMISSION FROM COMMISSIONER PHILIP ELMAN,
DATED JANUARY 14, 1969, AND MAY 2, 1969, RE REORGANIZATION
PLAN No. 8 OF 1950: COMMISSION APPROVAL OF APPOINTMENTS OF
HEADS OF MAJOR ADMINISTRATIVE UNITS

Subject: Reorganization Plan No. 8 of 1950: Commission Approval of Appointments of Heads of Major Administrative Units

To: The Commission.

From: Philip Elman.

JANUARY 14, 1969.

Reorganization Plan No. 8 of 1950 (15 F.R. 3175, 64 Stat. 1264) provides that "The appointment by the Chairman of the heads of major administrative units of the Commission shall be subject to the approval of the Commission." (Sec. (b) (2).)

I move that the Commission determine that the following positions are subject to the approval of the Commission under Reorganization Plan No. 8:

- (1) Secretary.
 - (a) Assistant Secretary for Minutes.
 - (b) Assistant Secretary for Legal and Public Records.
- (2) Program Review Officer.
- (3) Executive Director.
 - (a) Assistant Executive Director.
- (4) Director, Office of Information.
- (5) Director, Office of Administration.
 - (a) Director of Personnel.
 - (b) Management Officer.
- (6) Comptroller.
- (7) General Counsel.
 - (a) Assistant General Counsel for Appeals.
 - (b) Assistant General Counsel for Consent Orders.
 - (c) Assistant General Counsel for Legislation.
 - (d) Assistant General Counsel for Export Trade.
 - (e) Assistant General Counsel for Federal-State Cooperation.
 - (f) Assistant General Counsel for Voluntary Compliance.
- (8) Chief Hearing Examiner.
- (9) Director, Bureau of Deceptive Practices.
 - (a) Assistant Director.
 - (b) Chief, Truth-in-Lending Section.
 - (c) Chief, Screening & Planning Section.
 - (d) Chief, Division of Compliance.
 - (e) Chief, Division of Food and Drug Advertising.
 - (f) Chief, Division of General Practices.
 - (g) Chief, Division of Scientific Opinions.
 - (h) Chief, Division of Special Projects.
- (10) Director, Bureau of Economics.
 - (a) Assistant Director.
 - (b) Chief, Division of Economic Evidence.
 - (c) Chief, Division of Industry Analysis.
 - (d) Chief, Division of Financial Statistics.
- (11) Director, Bureau of Field Operations.
 - (a) Assistant Director for Deceptive Practices.
 - (b) Assistant Director for Restraint of Trade.

- (12) Director, Bureau of Industry Guidance.
 - (a) Assistant Director.
 - (b) Chief, Division of Advisory Opinions.
 - (c) Chief, Division of Industry Guides.
 - (d) Chief, Division of Trade Regulation Rules.
- (13) Director, Bureau of Restraint of Trade.
 - (a) Assistant Director.
 - (b) Chief, Division of Accounting.
 - (c) Chief, Division of Compliance.
 - (d) Chief, Division of Discriminatory Practices.
 - (e) Chief, Division of General Trade Restraints.
 - (f) Chief, Division of Mergers.
- (14) Director, Bureau of Textiles and Furs.
 - (a) Assistant Director.
 - (b) Chief, Division of Enforcement.
 - (c) Chief, Division of Regulation.

I further move that the Commission proceed to determine whether the appointment by the Chairman of the present incumbents of the above positions has the approval of the Commission.

MAY 2, 1969.

Subject: Reorganization Plan No. 8 of 1950: Commission Approval of Appointments of Heads of Major Administrative Units

To: The Commission.

From: Philip Elman.

On January 31, 1969, the Commission, with Chairman Dixon voting in the negative and Commissioner MacIntyre abstaining, determined that appointments to certain staff positions are subject to approval of the Commission under Reorganization Plan No. 8 of 1950. The Chairman stated on the minutes that he would not abide by that determination, and I understand that he publicly testified to that effect in his appearance before the Senate Government Operations Committee on April 24.

I learned from Mr. Delaney this morning that the Chairman has written letters to the Civil Service Commission requesting approval of certain appointments he has made to positions covered by the Commission's determination of January 31, 1969. Mr. Delaney also informed me that the letters to the Civil Service Commission refer to the Commission's action on that date. I do not know what information other members of the Commission have on this subject, but before this morning I was entirely unaware either that any appointments had been made by the Chairman or that he had taken any action regarding them. It seems to me that the other members of the Commission should at least be furnished with copies of the Chairman's letters to the Civil Service Commission. If, as the Chairman believes, the Commission's action on January 31, 1969, was *ultra vires* and illegal, and if that legal question has now been submitted to the Civil Service Commission, the legal arguments in support of the majority's position should also be submitted to the Civil Service Commission.

Accordingly, I move that (1) copies of the letters (and any accompanying papers or memoranda which have been or will be sent to the Civil Service Commission bearing on this matter) be circulated to all the members of the Commission; and (2) the General Counsel be directed to prepare expeditiously a memorandum of law supporting the Commission's determination of January 31, 1969.

MEMORANDUM TO COMMISSION FROM GENERAL COUNSEL DATED MAY 29, 1969, RE "HEADS OF MAJOR ADMINISTRATIVE UNITS" AS CONTEMPLATED BY REORGANIZATION PLAN NO. 8 OF 1950

MEMORANDUM

Subject: "Heads of major administrative units" as contemplated by Reorganization Plan No. 8 of 1950

To: Commission.

From: General Counsel.

MAY 29, 1969.

In an action taken on January 31, 1969, the Commission, by a vote of three to one and one abstention, determined that the occupants of a total of sixty-three staff positions henceforth should be regarded as "heads of major administrative units," as that phrase is utilized in Section (1) (b) (2) of Reorganization Plan No. 8 of 1950. The increase from eleven to sixty-three in the number of employees so designated is due principally to the inclusion in the list of all Assistant General Counsels, Assistant Bureau Directors, Division Chiefs, and Attorneys in Charge of Field Offices, none of whom in the past has been included in this category.

The significance of the action lies in the fact that under Section (1) (b) (2) of Reorganization Plan No. 8, "The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission."

The question is whether the Commission's action purporting to determine the positions in its organizational structure to which this provision of the Plan applies was within the Commission's authority.

The answer, while not given categorically, is to be found in the legislative history of the Plan.¹

The legislative history of Reorganization Plan No. 8 is closely tied to that of Plans Nos. 7, 9 and 11 for other regulatory agencies, all of which were before the Congress at or around the same time.² The reports of the Congressional Committees considering these plans did not attempt to define the phrase "heads of major administrative units" as used in the plans, or to indicate whose responsibility it would be to determine the administrative units in the agency to be included in this category. The only discussion of these points in the legislative history took place during Senate debate on Reorganization Plan No. 7 for the Interstate Commerce Commission. This occurred in an exchange between proponents of reorganization, Senator Humphrey and Senator Douglas.³ Following explanation that Chairmen were to have control over "procedural" matters, but not over "substantive" matters, Senator Humphrey stated that " * * * where

¹ No reported cases have been found in which the phrase "major administrative units" as used in Reorganization Plan No. 8 has been considered. In view of the fact that the term does not have any precise, well-recognized meaning, but will, on the contrary, vary in its application, as the circumstances require, we must "[i]n aid of the process of construction * * * have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *United States v. Great Northern Ry.*, 287 U.S. 144, 154 (1932).

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³ Senator Humphrey acted as floor leader for the opponents to S. Res. 253, disfavoring Reorganization Plan No. 7 (96 *Cong. Rec.* 7155), and together with Senator Douglas, voted against each of the resolutions disfavoring these reorganization plans (96 *Cong. Rec.* 7173, 7177, 7375, 7383). "If resort to legislative history is had, the statements of those who supported the legislation and secured its passage will be accepted in determining its meaning." *Union Starch & Refining Co. v. N.L.R.B.*, 186 F. 2d 1008, 1012 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).

there is a conflict as between what is procedural and what is substantive, it is my interpretation that the vote of the Commission as a whole will overrule the administrative decision of the Chairman." Concerning the phrase "heads of major administrative units" and the roles of the Commissions and the Chairmen in the appointment of these employees, the discussion was as follows (96 Cong. Rec. 7164; *emphasis added*) :

Mr. DOUGLAS. Will the Senator from Minnesota give his interpretation of the following: Is the appointment of heads of major administrative units a procedural matter or a substantive matter?

Mr. HUMPHREY. I wish to say to the Senator from Illinois that the question has been brought up for considerable study, and *it was brought up in the form of questioning at the time of the hearings.*

It is my interpretation that these reorganization plans affecting regulatory agencies mean that the commission or agency as a whole shall have a voice in the appointment, in the promotion, or in the demotion of the heads of major administrative units—and in that connection, *the word "heads" is used in a plural sense.* That is to say, *the Commission would have a voice in the selection of and in the assignment of duties for bureau chiefs, assistant bureau chiefs, division chiefs, or chiefs of similar administrative units.*

I want that point made crystal clear, because I am sure there is a great deal of misunderstanding about the powers of the Commission as compared to the powers of the administrative head or of the Chairman of the Commission.

Mr. DOUGLAS. In other words, we are not creating administrative czars?

Mr. HUMPHREY. Certainly we are not. What we are attempting to do is to expedite the work of the Commission.

If every single commissioner is going to be engaged in a great deal of administrative detail, in the signing of all kinds of documents and in the processing of innumerable papers, and is going to be involved in all manner of personnel relationships, insofar as they are routine, that will bog down the quasi-judicial and quasi-legislative functioning of the Commission.

The report of the task force and of the Hoover Commission itself indicated the desirability of having a chairman who had such administrative powers, and to relieve the other commissioners of them.

Mr. DOUGLAS. But am I correct in concluding that this power is not to be used as a cloak behind which the Chairman of the Commission can take over the disciplining of the staff and the determination of the policies of the Commission? Is it true that the Commission is ultimately to be responsible for the delegation of work and for the major policies to be followed, not only in the final determination of issues, but in the investigation and processing of complaints and requests; is that correct?

Mr. HUMPHREY. The Senator from Illinois has stated the matter very accurately. When the words which are used tell me that the Commission as a whole shall make the determinations of policy and the policy decisions, that is the fact; and then the Chairman of the Commission shall be left to carry out, if you please, the determinations of policy and the other procedures involving policy which have been prescribed by the Commission.

Mr. DOUGLAS. I thank the Senator from Minnesota. *I hope this record in the debate will be taken to heart by the chairman of the various administrative bodies and will be authoritative legislative history, with the understanding that it applies not only to Reorganization Plan No. 7, but to all the other reorganization plans affecting regulatory agencies.*

The "questioning at the time of the hearings" alluded to by Senator Humphrey (concerning the appointments of heads of major administrative units under the reorganization plans) apparently occurred when James F. Rowe, a former member of the Hoover Commission, appeared before the Senate Committee in favor of the reorganization plans. Following agreement by Senator Schoeppel and Mr. Rowe that the Chairman's new authority would not permit him to hire and fire hearing examiners, Mr. Rowe directed the Senator's attention to the plans' express reservation to the full Commission of the right to make general policy. And it is by this means, Mr. Rowe said, that the Commission as a whole can preclude the Chairman from the exercise of his own will, regardless of the wishes of the other Commissioners, with respect to the appointment and supervision of employees generally.

Senator SCHOEPEL. That is the thing I want to be very sure about, because I am trying to maintain an open mind on this situation. I

am afraid of the channeling of all this authority into the Chairman in an administrative way, and how that administrative attitude or discretion could influence all the personnel, being subservient to and answerable as they are to the Chairman.

Mr. ROWE. I think that is a somewhat different question from the examiners. The Administrative Procedure Act removes them for all intents and purposes from the Commission. But as to the other personnel, I think you probably mean the lawyers and that sort of thing?

Senator SCHOEPPFL. That is right.

Mr. ROWE. I think not, Senator. You have to make certain assumptions. First of all, you have to assume that a Chairman, this particular Chairman, just does not want to get along with his Commission and wants to run the whole thing and will pay no attention to the members. I think in that case there is in the plan a check and balance.

Senator SCHOEPPFL. b(1)?

Mr. ROWE. b(1). And I think section 4, the general policy provision there. If you take an extreme example, if the Chairman decides he will appoint everybody and he will do exactly what he wants, I think the members of the Commission can then outline a general policy which will control that. That is in a case where the Chairman is running roughshod over everything. I think that check is so strong there would be no problem whatsoever about it.

Senator SCHOEPPFL. In other words, certainly it was not the desire of the members of the Hoover Commission to permit this to get into a position where the other Commissions would merely be figure heads?

Mr. ROWE. Certainly not.

Senator SCHOEPPFL. And certainly on the decisions relating to important quasi-judicial determinations and functions?

Mr. ROWE. No. My own feeling about it is it puts an administrative burden on the Chairman. It is rather dull work. It leaves members free to work on the important and exciting problems, the substantive problems of the Commission. That is the way I would look at it.⁴

The view of Mr. Rowe was shared by Senator O'Connor, author of the Senate Report favoring Reorganization Plan No. 8.⁵ During debate on the Plan for the Federal Trade Commission he explained that the Commission is free to determine that even an administrative matter may be of sufficient importance to treat it as a matter of policy subject to determination by the full Commission (96 Cong. Rec. 7361, 7362, *emphasis added*):

Further, the plan expressly provides certain limitations on the Chairman, so that even if the Chairman is vested with this authority he still will be subject to the Control of the Commission. The plan also provides certain reservoirs of responsibility in the Commission. *Thus it is expressly provided that in exercising any of these functions, the Chairman shall be subject to general policies of the Commission. This refers to the Commission's policies on administrative matters.*

Then the plan expressly reserves to the Commission, as a whole, rather than the Chairman, certain specific administrative responsibilities, namely:

First. Approval of appointment by [sic] heads of major administrative units.

Second. Personnel employed in the immediate offices of the commissioners.

Third. Revising budget estimates and allocating appropriated funds according to major programs and purposes.

All those things I repeat, are reserved to the Commission as a whole.

These three administrative responsibilities specifically reserved to the Commission are concrete examples of the over-all administrative control

⁴ Hearings, pp. 46-47.

The "check and balance" cited by Mr. Rowe is as follows (*id.*, p. 7):

(b)(1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

There are hereby reserved to the Commission its functions with respect to revising the budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

⁵ S. Rep. No. 1562, 81st Cong., 2d Sess., reporting unfavorably S. Res. 254 (expressing disapproval of Reorganization Plan No. 8).

which remains in the hands of the Commission, namely, that *whenever a matter of administration and administrative action is of such importance that the Commission regards it as a policy matter, then the Commission may handle it as being a question of policy.*

* * * * *

The reservation of the commission's power as to matters of policy in administrative matters completely refutes the charge that these plans make dictators out of the chairman. *The commission has the authority to decide what is a question of policy.*

A commission set-up not only does not make for efficiency in regard to these details, but the individual commissioners have their time taken away from the really important responsibilities.

This is not simply a matter of abstract analysis. The Hoover Commission found, for example, that the Federal Trade Commission, the very Commission we are now discussing, which has a system of rotating chairmen, at the time of the task-force survey, was giving consideration in commission meetings to such matters as "the organization of the stenographers pool; mail-room procedures; appointment of junior professional personnel—and shortly before the FTC was also passing on all appointments—even clerical."

I submit, Mr. President, that such matters ought not to engage the attention of the entire Commission, but should properly be handled in a more businesslike way.

* * * * *

The President has established plans which are generally wise and well considered. They will tend to centralize administrative responsibility and leadership in the Chairman and to free the time of the individual commissioners for basic regulatory determinations *and for such matters of administration as are matters of policy.*

On the basis of the foregoing, it is apparent that the phrase "heads of major administrative units" as used in Reorganization Plan No. 8 was intended to embrace heads of administrative units below the Bureau level. It is equally apparent that the determination of the positions in the Commission's organizational structure to be included in this category is a matter of general policy over which the Commission as a whole retains control. And since the meaning and application of the phrase "heads of major administrative units" are necessarily flexible, the action taken by the Commission on January 31, 1969, was consistent with the purpose and spirit of the plan.

In originally implementing Reorganization Plan No. 8, the Federal Trade Commission was guided by a memorandum opinion by General Counsel William T. Kelly, dated June 28, 1950. It was Mr. Kelly's view, among others, that while "obviously" all administrative units are not major, "there is a considerable area of discretion in determining which are major. It is perfectly clear that the heads of each of the seven Bureaus are heads of major administrative units. Within the area of discretion it is possible that the Chairman and Commission might determine that some of the administrative units within bureaus are major administrative units, provided this is not carried to the extent of designating a majority of the administrative units as major."

While Mr. Kelly's memorandum supports the principle that a determination of which administrative units in the Commission's organizational structure constitute "major administrative units" must be made, which, Mr. Kelly said, involves the exercise of "discretion," it is deficient in at least two key respects: (1) it does not indicate whose "discretion" is controlling in the event of a disagreement between the Chairman and the Commission as a whole; and (2) its conclusion that numerical considerations are pertinent in forming judgments as to which administrative units are "major" and which are not is wholly unsupported.

With respect to the first of these deficiencies, the legislative history appears to be irrefutable. It shows that in the minds of the supporters of the legislation, at least, the determination of which of the agency's administrative units are to be regarded as "major administrative units" for purposes of operation under Reorganization Plan No. 8 is a matter of policy over which the Commission retains control and that in the event of a disagreement between the Chairman and the Commission, the decision of the Commission is controlling.

On the second deficiency, the legislative history is silent. It would seem, however, that any attempt to maintain a numerical balance as between those ad-

ministrative units which are "major" and those which are not, might well lead to an unreasonable proliferation of subdivisions in the Commission's Bureaus and thus to a more complex and wholly undesirable organizational structure, which Reorganization Plan No. 8 does not encourage. Additionally, and of even more significance, is the apparent encroachment of this concept on the clear intention of the supporters of the plan to leave the determination of all questions of general policy, including those related to administration and administrative actions, to the Commission as a whole.⁶

Respectfully submitted,

JOHN V. BUFFINGTON,
General Counsel.

⁶ Presumably, the Commission had not, prior to January 31, 1969, seen fit to determine as a matter of policy that any of the administrative units in its organizational structure below the Bureau level were "major administrative units." This, however, is of no consequence and does not now preclude it from making such determination, for "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but, if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise." *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950); cf. *United States v. DuPont & Co.*, 353 U.S. 586, 590 (1957); *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 610-611 (1966).

LETTER TO THE HONORABLE JOHN N. MITCHELL, ATTORNEY GENERAL, FROM PAUL RAND DIXON, CHAIRMAN, DATED JUNE 12, 1969, ATTACHING COPY OF HIS LETTER TO THE CHAIRMAN, CIVIL SERVICE COMMISSION AND GENERAL COUNSEL MEMORANDUM OF MAY 29, 1969; JOINT LETTER TO ATTORNEY GENERAL JOHN N. MITCHELL SIGNED BY COMMISSIONERS PHILIP ELMAN, MARY GARDINER JONES AND JAMES M. NICHOLSON, DATED JUNE 13, 1969; AND LETTER TO ATTORNEY GENERAL JOHN N. MITCHELL FROM COMMISSIONER A. EVERETTE MACINTYRE, DATED JUNE 20, 1969—ALL PERTAINING TO THE AUTHORITY TO MAKE APPOINTMENTS OF KEY STAFF PERSONNEL

FEDERAL TRADE COMMISSION,
Washington, D.C., June 12, 1969.

HON. JOHN N. MITCHELL,
*Attorney General,
Department of Justice,
Washington, D.C.*

MY DEAR MR. ATTORNEY GENERAL: On January 31, 1969, a majority of the Federal Trade Commission took an action affecting the duties and responsibilities of the Chairman of the Federal Trade Commission under Reorganization Plan No. 8 of 1950. By letter of March 5, 1969, addressed to Chairman Robert E. Hampton of the Civil Service Commission, I outlined the problem presented by the action of the majority of the Commission and asked for his approval of an appointment of a Division Chief, without submitting the appointment to the Commission for approval. Similar action has been taken by me and my predecessors since 1950. On June 10th, by phone, I asked Chairman Hampton for a status report on my request and he informed me that it had been sent to your office for an opinion. I am enclosing a copy of my March 5th letter to Chairman Hampton.

Due to the retirement of the General Counsel of the Commission in March of this year, the Commission recently selected as its General Counsel Mr. John V. Buffington. Upon assuming the office of the General Counsel, Mr. Buffington was called upon by a majority of the Commission to furnish the majority with a memorandum in support of its position regarding its determination that "the occupants of a total of sixty-three staff positions henceforth should be regarded as 'heads of major administrative units,' as that phrase is utilized in Section (1) (b) (2) of Reorganization Plan No. 8 of 1950." Enclosed also is a copy of this memorandum.

Characterizing as irrefutable the "legislative history," referred to in his memorandum, Mr. Buffington concludes that the phrase "heads of major administrative units" as used in Reorganization Plan No. 8 was intended to embrace heads of the administrative units below the Bureau level, and that the determination of such positions is a matter of general policy over which the Commission as a whole retains exclusive control. With this opinion, I disagree.

I am not persuaded that the remarks referred to by Mr. Buffington properly constitute binding "legislative history" because of the nature of the proceeding. The Congress was not here considering proposed legislation originating from its body, but was debating the merits of a proposed disapproval resolution.

Congress had delegated to the President reorganization powers which he had exercised subject to disapproval by resolution.

When Reorganization Plan No. 8 became effective in 1950, the Federal Trade Commission adopted the recommendation of Chairman James M. Mead that under the Plan "major administrative units" would be considered the Secretary, Executive Director, General Counsel, and the heads of all the Bureaus of the Commission. Since that date, this action of the Commission has been followed by

Chairmen Edward F. Howrey, John W. Gwynne, Earl W. Kintner, and by me since assuming office on March 21, 1961. Such determination has been followed by the various panels of Commissioners since that date until the action of the majority on January 31, 1969. This constitutes the administrative history of Reorganization Plan No. 8.

I think the action taken by the Commission in 1950 was correct. It was taken while the views expressed in the Hoover Commission report were fresh in the minds of the members of the Federal Trade Commission. Certainly one of the main theses expressed in that report was the necessity to transfer from the Commission generally the power to select the heads of all but the heads of major administrative units.

The Commission is a relatively small agency having less than 1200 employees. There is attached thereto an organization chart of the Commission which was approved by the Commission. The vast majority of the professional personnel of the Commission are in the Operating Bureaus.

There are only two types of units in this part of the Commission—the Bureaus and the subsidiary Divisions thereof. The Bureaus are the major administrative units. The Divisions are the minor administrative units. Any other interpretation would be a contradiction in terms. Reorganization Plan No. 8 plainly states that the Commission may confirm only the heads of the major administrative units. The clear implication is that the Chairman may appoint without the advice of the Commission the heads of the minor administrative units and the other personnel of the Commission, excepting those in the offices of the Commissioners. A colloquy between two Senators who were not a part of the Authority (the President) which issued the Reorganization Plan cannot be relied on to alter the clear meaning of the language contained in the Plan. I also maintain that any majority of this Commission cannot by interpretation change the clear meaning of the Plan. Neither I nor any other Chairman of this Commission appointed by the President should accede to an attempt by any majority of this Commission to impinge upon the authority of the Chairman specifically delegated by a Reorganization Plan issued by the President. Lawfully delegated administrative power may be eroded by unfortunate precedents. It is for this reason that I am forced reluctantly to request your advice.

With kindest regards, I am

Respectfully,

PAUL RAND DIXON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., March 5, 1969.

HON. ROBERT E. HAMPTON,
Chairman, Civil Service Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: As I explained to you by phone, an action was taken by the majority of the Commission on January 31, 1969, affecting the powers of the Chairman of the Federal Trade Commission under Reorganization Plan No. 8 of 1950.

Reorganization Plan No. 8 of 1950 (15 F.R. 3175, 64 Stat. 1264) provides that "The appointment by the Chairman of the heads of major administrative units of the Commission shall be subject to the approval of the Commission." (Sec. (b) (2)). When this plan became effective, the Chairman, James M. Mead, sought the advice of the General Counsel of the Commission, William T. Kelley. Attached hereto is the opinion rendered by Mr. Kelley at that time. Predicated on this opinion, the Commission adopted the recommendation of Chairman Mead that under Reorganization Plan No. 8 the major administrative units would be considered to be the Secretary, Executive Director, General Counsel, and the heads of all the Bureaus of the Commission. Since that date, this action of the Commission has been followed by Chairmen Edward F. Howre, John W. Gwynne, Earl W. Kintner, and by me since assuming office on March 21, 1961.

When it was determined that other regulatory agencies operating under similar reorganization plans were interpreting "major administrative units" differently, the Commissioners, on January 31, 1969, on the motion of Commissioner Philip Elman, seconded by Commissioner Mary Gardiner Jones, and concurred in by Commissioner James M. Nicholson, with Commissioner A. Everette MacIntyre not voting, and over my opposition, determined that the following posi-

tions are to be subject to the approval of the Commission under Reorganization Plan No. 8:

- (1) Secretary
 - (a) Assistant Secretary for Minutes
 - (b) Assistant Secretary for Legal and Public Records
- (2) Program Review Officer
- (3) Executive Director
 - (a) Assistant Executive Director
- (4) Director, Office of Information
- (5) Director, Office of Administration
 - (a) Director of Personnel
 - (b) Management Officer
- (6) Comptroller
- (7) General Counsel
 - (a) Assistant General Counsel for Appeals
 - (b) Assistant General Counsel for Consent Orders
 - (c) Assistant General Counsel for Legislation
 - (d) Assistant General Counsel for Export Trade
 - (e) Assistant General Counsel for Federal-State Cooperation
 - (f) Assistant General Counsel for Voluntary Compliance
- (8) Chief Hearing Examiner
- (9) Director, Bureau of Deceptive Practices
 - (a) Assistant Director
 - (b) Chief, Truth-in-Lending Section
 - (c) Chief, Screening & Planning Section
 - (d) Chief, Division of Compliance
 - (e) Chief, Division of Food and Drug Advertising
 - (f) Chief, Division of General Practices
 - (g) Chief, Division of Scientific Opinions
 - (h) Chief, Division of Special Projects
- (10) Director, Bureau of Economics
 - (a) Assistant Director
 - (b) Chief, Division of Economic Evidence
 - (c) Chief, Division of Industry Analysis
 - (d) Chief, Division of Financial Statistics
- (11) Director, Bureau of Field Operations
 - (a) Assistant Director for Deceptive Practices
 - (b) Assistant Director for Restraint of Trade
- (12) Director, Bureau of Industry Guidance
 - (a) Assistant Director
 - (b) Chief, Division of Advisory Opinions
 - (c) Chief, Division of Industry Guides
 - (d) Chief, Division of Trade Regulation Rules
- (13) Director, Bureau of Restraint of Trade
 - (a) Assistant Director
 - (b) Chief, Division of Accounting
 - (c) Chief, Division of Compliance
 - (d) Chief, Division of Discriminatory Practices
 - (e) Chief, Division of General Trade Restraints
 - (f) Chief, Division of Mergers
- (14) Director, Bureau of Textiles and Furs
 - (a) Assistant Director
 - (b) Chief, Division of Enforcement
 - (c) Chief, Division of Regulation

Thereafter, Commissioner Jones moved that the Commission determine that the major administrative units be construed to include the positions of the attorneys in charge of the eleven field offices of the Commission. This motion was carried, with the approval of Commissioners Elman, MacIntyre, and Nicholson, with me again voting in the negative.

As I explained to you, I consider the action taken by the majority of the Commission improper because it is an attempt by the majority to erode or take from the Chairman power and responsibility vested in him by Reorganization Plan No. 8. This plan was an attempt to solve the problem which had arisen where every employee had to seek a majority vote of the Commission in order

to be hired, raised, or given supervisory responsibility. To return to this system would be a drastic mistake.

When the motions referred to above were carried at the Commission table, I informed the Commission that I considered the vote improper and an illegal intrusion on the powers of the Chairman and would not honor it. I know this creates an embarrassing situation but I cannot accede to the wishes of the majority and surrender the responsibility assigned to me by Reorganization Plan No. 8.

Because of retirements, I am now faced with the problem of filling several of the positions which have heretofore not been considered within the definition of "major administrative units." I have just selected George Dobbs, M.D., as the new Chief of the Division of Scientific Opinions. Dr. Dobbs is a distinguished public servant. I would be hopeful that had I submitted his name to the Commission for approval that he would have been approved. But to do so would have been to surrender to the principle that I adhere to and have set forth above. I ask for your approval of this new assignment for Dr. Dobbs.

I anticipate in the very near future sending over several other names for positions which have heretofore not been considered to fall within the definition of the head of a "major administrative unit."

With kindest regards, I am

Sincerely,

PAUL RAND DIXON, *Chairman.*

"HEADS OF MAJOR ADMINISTRATIVE UNITS" AS CONTEMPLATED BY REORGANIZATION
PLAN No. 8 OF 1950

Memorandum to: Commission.

From: General counsel.

MAY 29, 1969.

In an action taken on January 31, 1969, the Commission, by a vote of three to one and one abstention, determined that the occupants of a total of sixty-three staff positions henceforth should be regarded as "heads of major administrative units," as that phrase is utilized in Section (1) (b) (2) of Reorganization Plan No. 8 of 1950. The increase from eleven to sixty-three in the number of employees so designated is due principally to the inclusion in the list of all Assistant General Counsels, Assistant Bureau Directors, Division Chiefs, and Attorneys in Charge of Field Offices, none of whom in the past has been included in this category.

The significance of the action lies in the fact that under Section (1) (b) (2) of Reorganization Plan No. 8, "The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission."

The question is whether the Commission's action purporting to determine the positions in its organizational structure to which this provision of the Plan applies was within the Commission's authority.

The answer, while not given categorically, is to be found in the legislative history of the Plan.¹

The legislative history of Reorganization Plan No. 8 is closely tied to that of Plans Nos. 7, 9 and 11 for other regulatory agencies, all of which were before the Congress at or around the same time.² The reports of the Congressional Committees considering these plans did not attempt to define the phrase "heads of major administrative units" as used in the plans, or to indicate whose responsibility it would be to determine the administrative units in the agency to be included in this category. The only discussion of these points in the legislative history took place during Senate debate on Reorganization Plan No. 7 for the Interstate Commerce Commission. This occurred in an exchange between pro-

¹ No reported cases have been found in which the phrase "major administrative units" as used in Reorganization Plan No. 8 has been considered. In view of the fact that the term does not have any precise, well-recognized meaning, but will, on the contrary, vary in its application, as the circumstances require, we must "[i]n aid of the process of construction * * * have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *United States v. Great Northern Ry.*, 287 U.S. 144, 154 (1932).

² Plans Nos. 7, 8, 9 and 11 of 1950, relating to the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, and the Federal Communications Commission, used identical language in proposing new authority to the Chairmen of the respective Commissions (*Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 253, 254, 255 and 256, 81st Cong., 2d Sess., April 24-26, 1950, pp. 5-8*).

ponents of reorganization, Senator Humphrey and Senator Douglas.³ Following explanation that Chairmen were to have control over "procedural" matters, but not over "substantive" matters, Senator Humphrey stated that " * * * *where there is a conflict as between what is procedural and what is substantive, it is my interpretation that the vote of the Commission as a whole will overrule the administrative decision of the Chairman.*" Concerning the phrase "heads of major administrative units" and the roles of the Commissions and the Chairmen in the appointment of these employees, the discussion was as follows (96 Cong. Rec. 7164; *emphasis added*) :

Mr. DOUGLAS. Will the Senator from Minnesota give his interpretation of the following: Is the appointment of heads of major administrative units a procedural matter or a substantive matter?

Mr. HUMPHREY. I wish to say to the Senator from Illinois that the question has been brought up for considerable study, and it was brought up in the form of questioning at the time of the hearings.

It is my interpretation that these reorganization plans affecting regulatory agencies mean that the Commission or agency as a whole shall have a voice in the appointment, in the promotion, or in the demotion of the heads of major administrative units—and in that connection, *the word "heads" is used in a plural sense.* That is to say, *the Commission would have a voice in the selection of and in the assignment of duties for bureau chiefs, assistant bureau chiefs, division chiefs, or chiefs of similar administrative units.*

I want that point made crystal clear, because I am sure there is a great deal of misunderstanding about the powers of the Commission as compared to the powers of the administrative head or of the Chairman of the Commission.

Mr. DOUGLAS. In other words, we are not creating administrative czars?

Mr. HUMPHREY. Certainly we are not. What we are attempting to do is to expedite the work of the Commission.

If every single commissioner is going to be engaged in a great deal of administrative detail, in the signing of all kinds of documents and in the processing of innumerable papers, and is going to be involved in all manner of personnel relationships, insofar as they are routine, that will bog down the quasi-judicial and quasi-legislative functioning of the Commission.

The report of the task force and of the Hoover Commission itself indicated the desirability of having a chairman who had such administrative powers, and to relieve the other commissioners of them.

Mr. DOUGLAS. But am I correct in concluding that this power is not to be used as a cloak behind which the Chairman of the Commission can take over the disciplining of the staff and the determination of the policies of the Commission? Is it true that the Commission is ultimately to be responsible for the delegation of work and for the major policies to be followed, not only in the final determination of issues, but in the investigation and processing of complaints and requests; is that correct?

Mr. HUMPHREY. The Senator from Illinois has stated the matter very accurately. When the words which are used tell me that the Commission as a whole shall make the determinations of policy and the policy decisions, that is the fact; and then the Chairman of the Commission shall be left to carry out, if you please, the determinations of policy and the other procedures involving policy which have been prescribed by the Commission.

Mr. DOUGLAS. I think the Senator from Minnesota. *I hope this record in the debate will be taken to heart by the chairmen of the various administrative bodies and will be authoritative legislative history, with the understanding that it applies not only to Reorganization Plan No. 7, but to all the other reorganization plans affecting regulatory agencies.*

The "questioning at the time of the hearings" alluded to by Senator Humphrey (concerning the appointments of heads of major administrative units under the reorganization plans) apparently occurred when James F. Rowe, a former member of the Hoover Commission, appeared before the Senate Committee in favor of the reorganization plans. Following agreement by Senator Schoeppel and Mr.

³ Senator Humphrey acted as floor leader for the opponents to S. Res. 253, disfavoring Reorganization Plan No. 7 (96 Cong. Rec. 7155), and together with Senator Douglas voted against each of the resolutions disfavoring these reorganization plans (96 Cong. Rec. 7173, 7177, 7375, 7383). "If resort to legislative history is had, the statements of those who supported the legislation and secured its passage will be accepted in determining its meaning." *Union Starch & Refining Co. v. N.L.R.B.*, 186 F. 2d 1008, 1012 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).

Rowe that the Chairman's new authority would not permit him to hire and fire hearing examiners, Mr. Rowe directed the Senator's attention to the plans' express reservation to the full Commission of the right to make general policy. And it is by this means, Mr. Rowe said, that the Commission as a whole can preclude the Chairman from the exercise of his own will, regardless of the wishes of the other Commissioners, with respect to the appointment and supervision of employees generally.

Senator SCHOEPEL. That is the thing I want to be very sure about, because I am trying to maintain an open mind on this situation. I am afraid of the channeling of all this authority into the Chairman in an administrative way, and how that administrative attitude or discretion could influence all the personnel, being subservient to and answerable as they are to the Chairman.

Mr. ROWE. I think that is a somewhat different question from the examiners. The Administrative Procedure Act removes them for all intents and purposes from the Commission. But as to the other personnel, I think you probably mean the lawyers and that sort of thing?

Senator SCHOEPEL. That is right.

Mr. ROWE. I think not, Senator. You have to make certain assumptions. First of all, you have to assume that a Chairman, this particular Chairman, just does not want to get along with his Commission and wants to run the whole thing and will pay no attention to the members. I think in that case there is in the plan a check and balance.

Senator SCHOEPEL. b(1)?

Mr. ROWE. b(1). And I think section 4, the general policy provision there.

If you take an extreme example, if the Chairman decides he will appoint everybody and he will do exactly what he wants, I think the members of the Commission can then outline a general policy which will control that. That is in a case where the Chairman is running roughshod over everything. I think that check is so strong there would be no problem whatsoever about it.

Senator SCHOEPEL. In other words, certainly it was not the desire of the members of the Hoover Commission to permit this to get into a position where the other Commissioners would merely be figure heads?

Mr. ROWE. Certainly not.

Senator SCHOEPEL. And certainly on the decisions relating to important quasi-judicial determinations and functions?

Mr. ROWE. No. My own feeling about it is it puts an administrative burden on the Chairman. It is rather dull work. It leaves members free to work on the important and exciting problems, the substantive problems of the Commission. That is the way I would look at it.⁴

The view of Mr. Rowe was shared by Senator O'Connor, author of the Senate Report favoring Reorganization Plan No. 8.⁵ During debate on the Plan for the Federal Trade Commission, he explained that the Commission is free to determine that even an administrative matter may be of sufficient importance to treat it as a matter of policy subject to determination by the full Commission (96 Cong. Rec. 7361, 7362, *emphasis added*):

Further, the plan expressly provides certain limitations on the Chairman, so that even if the Chairman is vested with this authority, he still will be subject to the control of the Commission. The plan also provides certain reservoirs of responsibility in the Commission. *Thus it is expressly provided that in exercising any of these functions, the Chairman shall be subject to general policies of the Commission. This refers to the Commission's policies on administrative matters.*

* * *

Then the plan expressly reserves to the Commission, as a whole, rather than the Chairman, certain specific administrative responsibilities, namely:

⁴ *Hearings*, pp. 46-47.

The "check and balance" cited by Mr. Rowe is as follows (*id.*, p. 7):

(b)(1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(4) There are hereby reserved to the Commission its functions with respect to revising the budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

⁵ *S. Rep. No. 1562*, 81st Cong., 2d Sess., reporting unfavorably S. Res. 254 (expressing disapproval of Reorganization Plan No. 8).

First. Approval of appointment by [sic] heads of major administrative units.

Second. Personnel employed in the immediate offices of the commissioners.

Third. Revising budget estimates and allocating appropriated funds according to major programs and purposes.

All those things, I repeat, are reserved to the Commission as a whole.

These three administrative responsibilities specifically reserved to the Commission are concrete examples of the over-all administrative control which remains in the hands of the Commission, namely, that *whenever a matter of administration and administrative action is of such importance that the Commission regards it as a policy matter, then the Commission may handle it as being a question of policy.*

* * * * *

The reservation of the commission's power as to matters of policy in administrative matters completely refutes the charge that these plans make dictators out of the chairman. *The commission of policy has the authority to decide what is a question of policy.*

A commission set-up not only does not make for efficiency in regard to those details, but the individual commissioners have their time taken away from the really important responsibilities.

This is not simply a matter of abstract analysis. The Hoover Commission found, for example, that the Federal Trade Commission, the very Commission we are now discussing, which has a system of rotating chairmen, at the time of the task-force survey, was giving consideration in commission meetings to such matters as "the organization of the stenographers pool; mail-room procedure; appointment of junior professional personnel—and shortly before the FTC was also passing on all appointments—even clerical."

I submit, Mr. President, that such matters ought not to engage the attention of the entire Commission, but should properly be handled in a more businesslike way.

* * * * *

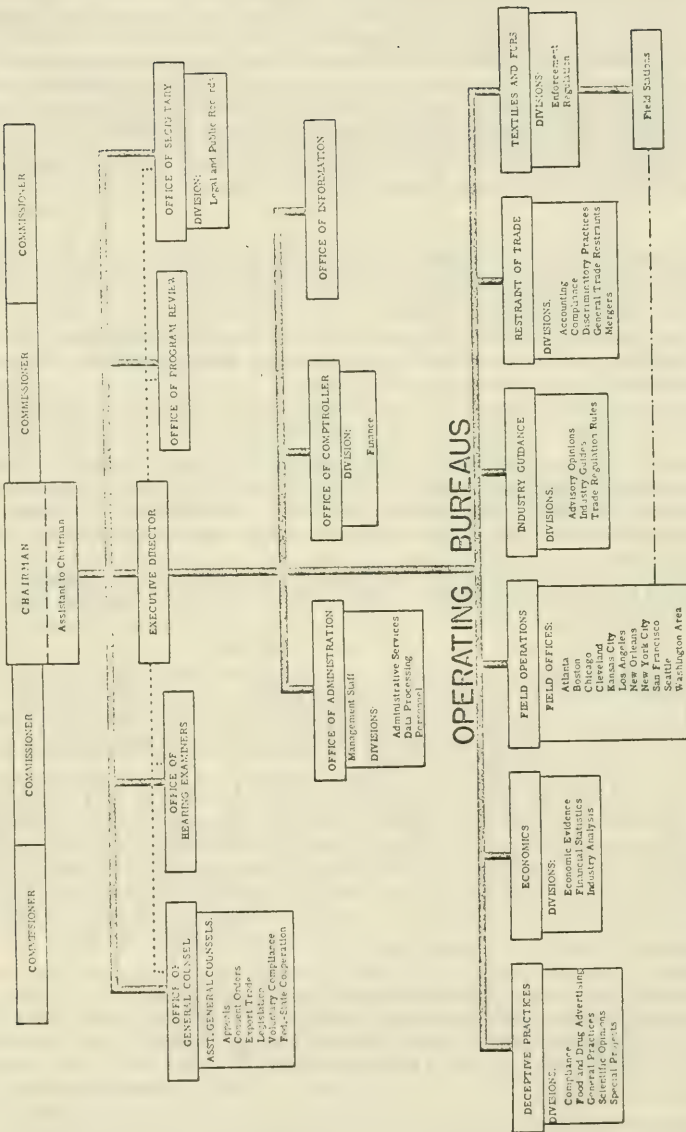
The President has established plans which are generally wise and well considered. They will tend to centralize administrative responsibility and leadership in the Chairman and to free the time of the individual commissioners for basic regulatory determinations *and for such matters of administration as are matters of policy.*

On the basis of the foregoing, it is apparent that the phrase "heads of major administrative units" as used in Reorganization Plan No. 8 was intended to embrace heads of administrative units below the Bureau level. It is equally apparent that the determination of the positions in the Commission's organizational structure to be included in this category is a matter of general policy over which the Commission as a whole retains control. And since the meaning and application of the phrase "heads of major administrative units" are necessarily flexible, the action taken by the Commission on January 31, 1969, was consistent with the purpose and spirit of the plan.

In originally implementing Reorganization Plan No. 8, the Federal Trade Commission was guided by a memorandum opinion by General Counsel William T. Kelly, dated June 28, 1950. It was Mr. Kelly's view, among others, that while "obviously" all administrative units are not major, "there is a considerable area of discretion in determining which are major. It is perfectly clear that the heads of each of the seven Bureaus are heads of major administrative units. Within the area of discretion it is possible that the Chairman and Commission might determine that some of the administrative units within bureaus are major administrative units, provided this is not carried to the extent of designating a majority of the administrative units as major."

While Mr. Kelly's memorandum supports the principle that a determination of which administrative units in the Commission's organizational structure constitute "major administrative units" must be made, which, Mr. Kelly said, involves the exercise of "discretion," it is deficient in at least two key respects: (1) it does not indicate whose "discretion" is controlling in the event of a disagreement between the Chairman and the Commission as a whole; and (2) its conclusion that numerical considerations are pertinent in forming judgments as to which administrative units are "major" and which are not is wholly unsupported.

FEDERAL TRADE COMMISSION



..... ADMINISTRATION ONLY.
 ADMINISTRATIVE SERVICES AND
 FORMAL INVESTIGATIVE MATTERS.

Approved: *Carl R. Davis*
 Chairman

With respect to the first of these deficiencies, the legislative history appears to be irrefutable. It shows that in the minds of the supporters of the legislation, at least, the determination of which of the agency's administrative units are to be regarded as "major administrative units" for purposes of operation under Reorganization Plan No. 8 is a matter of policy over which the Commission retains control and that in the event of a disagreement between the Chairman and the Commission, the decision of the Commission is controlling.

On the second deficiency, the legislative history is silent. It would seem, however, that any attempt to maintain a numerical balance as between those administrative units which are "major" and those which are not, might well lead to an unreasonable proliferation of subdivisions in the Commission's Bureaus and thus to a more complex and wholly undesirable organizational structure, which Reorganization Plan No. 8 does not encourage. Additionally, and of even more significance, is the apparent encroachment of this concept on the clear intention of the supporters of the plan to leave the determination of all questions of general policy, including those related to administration and administrative actions, to the Commission as a whole.⁶

Respectfully submitted,

JOHN V. BUFFINGTON,
General Counsel.

FEDERAL TRADE COMMISSION,
Washington, D.C., June 13, 1969.

Hon. JOHN N. MITCHELL,
Attorney General, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: Chairman Dixon has sent each of us a copy of his letter to you, dated June 12, 1969, in which he expresses disagreement with the action taken by the majority of the Commission under Reorganization Plan No. 8 of 1950 on January 31, 1969, and in effect asks you to reverse or overrule the determination made by the Commission. As the members of the Commission constituting the majority which took such action, we regret very much that the Chairman has seen fit to seek your intercession in this matter which we regard as purely internal and one which the members of the Commission should be able to resolve by themselves.

In our view, the question whether a particular staff position at the Federal Trade Commission is one for which Commission approval should be required under Reorganization Plan No. 8 of 1950 because it is a "head of major administrative unit", or because it is of key significance in the implementation of the laws administered by the Commission, is one of internal policy which the members of the Commission should determine, not an external body or official.

It is the members of the Commission who are best able to make a judgment, based on an evaluation of the nature and importance of a particular staff position, whether, as a matter of policy, the appointment is so critical in the discharge of the Commission's statutory obligations that all members of the Commission should share in the responsibility for such appointment. It is our view, for example, that the chiefs of the divisions which enforce the Merger Law and the Truth in Lending Act should be appointed not by the Chairman alone but with the approval of the Commission. (Even the job descriptions of these FTC personnel reflect on their face the policy significance of their responsibilities.) The Chairman disagrees.

The essential point we wish to make is that the members of the Commission should decide which appointments to staff positions, because of their nature, the importance of the responsibilities assigned, and their bearing on the Commission's performance in fulfilling its statutory obligations, should be subject to the Commission's approval. For our part, we have expressed a willingness to examine any or all of the positions in question and to reach a judgment as to whether they properly fall in this category. We believe that all the members of the Commission,

⁶ Presumably, the Commission had not, prior to January 31, 1969, seen fit to determine as a matter of policy that any of the administrative units in its organizational structure below the Bureau level were "major administrative units." This, however, is of no consequence and does not now preclude it from making such determination, for "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but, if granted, they are not lost by being allowed to lie dormant any more than nonexistent powers can be prescribed by an unchallenged exercise." *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950); cf. *United States v. DuPont & Co.*, 353 U.S. 586, 590 (1957); *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 610-611 (1966).

and not merely the Chairman alone, should participate in the process of classifying these positions, in accordance with subsection (b) (1) of Reorganization Plan No. 8, which provides that in executing his functions under the Plan the Chairman "shall be governed by general policies of the Commission."

We do not believe it is either desirable or appropriate for the Commission to ask you, or any other external body or official, to undertake that responsibility which seems to us to rest exclusively on the Commission's shoulders. If there be disagreements within the Commission, we believe they can and should be resolved internally in a collegial spirit consistent with the Commission's own best interests in effectively carrying out the duties imposed on it by the Congress. We regret very much, therefore, that you should have been asked to intercede in this matter.

With best wishes,

Sincerely,

PHILIP ELMAN.
MARY GARDNER JONES.
JAMES M. NICHOLSON.

FEDERAL TRADE COMMISSION,
Washington, D.C., June 20, 1969.

HON. JOHN N. MITCHELL,
Chairman, Federal Trades Commission, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: This communication is relevant to the matters referred to in the letters to you under date of June 12, 1969, from Chairman Dixon and June 13, 1969, from Commissioners Elman, Jones and Nicholson.

It has been and is my view that the problem presented by those letters is of such importance that to the extent the membership of the Federal Trade Commission is to consider it, that membership should not be so sharply divided that a prospective change in membership within a matter of weeks could lead to a different decision by a majority of the Commission. It was for this reason that I have objected to haste on the part of a majority of the Commission in an attempt to force a decision on this matter before September 25, 1969.

On June 18, 1969, I suggested without objection that I would undertake to disclose what the minutes of the Commission show on the last action by the Commission on this question. This from the minutes of the Commission of June 10, 1969, quoted as follows:

"Mr. Elman moved that to the list of staff positions which the Commission determined on January 31, 1969 require the approval of the Commission that there be added the new positions of Assistant General Counsel for Legal Services, Legislation and Federal-State Cooperation, and for Litigation, and that there be deleted from that list the positions abolished this date—i.e., Assistant General Counsel for Voluntary Compliance, Export Trade, and Consent Orders.

"As a substitute motion, Mr. MacIntyre moved that the determination of the proposals raised in the pending motion be deferred until there is nominated and qualified the incumbent who will hold office in the position on the Commission now held by Commissioner Nicholson for the term commencing September 26, 1969, and that if he were voted down, he possible will state his position publicly as to the reasons for such motion.

"Mr. Nicholson stated that he would not be intimidated by the probability of a public statement in this respect, and would add to Mr. Elman's motion that the position of Assistant to the General Counsel be included on the list of positions to be approved by the Commission.

"As to the foregoing action, Commissioners Elman, Jones and Nicholson voted in the affirmative, and Commissioners Dixon and MacIntyre abstained. Mr. MacIntyre stated he would have preferred the position as stated in his substitute motion and consequently cannot concur for that reason in the motion the Commission adopted, and that this does not mean he was voting yes or no on the merits."

Since each of the other Commissioners has communicated with you about this matter, I think you are entitled to know my position about it.

With best wishes,

Sincerely,

A. EVERETTE MACINTYRE,
Commissioner.

LETTER TO JOHN N. WHEELOCK FROM RICHARD W. McLAREN, DEPARTMENT OF JUSTICE, DATED MARCH 21, 1969, AND MISCELLANEOUS CORRESPONDENCE RE LIAISON ARRANGEMENT WITH DEPARTMENT OF JUSTICE

DEPARTMENT OF JUSTICE,
Washington, D.C., March 21, 1969.

JOHN N. WHEELOCK, Esq.,
Executive Director, Federal Trade Commission, Washington, D.C.

DEAR JOHN: Many thanks for your thoughtful note and good wishes. I had hoped to stop by to see you, Rand, and others long before this. Perhaps we shall at least get together at the ABA Spring Meeting.

I understand that our liaison arrangement is working very well, and we certainly must keep it that way.

Kindest regards,
Sincerely,

RICHARD W. McLAREN,
Assistant Attorney General, Antitrust Division.

DEPARTMENT OF JUSTICE,
Washington, D.C., October 20, 1966.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge your letter of October 7, 1966, concerning the liaison arrangements between the Antitrust Division and the Federal Trade Commission, established in 1948, to avoid duplication of effort on matters within their respective jurisdictions.

These liaison arrangements have made a significant contribution to our enforcement programs in the past, and I hold the view that they will continue to do so in the future. They have proven effective because they have been pursued in an atmosphere of mutual confidence and cooperation in recognition of our common responsibility for vigorous antitrust enforcement.

Consequently, I find it surprising that, because of a few instances of possible confusion in liaison, the Commission now suggests that the Division as a matter of practice is ignoring the terms of the liaison arrangement and substantially impeding the operations of that agency. To the contrary, the fact that problems have arisen in so few instances speaks well for the efforts of both agencies when we consider that many hundreds of matters have been handled.

At the time of the recent meeting between Messrs. Wheelock, Sheehy, and Lipsky of the Commission with Messrs. Zimmerman, Rashid, Philipps, and Swope of the Division on June 13, 1966, it was the consensus of all that the liaison arrangements were, on the whole, working satisfactorily. It was their further view that if problems arose in the future which could not be resolved by our respective liaison officers, personal conferences between Mr. Wheelock and Mr. Zimmerman would be held to resolve them. Until the receipt of your October 7 letter, we have had no suggestions from the Commission of any difficulties over the liaison arrangements.

More effective liaison arrangements between the two agencies are a matter of continuing concern to me. It was this concern which prompted me to issue Directive 5-66, dated July 18, 1966, shortly after the conference with your representatives, which was intended to clarify and reaffirm to all Division attorneys the scope and need of such liaison procedures. I am enclosing a copy of this directive for your information.

I should also like to point out that one of the matters discussed at the conference in June was the necessity of insuring liaison on requests for "business review letters" and "advisory opinions", which up to that time had not always been the subject of "clearance" between the two agencies. This matter was also covered by my directive to the staff.

Little purpose would be served by further exchanges concerning the facts involved in those instances where you feel that the liaison arrangement may have been breached. Similarly, little would be gained if I were to indicate to you instances where the Division has faced difficulties from the Commission on similar matters. These rare situations can better be handled by the procedure already established for resolving such problems between the Executive Director of the Commission and the First Assistant of the Division, more recently formalized in an exchange of letters of January 10 and January 24, 1966.

I find it hard to believe that these few instances of liaison difficulties have "substantially impeded" the work of the Commission. For example, the record indicates that, under this liaison procedure, we have cleared to the Commission during a recent three week period a total of 105 mergers, including the Whirlpool-Warwick matter, while the Division has requested and received clearance from the Commission on only 8 mergers. Indeed, the extraordinary volume of recent clearance requests which we have received from your staff itself raises a serious question as to future operation of the liaison program, for I should make it clear that we cannot consider technical clearances on this scale as a basis for clearing to the Commission future mergers in which the Antitrust Division has a substantial interest.

In order to resolve any outstanding problems and to strengthen the liaison arrangement, I suggest that it might be profitable for us to confer at the earliest convenience.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., October 7, 1966.

HON. DONALD F. TURNER,
*Assistant Attorney General, Antitrust Division,
Department of Justice, Washington, D.C.*

DEAR MR. TURNER: The liaison arrangement by which the Federal Trade Commission and the Antitrust Division of the Department of Justice avoid duplication of effort in the investigation of matters in their respective areas of statutory responsibility has been established since 1948. Consistent with the overall purpose of the arrangement, efforts in refining the relationship have been made from time to time. An exchange of correspondence in 1963 between the two agencies, which undoubtedly has been brought to your attention, represents the most recent statement of the liaison arrangement.

It is at once apparent that the terms of the existing liaison arrangement, to be effective, must be followed in every respect. The Commission's staff has always been informed of the terms of the liaison arrangement. It is understood that the necessary steps have been taken to insure that the staff of the Antitrust Division has been informed of the provisions of the liaison arrangement. It therefore seems that the notification procedures should be handled as a matter of required routine without attendant difficulties. However, recent developments, coming to the Commission's attention, indicate that the basic procedures of the liaison arrangement are not being followed in a substantial number of instances by the Antitrust Division.

Particularly, investigations of reported acquisitions and mergers have been undertaken by the Antitrust Division without regard to the existing liaison arrangement. Recent instances indicating that the Antitrust Division of the Department of Justice is not following the terms of the liaison arrangement are set forth below.

RCA-WHIRLPOOL ACQUISITION OF NORGE DIVISION OF BORG WARNER

On July 21, 1966, a letter of complaint was filed with the Commission, alleging an acquisition by RCA of the Fort Smith plant of Norge Division, Borg Warner Corp. On this date, the liaison office of the Antitrust Division informed the

liaison office of the Commission that the Antitrust Division had no current investigation and no investigation concerning the above companies and charge.

Pursuant to liaison procedures, on July 22, 1966, the Commission's liaison office sent its formal card advising the Antitrust Division that the Commission intended to conduct an investigation of the above reported acquisition. Finally on July 28, 1966, the liaison office of the Antitrust Division advised the Commission's liaison office that in January 1966, counsel for Borg Warner had conferred with members of the Antitrust Division and that counsel for Borg Warner were orally advised that the above transaction would not constitute a basis for any action on the part of the Antitrust Division. The oral "pre-merger clearance" was made by telephone to counsel for Borg Warner.

Our liaison records show that the Antitrust Division did not inform the Commission's liaison office in January or at any other time that the Antitrust Division had under consideration the investigation of the above proposed acquisition and that the Antitrust Division failed to inform the Commission's liaison office that a request for a "pre-merger clearance" had been filed with the Antitrust Division.

ICI-ETHYL CORP. JOINT VENTURE

On June 10, 1966, the Antitrust Division notified the Commission's liaison office of its intention to investigate a joint venture between Imperial Chemical Industries (ICI) and Ethyl Corp. On the same date, the Commission's liaison office advised the Antitrust Division's liaison office that there was a possibility of conflict with Commission investigations. The Commission's liaison office on June 17, 1966, notified the Antitrust Division of the following: (1) Ethyl Corp. acquired the low density polyethylene film assets from Union Carbide subsequent to the Commission's Order for divestiture of the Visking assets; (2) The Commission had underway an active investigation involving a joint venture in the same industry involving Phillips Petroleum; (3) The Commission had up-to-date statistics for the industry, concentration ratios obtained from the Tariff Commission and the Bureau of Economics was conducting a polyolefin study.

The liaison office of the Department of Justice advised on June 24, 1966, that the Department was considering the proposed joint venture under a 1952 Judgment, *U.S. v. Imperial Chemical Industries*. With respect to this Judgment, the Antitrust Division's liaison office was informed that the Judgment involved division of territories and patents, but that it did not include a prohibition against acquisitions or formation of joint ventures.

The Liaison offices had numerous discussions concerning this proposed joint venture between June 10 and July 1, 1966. Finally on July 28, the liaison office of the Antitrust Division advised that members of the Antitrust Division had conferred with counsel for ICI. On July 29, 1966, the Antitrust Division advised the Commission's liaison office that the Division had advised counsel for ICI to the effect that the proposed joint venture did not constitute a basis for any action on the part of the Antitrust Division. This "pre-merger clearance" was given orally.

FANNIE MAY CANDY CO.—ANDES CANDY, INC., ACQUISITION

The Commission's liaison office on August 15, 1966, formally notified the liaison office of the Antitrust Division of the Commission's intention to investigate the acquisition of Andes Candy, Inc. by Fannie May Candy Co. On August 16, 1966, the Antitrust Division's liaison office advised by telephone that the Antitrust Division had already looked into the above acquisition under its "business review procedure." The acquisition was consummated after information was received by the Antitrust Division indicating a failing company and that no other purchasers were available.

In this instance the Commission became aware of the Antitrust Division's investigation and subsequent approval of the merger only after service of its own notice of intention to investigate.

WHIRLPOOL CORP.—WARWICK ACQUISITION

In the Wall Street Journal of August 11, 1966, an article reported a transaction by which Sears Roebuck intended to sell its interest in Warwick to the Whirlpool Corporation. The announcement in the Wall Street Journal was discussed with the liaison office of the Antitrust Division. Notification by the Commission of its intention to investigate was given by telephone on August 11, 1966.

The Antitrust Division's liaison office advised that counsel for Whirlpool had come to the Antitrust Division about a week prior to the report of the transaction in the Wall Street Journal. The Antitrust Division informed Whirlpool counsel by letter that the Antitrust Division did not wish any further information on the transaction.

In this instance also, the Antitrust Division did not inform the Commission's liaison office of the proposed investigation with the result that the Commission learned of it only after it had itself decided to investigate.

HOERNER BOX CO.—WALDORF PAPER PRODUCTS CO.

The Commission's liaison office formally notified the Antitrust Division on November 1, 1965, of its intention to investigate the above acquisition. On November 2, 1965, the Antitrust Division forwarded to the Commission its own notice of intention to investigate the same acquisition. Notwithstanding this impasse, and without resolution of the issue by the Assistant Attorney General and the Chairman as contemplated by the liaison arrangement, the Antitrust Division sent a letter of inquiry to Hoerner Box Company and advised the Commission's liaison office to this effect on November 10.

The following is an example of an instance where the liaison procedures were not followed by the Antitrust Division in matters other than Section 7.

UNIVERSAL-RUNDLE CORP.

On February 20, 1964, the Antitrust Division was informed that the Commission did not then have pending an investigation with which the Antitrust Division's proposed investigation of the Plumbing Fixtures Manufacturers Association in the Maryland and Washington, D.C. area on a charge of price fixing under Section 1 of the Sherman Act would conflict or overlap.

The Commission's liaison office had no further word from the Antitrust Division with regard to this investigation until July 1966. On July 19, the Commission's liaison office notified the liaison office of the Antitrust Division that the Commission intended to conduct an investigation of Universal-Rundle Corp. on the West Coast, concerning an alleged violation of Section 5 of the FTC Act, i.e., selling at unreasonably low prices. On July 26, 1966, the Antitrust Division's liaison office replied that the area in its earlier investigation had been changed from Maryland and Washington, D.C. to a nationwide area, that the Antitrust Division had added 15 companies as parties involved in that investigation. One of the companies added to the Antitrust Division's investigation, without notification to the Commission, was Universal-Rundle Corp. The Antitrust Division's investigation is presently a Grand Jury matter.

In this instance, the Antitrust Division not only enlarged the scope of its investigation but also added 15 companies as parties to its investigation without advising the Commission's liaison office at any time from February 1964 to July 26, 1966.

In reaching the liaison arrangement it was our central purpose, certainly, to improve the exchange of information between the two agencies and to insure a coordinated and effective law enforcement program in the important field of anti-trust law. The Commission will continue to work toward this purpose.

The above instances, however, involve initiation of investigations and granting of pre-merger clearances by the Antitrust Division, all without regard to the existing liaison arrangement. These instances are not isolated. They occur in the face of the clearly defined arrangement between the two agencies and substantially impede the operation of the Commission. Unless the terms of the liaison arrangement are carried out in full, the purposes of avoiding duplication of work and the promotion of consistency of actions in areas where both agencies have statutory responsibilities will not be realized.

I invite your personal attention to the serious departures from the liaison arrangement, and shall appreciate your advice as to the steps which may be taken to implement the arrangement in a manner that will preclude future deviations.

By order of the Commission, Commissioner Elman not participating.

PAUL RAND DIXON, *Chairman*.

FEDERAL TRADE COMMISSION,
Washington, D.C., January 10, 1966.

EDWIN M. ZIMMERMAN,
First Assistant, Antitrust Division, Department of Justice, Washington, D.C.

DEAR MR. ZIMMERMAN: When you were in Chairman Dixon's Office recently, I mentioned to you a point of procedure in connection with the liaison between the Antitrust Division and the Commission.

You are, undoubtedly, familiar with the exchange of letters between the two Agencies stating the existing liaison. In addition, at a meeting held in December of 1961 between Chairman Dixon and Assistant Attorney General Loevinger and members of the staffs, it was agreed that when the usual liaison procedures were not successful in determining which Agency should proceed in a matter then the facts should be submitted to the First Assistant and to the Executive Director and that these two officials would attempt to resolve the disagreement.

During the past few years, Mr. Wright and I have resolved a few disagreements. I would be happy to continue this procedure if it is agreeable to you.

With best personal regards, I am

Sincerely yours,

JOHN N. WHEELOCK,
Executive Director.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., January 24, 1966.

JOHN N. WHEELOCK,
Executive Director, Federal Trade Commission, Washington, D.C.

DEAR MR. WHEELOCK: Thank you for your letter of January 10, 1966 concerning liaison between our agencies. I am in complete agreement with your proposal that the existing arrangement between the Executive Director and the First Assistant be continued.

Thank you for bringing this to my attention.

With all good wishes,

Sincerely,

EDWIN M. ZIMMERMAN,
First Assistant, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, April 29, 1963.

LIAISON BETWEEN THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE

There are attached hereto copies of a letter dated March 8, 1963, from Assistant Attorney General Lee Loevinger (Antitrust Division) to Chairman Dixon and the reply of Chairman Dixon dated April 11, 1963.

This exchange of letters is self-explanatory regarding existing liaison arrangements between the Federal Trade Commission and the Department of Justice.

JOHN N. WHEELOCK,
Executive Director.

DEPARTMENT OF JUSTICE,
Washington, D.C., March 8, 1963.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR RAND: Conferences have been held periodically between representatives of the Antitrust Division and the Federal Trade Commission on the subject of liaison since 1938. A notification plan originated in 1938 was reduced to writing in 1948 by Mr. McIntyre of the FTC and Mr. Hodges of Antitrust. In essence,

the plan provides that each agency will make out a duplicate card for each investigation undertaken. The cards show the file number, title, specification of products and companies involved, and the charges involved. Before an investigation is instituted, one of the duplicate cards is sent to the other agency. Therefore, information is conveyed by telephone from the recipient to the sender as to whether or not any matter is pending in the former concerning the proposed investigation. If not, the investigation proceeds without further liaison. If a matter is pending, further liaison is effected to minimize duplicate effort. Nothing in the arrangement limits either agency in making its own decision as to the investigations it will undertake.

It is further understood, as a result of correspondence between us, that if no response to a card is received within 24 hours, the sender shall assume that there is no overlapping or conflicting investigation or proceeding.

This procedure has been followed for many years, and certain aspects might well be refined for more efficient utilization of the resources of both agencies. On occasion, full information is not exchanged, and the scope of a proposed investigation is not fully known to the other agency. Also, on occasion, a proposed investigation is reported with a considerably different scope than that actually involved, through error or because of change as the investigation progresses. Finally, it appears that there is occasionally unnecessary overlapping and duplication of effort between the agencies, and even prejudice to the enforcement activity of one or the other by virtue of immunities granted in particular investigations.

All this suggests the desirability of some general agreement on the areas of primary responsibility of each agency. In order to deal with these matters the following suggestions are offered for the approval of the Commission.

The staffs of each agency should be instructed that notice to the other agency of a proposed investigation is not merely a formal requirement, but is intended to permit a full exchange of information with respect to the subject matter of the notice. If the recipient has further questions as to any proposed investigation, the initiating agency shall give as much information as is available to it upon request.

When an investigation is proposed, the initiating agency shall make a fair attempt to specify its purpose and scope, and shall fully advise the other agency of the proposed purpose and scope, including the probable charges involved. If it subsequently appears that the scope of the investigation is significantly broadened or changed, the investigating agency shall notify the other agency promptly.

The undertaking of a broad scale study of an economic field by either agency shall not preclude the other either from utilizing information thus gathered or from initiating a specific investigation or prosecution within the same general economic field.

As to the general character of the effort of each agency, it is recognized that by virtue of their respective statutory mandates there is an inescapable area of overlapping. Violation of the Sherman Act may constitute violation of Section 5 of the FTC Act, and unfair competitive activity may constitute restraint of trade or monopolization. Nevertheless, it must be recognized that Congress has given the FTC exclusive responsibility for enforcing the FTC Act and has given the Department of Justice exclusive responsibility for enforcement of the Sherman Act. Accordingly, matters involving *per se* violations of the Sherman Act, or primarily concerned with Sherman Act violations, shall be referred by FTC to Antitrust. Antitrust shall, upon such reference, assume responsibility for such matters. Matters involving primarily violations of Section 5 of the FTC Act, matters with a primary thrust of unfair competitive practices, or unfair or deceptive practices affecting consumers, and matters involving discriminatory pricing or other practices within the scope of the Robinson-Patman Act (except Section 3 thereof) shall be recognized as being the primary responsibility of FTC and shall be referred by Antitrust to the FTC. Upon such reference FTC shall assume responsibility for handling such matters. Matters involving violation of Section 3 of Robinson-Patman, because of the criminal nature thereof, shall be recognized as the responsibility of Antitrust and shall be referred to it. References to the other agency shall be made as soon as the nature of the matter is ascertained.

It is recognized by both agencies that investigations cannot always be clearly categorized. Nevertheless, the staffs of the respective agencies shall be instructed to observe these lines of responsibility and to cooperate with each other in seek-

ing to avoid duplicitous effort in order to permit each agency to function within the area of its greatest effectiveness. The staffs of the respective agencies shall be instructed to exchange information and evidence between the agencies freely and promptly and each shall fully inform the other of the scope, substance and disposition of proposed or pending investigations and cases whenever any question between the agencies arises.

It shall be understood that each agency retains full responsibility and authority for the discharge of its statutory duties, and that the understanding between the agencies is for the purpose of cooperation and efficiency in the enforcement of the laws. Any issue with respect to the matters referred to herein which cannot be otherwise determined shall be referred to the Chairman of the Commission and the Assistant Attorney General in charge of the Antitrust Division, who shall confer and seek a resolution of the issue.

I will appreciate it if you will consider the foregoing and let me know whether it meets with the approval of the Commission. If there are any questions about this, or if you have any suggestions as to a further improvement or refinement in either the principles or the statement suggested, I would be very happy to have these from you.

Sincerely yours,

LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 11, 1963.

HON. LEE LOEVINGER,
*Assistant Attorney General, Antitrust Division,
Department of Justice, Washington, D.C.*

DEAR JUDGE LOEVINGER: In your letter of March 8, 1963, you have accurately reflected the liaison arrangements which have existed between the Antitrust Division of the Department of Justice and the Federal Trade Commission since 1948. We at the Commission wish to join with you in working toward a refinement of our relationship in order that there may be a more efficient utilization of the resources of both agencies. We believe that in the main our arrangement has served the public well in view of our respective statutory mandates.

It is agreed that the staffs of each agency should be instructed that notice to the other agency of a proposed investigation is not merely a formal requirement but is intended to permit a full exchange of information with respect to the subject matter of the notice. If the recipient has further questions regarding the scope or nature of any proposed investigation, it is agreed that the initiating agency upon request shall submit all available information in answer to such questions.

It is further agreed that when notice of a proposed investigation is given, the initiating agency shall fully advise the other agency of the purpose and scope of the proposed investigation, including the probable charges involved. If it subsequently appears that the scope of the investigation is significantly broadened or changed, the investigating agency shall notify the other agency promptly.

Subject to applicable law and public policy, it is further agreed that the undertaking of a broad-scale study of an economic field by either agency shall not preclude the other either from utilizing information gathered by the investigating agency or from initiating a specific investigation or prosecution within the same general economic field.

We recognize here that by virtue of the respective statutory mandates to both agencies there is an inescapable area of concurrent jurisdiction. Violation of the Sherman Act may constitute violation of Section 5 of the Federal Trade Commission Act, but the converse is not necessarily true. There are many unfair methods of competition and unfair practices that do not assume the proportions of a Sherman Act violation. In this connection, Congress gave to the Federal Trade Commission exclusive responsibility for enforcing the Federal Trade Commission Act and to the Department of Justice exclusive responsibility for enforcement of the Sherman Act. In those rare instances where we would not have jurisdiction under Section 5 of a Sherman Act violation because of the necessity of establishing that the activities were carried on "in commerce," the matters would be referred to the Department of Justice.

In your letter of March 8, 1963, you suggest that the Federal Trade Commission refer to the Antitrust Division all matters involving *per se* violations of the Sherman Act, matters primarily concerned with Sherman Act violations, and matters within the scope of Section 3 of the Robinson-Patman Act. In line with this suggestion, but by way of a modification thereof, we propose the following: When a matter is before the Commission and the Commission determines prior to the issuance of a complaint that the facts appear to warrant consideration of possible criminal action against the parties involved the Commission by written notice will inform the Antitrust Division of the investigation and will make available to the Division the files of the investigation for determination by the Division as to whether it desires to present the matter to a grand jury. Such determination shall be made by the Antitrust Division within a period of thirty days, within which time the Division will inform the Commission of its position. If the Division desires to present the matter to a grand jury, it will request the Federal Trade Commission to transfer the matter to it for such purpose. If, on the other hand, the Antitrust Division within this period of time informs the Commission that it does not intend to present the matter for grand jury consideration, then the Commission will proceed under its regular procedures.

We believe that we can and will conduct our investigations in such a way as to avoid the danger of deterring the effectiveness of the Department of Justice, by improvidently granting immunization to witnesses where the Department desires to proceed against them for criminal sanctions.

With respect to all of the laws under which the Commission and the Department have concurrent jurisdiction, it is our feeling that except where criminal prosecution is preferable, no changes should be made in the liaison in procedures now in effect as described in the first paragraph of your letter.

Except in rare instances, neither the Antitrust Division nor the Commission can predict with certainty the totality of facts which may develop during the course of an investigation. Because of this difficulty, I think the greatest public service that we can perform for our respective agencies is to respect each other and act together to use the best procedure available in individual instances in order to guarantee that the public interest is fully served.

We at the Commission laud you for your resolve to use more effectively the criminal sections of the law. In this respect, we want to cooperate fully with the Department. We believe that we can best do this through the use of the suggested procedures we have outlined.

We accept your suggestion that any matters referred to herein which cannot be otherwise determined shall be resolved by the Assistant Attorney General in charge of the Antitrust Division and the Chairman of the Commission, who shall obtain the approval of the Commission.

With kind personal regards, I am

Sincerely,

PAUL RAND DIXON, *Chairman.*

DEPARTMENT OF JUSTICE,
Washington, D.C., April 18, 1963.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission, Washington, D.C.

DEAR MR. DIXON: Thank you for your letter of April 11, 1963, stating the response of the Commission to my letter of March 8, 1963. I appreciate the consideration the Commission has given to the problems discussed and the agreement stated in your letter of April 11 with statements and suggestions contained in my March 8 letter. I shall distribute copies of these letters to the Antitrust Division staff and advise the staff that these letters represent the present arrangement and understanding between the agencies.

Recognizing the inescapable area of concurrent jurisdiction referred to in your letter, I would still hope that it might be possible to delineate more specific areas of primary responsibility for these agencies. In any event, the Department of Justice will work with the Federal Trade Commission toward effective enforcement of the laws constituting the respective responsibilities of these agencies and will expect to have further discussions of these matters in the future.

With best personal regards, I am

Sincerely yours,

[s] LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 26, 1963.

HON. LEE LOEVINGER,
Assistant Attorney General, Antitrust Division, Department of Justice,
Washington, D.C.

DEAR LEE: In response to your letter of April 18, this is to advise you that I shall distribute a copy of your letter of March 8, 1963 to the Commission, as well as the Commission's letter of April 11, 1963 in response thereto, to the staff of the Bureau of Restraint of Trade with the instruction to the staff that these letters represent the present arrangement and understanding between the agencies.

We here at the Commission assure you that we shall continue to work with the Department of Justice toward more effective enforcement of the laws constituting the respective responsibilities of both agencies.

With kindest personal regards, I am

Sincerely,

[S] PAUL RAND DIXON,
Chairman.

DEPARTMENT OF JUSTICE,
Washington, D.C., August 28, 1962.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR RAND: Thanks very much for your letter of August 14, 1962, regarding the clearance procedure followed by the Federal Trade Commission and the Antitrust Division.

With respect to this Division, although we do have field offices, we keep a record in Washington of the activities and investigations of each field office so that any field office check can be made here. In the exceptional case in which it may be necessary to seek further information from a field office, we are prepared to undertake this by telephone and to advise the Federal Trade Commission with respect to clearance of any matter within one day after an FTC request for clearance.

In view of your letter, I shall advise the staff that we may presume that a matter has been cleared if we have not been advised to the contrary within one working day after reference of a clearance request to the FTC. We will, of course, expect the FTC to take the same position with reference to clearance requests made by the Antitrust Division.

It has occurred to me that it might be desirable for us to keep some further discussion of the division of cases between the FTC and the Antitrust Division and I would appreciate it if you would give me a ring sometime at your convenience so that we might set up a date for this. There is no immediate crisis or urgency and I am suggesting this in an effort to increase the efficiency of both agencies and the cooperation between us.

Sincerely yours,

LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., August 14, 1962.

HON. LEE LOEVINGER,
Assistant Attorney General, Antitrust Division, Department of Justice,
Washington, D.C.

DEAR JUDGE LOEVINGER: I have your letter of August 2, 1962, concerning delays in responding to requests for clearance and proposing the establishment of a rule whereby clearance may be assured on any matter referred by the Antitrust Division to the Federal Trade Commission unless you are advised to the contrary within one day after the reference.

Although I am not aware of the particular incident or incidents which prompted your letter, I assure you that we too are interested in preventing undue delay in responding to requests for clearance. There are instances as you

must know, where, because of the necessity of checking with field offices as to the status and nature of matters in investigation and litigation or for other valid reasons, it is not feasible to give an immediate response to a request for clearance. I am informed that is quite often necessary for members of your staff to check with your field offices before responding to a Federal Trade Commission request for clearance. I understand that in instances of this nature the requesting agency is notified of the reason for the delay. I have instructed our liaison officer to see that any such delay is not unduly prolonged. I assume that your letter did not refer to delays of this kind.

I have no objection to the rule you proposed if it is understood that it will not be applicable to those matters wherein clearance is delayed for a good reason and the requesting agency is advised of the reason, providing, of course, that the rule will be applicable to matters referred by the Federal Trade Commission to the Antitrust Division for clearance as well as to matters referred by the Antitrust Division to the Federal Trade Commission.

Sincerely yours,

PAUL RAND DIXON, *Chairman.*

DEPARTMENT OF JUSTICE,
Washington, August 2, 1962.

HON. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR RAND: The clearance procedure by which the Federal Trade Commission and the Antitrust Division avoid duplication of effort in the investigation of complaints and the prosecution of proceedings has been established for a long time and has, on the whole, worked well. However, it has come to my attention that there is one difficulty we have experienced on a number of occasions. I understand that an Antitrust Division inquiry concerning a matter, or request for clearance from FTC, sometimes receives no response for as long as a week or ten days. We are making every effort to act promptly on complaints received, and with respect to matters referred by Senators and Congressmen we seek to respond within 48 hours. You will understand, therefore, that a delay of a week or more in securing a response from FTC substantially impedes the operation of this Division.

Accordingly, unless you have very strong objections, I should like to establish the rule that we will assume that we have FTC clearance on any matter referred by the Antitrust Division to the FTC unless we are advised to the contrary within one day after the reference.

Sincerely yours,

LEE LOEVINGER,
Assistant Attorney General, Antitrust Division.

FEDERAL TRADE COMMISSION,
Washington, D.C., July 8, 1948.

Re proposed liaison arrangements of Federal Trade Commission with Antitrust Division of the Department of Justice.

HON. HERBERT A. BERGSON,
Assistant Attorney General, Department of Justice,
Washington, D.C.

DEAR MR. BERGSON: The Commission authorized Everette MacIntyre, its liaison official with the Antitrust Division of the Department of Justice, to place before you in his conference in your office, on June 21, 1948, a proposal that there be established a systematic mutual exchange of information regarding pending antimonopoly investigations and of each new investigation at the time it is directed.

The exchange of information proposed would include the following for each investigation: the file number, the title, specification of product or products involved, and statement of charges. The proposal provides that all information concerning Federal Trade Commission investigations exchanged would be transmitted from the office of Assistant Chief Examiner L. Garland Kendrick to the office of Mr. Edward P. Hodges, Chief of the Complaint Section of the Antitrust Division, and that information concerning Department of Justice

antitrust investigations would be transmitted from the office of Mr. Hodges to the office of Mr. Kendrick. Information thus exchanged would be designated confidential. Its use would be limited to the promotion of liaison and coordination of effort of the two agencies in their antimonopoly work.

It is understood that the details concerning the exchange of information were discussed and agreed upon by Mr. MacIntyre, Mr. Kendrick and Mr. Hodges in conference June 21, 1948.

By direction of the Commission.

Very truly yours,

R. E. FREER, *Chairman.*

PROPOSED LIAISON ARRANGEMENTS WITH THE ANTITRUST DIVISION OF THE
DEPARTMENT OF JUSTICE

Reference is made to Commission minute of June 11, 1948, authorizing and directing the undersigned to attend a conference, which was held in the office of the Assistant Attorney General in charge of the Antitrust Division on June 21, 1948, concerning liaison relations between the Commission and the Department of Justice, with particular reference to investigations involving farm equipment manufacturers and the National Paper Trade Association, and to present his suggestions, as set forth in his memorandum of June 8, 1948, with reference to liaison arrangements between the Commission and the Department of Justice.

The authorized conference was held on June 21. Those in attendance included Hon. Herbert A. Bergson, Assistant Attorney General in Charge of the Antitrust Division, Holmes Baldridge, Chief of the Litigation Section, Antitrust Division, Edward P. Hodges, Chief of the Complaint Section, Antitrust Division, L. Garland Kendrick, Assistant Chief Examiner, and the undersigned. During the course of the conference an agreement was reached providing for the establishment of a systematic, mutual exchange of information, regarding pending antimonopoly investigations and of each new investigation at the time it is directed. The exchange of information thus agreed upon would include the file number, the title, specification of product or products involved, and statement of charges. The proposal provides that all information concerning Federal Trade Commission investigations exchanged would be transmitted from the office of Assistant Chief Examiner L. Garland Kendrick to the office of Mr. Edward P. Hodges, Chief of the Complaint Section of the Antitrust Division, and that information concerning Department of Justice antitrust investigations would be transmitted from the office of Mr. Hodges to the office of Mr. Kendrick. Information thus exchanged would be designated confidential. Its use would be limited to the promotion of liaison and coordination of effort of the two agencies in their antimonopoly work.

Following the conference in Mr. Bergson's office, the undersigned, Mr. Kendrick and Mr. Hodges discussed and worked out details concerning the exchange of information by the two agencies. An agreement on those details was reached, as shown by the attached memorandum prepared by Mr. Kendrick.

It is contemplated that the exchange of information will be undertaken immediately following dispatch by the Commission of a letter to Mr. Bergson that the arrangement worked out has the approval of the Commission. A reply from Mr. Bergson would inform the Commission that the arrangement is approved by the head of the Antitrust Division. To that end the draft of a letter to Mr. Bergson has been prepared for the signature of the Chairman. It is transmitted herewith.

Respectfully submitted,

EVERETTE MACINTYRE,
Chief, Division of Antimonopoly Trials.

JUNE 30, 1948.

FEDERAL TRADE COMMISSION, TREASURY EXPENDITURES BY BUREAUS, FISCAL YEARS JULY 1, 1958-JUNE 30, 1968

[In thousands of dollars]

Bureau	1968	1967	1966	1965	1964	1963	1962	1961	1960	1959
Commissioners and Offices----	590	589	567	533	460	409	372	288	261	249
Office of the Secretary-----	358	335	344	351	320	285	265	171	202	192
Office of Program Review-----	41	43	46							
Executive Director-----	109	122	140	889	662	649	534	453	366	336
Office of Administration-----	865	877	734							
Office of the Comptroller-----	178	181	253	250	212	212	427	376	331	312
Office of the General Counsel--	856	800	784	846	633	556	502	634	542	472
Hearing Examiners-----	451	445	470	563	527	485	414	332	286	249
Bureau of Litigation-----								1,152	1,013	927
Bureau of Restraint of Trade--	2,653	2,469	2,370	2,411	2,168	1,960	1,664			
Bureau of Investigation-----								3,110	2,604	2,423
Bureau of Deceptive Practices--	1,840	1,572	1,509	1,552	1,329	1,239	1,146			
Bureau of Textiles and Furs--	1,200	1,058	1,006	1,000	870	801	634	180	148	111
Bureau of Field Operations-----	3,241	3,007	2,885	2,926	2,675	2,647	2,008			
Bureau of Consultation-----								432	377	358
Bureau of Industry Guidance--	782	753	670	645	531	465	388			
Bureau of Economics-----	1,261	1,201	1,201	1,131	971	931	502	305	305	289
General operating costs-----	768	638	729	559	656	679	620	381	284	185
Total-----	15,193	14,090	13,708	13,656	12,014	11,318	9,476	7,814	6,719	6,103

Total program costs—fiscal year 1969 (first 9 months only)

Total funds available, 1969----- \$16,900,000

Antimonopoly:

F.T.C. Act, section 5----- \$2,049,351
 Clayton Act, section 2----- 1,845,956
 Clayton Act, section 3----- 26,906
 Clayton Act, section 7----- 1,181,446
 Clayton Act, section 8-----
 Trademarks----- 926

5,104,585

Deceptive practices:

F.T.C. Act, section 5----- 3,600,048
 F.T.C. Act, section 12----- 462,083
 Insurance----- 24,329
 Wool Act----- 272,070
 Fur Act----- 515,292
 Flammable Fabrics Act----- 116,122
 Fabrics Identification Act----- 489,172

5,479,116

Truth in lending-----

202,996

Truth in packaging-----

132,086

Export Trade Act-----

39,612

Industry guidance-----

662,552

Economic and financial reports-----

862,844

Net obligations incurred to Mar. 31, 1969-----

12,482,891

(588)

Total program costs, fiscal year 1968

Total funds available, 1968-----		\$15, 281, 000
Antimonopoly:		
F.T.C. Act, section 5-----	\$2, 757, 592	
Clayton Act, section 2-----	2, 238, 246	
Clayton Act, section 3-----	28, 600	
Clayton Act, section 7-----	1, 348, 276	
Clayton Act, section 8-----		
Trademarks-----	21, 000	
		6, 393, 714
Deceptive practices:		
F.T.C. Act, section 5-----	4, 515, 501	
F.T.C. Act, section 12-----	473, 890	
Insurance-----	40, 615	
Wool Act-----	447, 501	
Fur Act-----	401, 610	
Flammable Fabrics Act-----	201, 830	
Fabrics Identification Act-----	564, 964	
		6, 645, 911
Truth in packaging-----		92, 161
Export Trade Act-----		49, 809
Industry guidance-----		986, 590
Economic and financial reports-----		1, 152, 973
Total program costs-----		15, 321, 158
Deduct: Net unfunded operating costs-----		-41, 000
Net obligations incurred-----		15, 280, 158

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1968	1967	1966	1965
Antimonopoly:				
FTC Act, sec. 5-----	18.0	17.8	18.9	19.9
Clayton Act, sec. 2-----	14.7	15.6	17.1	19.9
Clayton Act, sec. 3-----	.2	.1	.2	.1
Clayton Act, sec. 7-----	8.8	10.7	10.3	9.9
Clayton Act, sec. 8-----		.1	.2	.2
Compliance—Attorney General-----				1.2
Trademarks-----	.1	.2	.2	.2
Total antimonopoly-----	41.8	44.5	46.9	51.4
Deceptive practices:				
FTC Act, sec. 5-----	29.5	26.8	23.8	21.6
FTC Act, sec. 12-----	3.1	3.5	4.8	5.4
Insurance-----	.3	.4	.3	.1
Wool Act-----	2.9	2.5	2.7	2.4
Fur Act-----	2.6	2.2	2.3	2.4
Flammable Fabrics Act-----	1.3	1.1	.7	.8
Fabrics Identification Act-----	3.7	4.2	4.5	4.1
Total deceptive practices-----	43.4	40.7	39.1	36.8
Truth in packaging-----	.6			
Export Trade Act-----	.3	.4	.5	.4
Industry guidance-----	6.4	6.7	5.9	4.1
Economic and financial reports-----	7.5	7.7	7.6	7.3
Total-----	100.0	100.0	100.0	100.0
Total program costs-----	\$15, 321, 158	\$14, 323, 742	\$13, 657, 057	\$13, 460, 089

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1968		Fiscal year 1967		Fiscal year 1966	
	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2
Sec. 2(a).....	\$1,519,587	67.8	\$1,330,779	59.4	\$1,401,809	59.9
Sec. 2(c).....	278,682	12.5	314,730	14.0	279,418	11.9
Sec. 2(d).....	263,598	11.8	315,764	14.0	401,710	17.2
Sec. 2(e).....	19,899	.9	21,798	1.0	9,900	.4
Sec. 2(f).....	156,480	7.0	259,168	11.6	247,431	10.6
Total.....	2,238,246	100.0	2,242,239	100.0	2,340,268	100.0

Total program costs, fiscal year 1967

Total funds available, 1967.....	\$14,378,000
Antimonopoly:	
FTC Act, section 5.....	\$2,537,610
Clayton Act, section 2.....	2,242,239
Clayton Act, section 3.....	16,104
Clayton Act, section 7.....	1,528,372
Clayton Act, section 8.....	19,504
Trademarks.....	30,496
	6,374,325
Deceptive practices:	
FTC Act, section 5.....	3,835,535
FTC Act, section 12.....	502,052
Insurance.....	58,206
Wool Act.....	365,938
Fur Act.....	310,042
Flammable Fabrics Act.....	157,979
Fabrics Identification Act.....	605,525
	5,835,277
Truth in packaging.....	4,797
Export Trade Act.....	52,293
Industry guidance.....	960,093
Economic and financial reports.....	1,096,957
Total program costs.....	14,323,742
Deduct: Net unfunded operating costs.....	-19,000
New obligations incurred.....	14,304,742

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1967	1966	1965	1964
Antimonopoly:				
FTC Act, sec. 5.....	17.8	18.9	19.9	17.7
Clayton Act, sec. 2.....	15.6	17.1	19.9	19.7
Clayton Act, sec. 3.....	.1	.2	.1	.2
Clayton Act, sec. 7.....	10.7	10.3	9.9	10.6
Clayton Act, sec. 8.....	.1	.2	.2	.1
Compliance—Attorney General.....			1.2	4.8
Trademarks.....	.2	.2	.2	.2
Total antimonopoly.....	44.5	46.9	51.4	53.3
Deceptive practices:				
FTC Act, sec. 5.....	26.8	23.8	21.6	21.8
FTC Act, sec. 12.....	3.5	4.8	5.4	4.8
Insurance.....	.4	.3	.1	
Wool Act.....	2.5	2.7	2.4	2.2
Fur Act.....	2.2	2.3	2.4	3.0
Flammable Fabrics Act.....	1.1	.7	.8	.9
Fabrics Identification Act.....	4.2	4.5	4.1	3.4
Total deceptive practices.....	40.7	39.1	36.8	36.1
Export Trade Act.....	.4	.5	.4	.3
Industry guidance.....	6.7	5.9	4.1	3.9
Economic and financial reports.....	7.7	7.6	7.3	6.4
Total.....	100.0	100.0	100.0	100.0
Total program costs.....	\$14,323,742	\$13,657,057	\$13,460,089	\$12,275,700

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1967		Fiscal year 1966		Fiscal year 1965	
	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2
Sec. 2(a).....	\$1,330,779	59.4	\$1,401,809	59.9	\$1,620,155	60.9
Sec. 2(c).....	314,730	14.0	279,418	11.9	223,886	8.4
Sec. 2(d).....	315,764	14.0	410,710	17.2	533,143	20.1
Sec. 2(e).....	21,798	1.0	9,900	.4	22,350	.8
Sec. 2(f).....	259,168	11.6	247,431	10.6	259,719	9.8
Total.....	2,242,239	100.0	2,340,268	100.0	2,659,253	100.0

Total program costs, fiscal year 1966

Total funds available, 1966..... \$13,860,000

Antimonopoly:

FTC Act, section 5.....	\$2,580,119	6,404,777
Clayton Act, section 2.....	2,340,268	
Clayton Act, section 3.....	25,442	
Clayton Act, section 7.....	1,407,160	
Clayton Act, section 8.....	19,932	
Trademarks.....	31,856	

Deceptive practices:

FTC Act, section 5.....	3,257,588	5,336,096
FTC Act, section 12.....	653,070	
Insurance.....	37,767	
Wool Act.....	363,136	
Fur Act.....	314,273	
Flammable Fabrics Act.....	94,931	
Fabrics Identification Act.....	615,331	

Total program costs, fiscal year 1966—Continued

Export Trade Act.....	\$72,723
Industry guidance.....	801,424
Economic and financial reports.....	1,042,037
Total program costs.....	13,657,057
Add: Net unfunded operating costs.....	14,500
Net obligations incurred.....	13,671,557

SUMMARY OF PROGRAM COSTS

[Comparison with prior years by percent of cost]

	Fiscal years			
	1966	1965	1964	1963
Antimonopoly:				
FTC act, sec. 5.....	18.9	19.9	17.7	13.9
Clayton Act, sec. 2.....	17.1	19.9	19.7	18.3
Clayton Act, sec. 3.....	.2	.1	.2	.3
Clayton Act, sec. 7.....	10.3	9.9	10.6	11.7
Clayton Act, sec. 8.....	.2	.2	.1	
Compliance—Attorney General.....		1.2	4.8	8.3
Trademarks.....	.2	.2	.2	.2
Total, antimonopoly.....	46.9	51.4	53.3	52.7
Deceptive practices:				
FTC act, sec. 5.....	23.8	21.6	21.8	22.2
FTC act, sec. 12.....	4.8	5.4	4.8	6.3
Insurance.....	.3	.1		
Wool Act.....	2.7	2.4	2.2	1.9
Fur Act.....	2.3	2.4	3.0	3.5
Flammable Fabrics Act.....	.7	.8	.9	.6
Fabrics Identification Act.....	4.5	4.1	3.4	3.2
Total, deceptive practices.....	39.1	36.8	36.1	37.7
Export Trade Act.....	.5	.4	.3	.1
Industry guidance.....	5.9	4.1	3.9	3.7
Economic and financial reports.....	7.6	7.3	6.4	5.8
Total.....	100.0	100.0	100.0	100.0
Total program costs.....	\$13,657,057	\$13,460,089	\$12,275,700	\$11,456,007

Total program costs, fiscal year 1964

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1966		Fiscal year 1965		Fiscal year 1964	
	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2
Sec. 2(a).....	\$1,401,809	59.9	\$1,620,155	60.9	\$1,422,644	58.9
Sec. 2(c).....	279,418	11.9	223,886	8.4	217,606	9.0
Sec. 2(d).....	401,710	17.2	533,143	20.1	620,542	25.7
Sec. 2(e).....	9,900	.4	22,350	.8	45,163	1.9
Sec. 2(f).....	247,431	10.6	259,719	9.8	108,226	4.5
Total.....	2,340,268	100.0	2,659,153	100.0	2,414,181	100.0

Total funds available, 1965..... \$13,509,369

Antimonopoly:

F.T.C. Act, section 5.....	\$2,673,636
Clayton Act, section 2.....	2,659,253
Clayton Act, section 3.....	20,112
Clayton Act, section 7.....	1,328,509
Clayton Act, section 8.....	26,214
Compliance, Attorney General.....	155,277
Trademarks.....	24,288

6,887,289

Total program costs, fiscal year 1964—Continued

Deceptive practices:		
F.T.C. Act, section 5	\$2, 925, 820	
F.T.C. Act, section 12	732, 698	
Insurance	7, 671	
Wool Act	328, 115	
Fur Act	329, 707	
Flammable Fabrics Act	111, 210	
Fabrics Identification Act	545, 584	
		\$4, 980, 805
Export Trade Act		57, 913
Industry guidance		555, 820
Economic and financial reports		978, 262
Total program costs		13, 460, 089
Add: Net unfunded operating costs		230
Net obligations incurred		13, 460, 319

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1965	1964	1963	1962
Antimonopoly:				
FTC Act, sec. 5	19.9	17.7	13.9	11.8
Clayton Act, sec. 2	19.9	19.7	18.3	18.1
Clayton Act, sec. 3	.1	.2	.3	.7
Clayton Act, sec. 7	9.9	10.6	11.7	12.4
Clayton Act, sec. 8	.2	.1		
Compliance—Attorney General	1.2	4.8	8.3	7.1
Trademarks	.2	.2	.2	.4
Total antimonopoly	51.4	53.3	52.7	50.5
Deceptive practices:				
FTC Act, sec. 5	21.6	21.8	22.2	21.0
FTC Act, sec. 12	5.4	4.8	6.3	6.5
Insurance	.1			
Wool Act	2.4	2.2	1.9	2.0
Fur Act	2.4	3.0	3.5	3.7
Flammable Fabrics Act	.8	.9	.6	.5
Fabrics Identification Act	4.1	3.4	3.2	3.4
Total deceptive practices	36.8	36.1	37.7	37.1
Export Trade Act	.4	.3	.1	.2
Industry guidance (except advisory opinions)	4.1	3.9	3.7	4.9
Economic and financial reports	7.3	6.4	5.8	7.3
Total	100.0	100.0	100.0	100.0
Total program costs	\$13, 460, 089	\$12, 275, 700	\$11, 456, 007	\$9, 963, 000

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1965		Fiscal year 1964		Fiscal year 1963	
	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2
Sec. 2(a)	\$1, 620, 155	60.9	\$1, 422, 644	58.9	\$1, 288, 894	58.9
Sec. 2(c)	223, 886	8.4	217, 606	9.0	253, 129	12.1
Sec. 2(d)	533, 143	20.1	620, 542	25.7	422, 924	20.3
Sec. 2(e)	22, 350	.8	45, 163	1.9	42, 390	2.0
Sec. 2(f)	259, 719	9.8	108, 226	4.5	139, 053	6.7
Total	2, 659, 253	100.0	2, 414, 181	100.0	2, 086, 390	100.0

Total program costs, fiscal year 1964

Total funds available, appropriation 1964-----		\$12,214,750
Antimonopoly		
F.T.C. Act, section 5-----	\$2,169,895	
Clayton Act, section 2-----	2,414,181	
Clayton Act, section 3-----	30,607	
Clayton Act, section 7-----	1,299,537	
Clayton Act, section 8-----	10,982	
Compliance, Attorney General-----	586,433	
Trademarks-----	28,312	
		6,539,947
Deceptive practices:		
F.T.C. Act, section 5-----	2,677,448	
F.T.C. Act, section 12-----	590,382	
Insurance-----	908	
Wool Act-----	265,067	
Fur Act-----	371,098	
Flammable Fabrics Act-----	113,205	
Fabrics Identification Act-----	417,281	
		4,435,389
Export Trade Act-----		34,386
Economic and financial reports-----		781,957
Industry guidance-----		484,381
Total program costs-----		12,275,700
Less: Unfunded operating costs-----		68,617
Net obligations incurred-----		12,207,083

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1964	1963	1962	1961
Antimonopoly:				
FTC Act, sec. 5-----	17.7	13.9	11.8	10.8
Clayton Act, sec. 2-----	19.7	18.3	18.1	22.2
Clayton Act, sec. 3-----	.2	.3	.7	1.1
Clayton Act, sec. 7-----	10.6	11.7	12.4	13.8
Clayton Act, sec. 8-----	.1			.1
Compliance—Attorney General-----	4.8	8.3	7.1	
Trademarks-----	.2	.2	.4	.3
Total, antimonopoly-----	53.3	52.7	50.5	48.3
Deceptive practices:				
FTC Act, sec. 5-----	21.8	22.2	21.0	23.8
FTC Act, sec. 12-----	4.8	6.3	6.5	4.5
Insurance-----				.1
Wool Act-----	2.2	1.9	2.0	2.0
Fur Act-----	3.0	3.5	3.7	3.3
Flammable Fabrics Act-----	.9	.6	.5	.3
Fabrics Identification Act-----	3.4	3.2	3.4	2.9
Total, deceptive practices-----	36.1	37.7	37.1	36.9
Export Trade Act-----	.3	.1	.2	.4
Industry guidance (except advisory opinions)-----	3.9	3.7	4.9	5.7
Economic and financial reports-----	6.4	5.8	7.3	8.7
Total-----	100.0	100.0	100.0	100.0
Total program costs-----	\$12,275,700	\$11,456,007	\$9,963,000	\$8,003,124

DETAIL OF CLAYTON ACT, SEC 2

	Fiscal year 1964		Fiscal year 1963	
	Amount	Percent to total sec. 2	Amount	Percent to total sec. 2
Sec 2(a)-----	\$1,422,644	58.9	\$1,228,894	58.9
Sec 2(c)-----	217,606	9.0	253,129	12.1
Sec 2(d)-----	620,542	25.7	422,924	20.3
Sec 2(e)-----	45,163	1.9	42,390	2.0
Sec 2(f)-----	108,226	4.5	139,053	6.7
Total-----	2,414,181	100.0	2,086,390	100.0

Total program costs, fiscal year 1963

Total funds available, appropriation 1963----- \$11,472,500

Antimonopoly:

F.T.C. Act, section 5----- \$1,608,369
 Clayton Act, section 2----- 2,177,493
 Clayton Act, section 3----- 34,713
 Clayton Act, section 7----- 1,353,807
 Clayton Act, section 8----- -----
 Compliance, Attorney General----- 960,393
 Trademarks ----- 23,142

6,097,917

Deceptive practices:

F.T.C. Act, section 5----- 2,568,762
 F.T.C. Act, section 12----- 728,973
 Insurance ----- -----
 Wool Act----- 219,849
 Fur Act----- 404,985
 Flammable Fabrics Act----- 69,426
 Fabrics Identification Act----- 370,272

4,362,267

Export Trade Act-----

11,571

Industry guidance-----

428,127

Economic and financial reports-----

671,118

Total program costs-----

11,571,000

Less: Unfunded operating costs-----

115,000

Net obligations incurred-----

11,456,000

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1963	1962	1961	1960
Antimonopoly:				
FTC Act, sec. 5	13.9	11.8	10.8	11.7
Clayton Act, sec. 2	18.3	18.1	22.2	19.5
Clayton Act, sec. 3	.3	.7	1.1	1.3
Clayton Act, sec. 7	11.7	12.4	13.8	15.4
Clayton Act sec. 8			.1	.2
Compliance—Attorney General	8.3	7.1		
Trade marks	.2	.4	.3	.2
Total antimonopoly	52.7	50.5	48.3	48.3
Deceptive practices:				
FTC Act, sec. 5	22.2	21.0	23.8	23.0
FTC Act, sec. 12	6.3	6.5	4.5	4.2
Insurance			.1	
Wool Act	1.9	2.0	2.0	3.2
Fur Act	3.5	3.7	3.3	3.2
Flammable Fabrics Act	.6	.5	.3	.1
Fabrics Identification Act	3.2	3.4	2.9	2.1
Total deceptive practices	37.7	37.1	36.9	35.8
Export Trade Act	.1	.2	.4	.6
Industry guidance	3.7	4.9	5.7	5.5
Economic and financial reports	5.8	7.3	8.7	9.8
Total	100.0	100.0	100.0	100.0
Total program costs	\$11,571,000	\$9,963,000	\$8,003,124	\$6,839,532

DETAIL OF CLAYTON ACT, SEC. 2

	Fiscal year 1963	
	Amount	Percent to total sec. 2
Sec. 2 (a)	\$1,228,894	58.9
Sec. 2 (c)	253,129	12.1
Sec. 2 (d)	422,924	20.3
Sec. 2 (e)	42,390	2.0
Sec. 2 (f)	139,053	6.7
Total	2,086,390	100.0

Summary of operating costs, fiscal year 1962

Antimonopoly:		
F.T.C. Act, section 5	\$1,177,900	
Clayton Act, section 2	1,802,400	
Clayton Act, section 3	67,500	
Clayton Act, section 7	1,231,700	
Clayton Act, section 8	600	
Compliance, Attorney General	706,300	
Trade marks	41,200	
		\$5,027,600
Deceptive practices:		
F.T.C. Act, section 5	2,096,800	
F.T.C. Act, section 12	647,500	
Wool Act	201,800	
Fur Act	368,600	
Flammable Fabrics Act	48,100	
Fabrics Identification Act	338,600	
		3,701,400
Export Trade Act		24,200
Industry guidance		483,400
Economic and financial report		726,400
Total operating costs		9,963,000

SUMMARY OF OPERATING COSTS—FISCAL YEAR 1962 COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—		
	1962	1961	1960
Antimonopoly:			
FTC Act, sec. 5	11.8	10.8	11.7
Clayton Act, sec. 2	18.1	22.2	19.5
Clayton Act, sec. 3	.7	1.1	1.3
Clayton Act, sec. 7	12.4	13.8	15.5
Clayton Act, sec. 8		.1	.2
Compliance—Attorney General	7.1		
Trademarks	.4	.3	.2
Total antimonopoly	50.5	48.3	48.4
Deceptive practices:			
FTC Act, sec. 5	21.0	23.8	23.0
FTC Act, sec. 12	6.5	4.5	4.2
Insurance		.1	
Wool Act	2.0	2.0	3.1
Fur Act	3.7	3.3	3.3
Flammable Fabrics Act	.5	.3	.1
Fabrics Identification Act	3.4	2.9	2.1
Total deceptive practices	37.1	36.9	35.8
Export Trade Act	.2	.4	.6
Industry guidance	4.9	5.7	5.5
Economic and financial reports	7.3	8.7	9.7
Total obligations incurred	100.0	100.0	100.0
Total operating costs	\$9,963,000	\$8,003,124	\$6,839,532

*Summary of operating costs, fiscal year 1961***Antimonopoly:**

FTC Act, section 5	\$865,798	
Clayton Act, section 2	1,780,133	
Clayton Act, section 3	86,444	
Clayton Act, section 7	1,105,208	
Clayton Act, section 8	5,856	
Trademarks	20,815	
		\$3,864,254

Deceptive practices:

FTC Act, section 5	1,904,030	
FTC Act, section 12	361,042	
Insurance	5,650	
Wool Act	161,220	
Fur Act	266,041	
Flammable Fabrics Act	24,328	
Fabrics Identification Act	234,665	
		2,956,976

Export Trade Act	32,542	
Trade practice conferences	452,530	
Economic and financial reports	696,822	

Total obligations incurred	8,003,124
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SUMMARY OF OPERATING, COSTS FISCAL YEAR 1961—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—		
	1961	1960	1959
Antimonopoly:			
FTC Act, sec. 5.....	10.8	11.7	11.3
Clayton Act, sec. 2.....	22.2	19.5	18.6
Clayton Act, sec. 3.....	1.1	1.3	1.3
Clayton Act, sec. 7.....	13.8	15.5	16.9
Clayton Act, sec. 8.....	.1	.2	.2
Trademarks.....	.3	.2	.4
Total antimonopoly.....	48.3	48.4	48.7
Deceptive practices:			
FTC Act, sec. 5.....	23.8	23.0	21.0
FTC Act, sec. 12.....	4.5	4.2	4.1
Insurance.....	.1	—	.5
Wool Act.....	2.0	3.1	4.0
Fur Act.....	3.3	3.3	4.4
Flammable Fabrics Act.....	2.3	.1	.1
Fabrics Identification Act.....	2.9	2.1	.8
Total deceptive practices.....	36.9	35.8	34.9
Export Trade Act.....	.4	.6	.6
Trade practice conferences.....	5.7	5.5	5.5
Economic and financial reports.....	8.7	9.7	10.3
Total obligations incurred.....	100.0	100.0	100.0
Total obligations in dollars.....	\$8,003,124	\$6,839,532	\$6,484,168

SUMMARY OF OPERATING COSTS, FISCAL YEARS 1959-60

	Fiscal year—	
	1960	1959
Antimonopoly:		
FTC Act, sec. 5.....	\$802,627	\$736,154
Clayton Act, sec. 2.....	1,333,899	1,204,853
Clayton Act, sec. 3.....	86,091	87,297
Clayton Act, sec. 7.....	1,055,526	1,094,021
Clayton Act, sec. 8.....	14,525	11,891
Trademarks.....	15,885	26,087
Total antimonopoly.....	3,308,553	3,160,303
Deceptive practices:		
FTC Act, sec. 5.....	1,574,027	1,362,203
FTC Act, sec. 12.....	285,715	264,991
Insurance.....	884	32,265
Wool Act.....	216,274	257,669
Fur Act.....	224,230	284,859
Flammable Fabrics Act.....	4,963	6,242
Fabrics Identification Act.....	141,435	55,673
Total deceptive practices.....	2,477,528	2,263,932
Export Trade Act.....	40,932	39,298
Trade practice conferences.....	375,634	355,921
Economic and financial reports.....	666,885	664,714
Total obligations incurred.....	6,839,532	6,484,168

OBLIGATIONS BY ACTIVITY

	Fiscal year—				
	1947	1948	1949	1950	1951
Antimonopoly:					
Legal casework	\$796,700	\$941,091	\$1,389,515	\$1,400,000	\$1,298,713
Economic and financial reports	257,537	202,375	222,797	234,174	292,615
Export trade	76,760	56,524	54,928	52,432	53,062
Total antimonopoly	1,130,997	1,199,990	1,667,240	1,686,606	1,644,390
Antideceptive practices:					
Legal casework	1,220,779	1,119,958	1,306,688	1,145,823	1,221,302
Trade practice conferences	169,720	234,793	257,384	211,497	236,600
Wool Act administration	311,994	310,551	326,522	311,165	309,362
Lanham Act and insurance		34,828	38,671	46,909	33,875
Total antideceptive practices	1,702,493	1,700,130	1,929,265	1,715,394	1,801,139
Administrative salaries				320,792	326,439
Total obligations incurred	2,833,490	2,900,120	3,596,505	2,722,792	3,771,968

	Fiscal year—						
	1952	1953	1954	1955	1956	1957	1958
Antimonopoly:							
Investigation and litigation	\$1,693,806	\$1,711,218	\$1,685,540	\$1,554,772	\$1,753,778	\$2,539,660	\$2,692,270
Economic and financial reports	229,511	267,851	234,210	275,210	314,736	514,650	546,530
Trade practice conference and small business					75,000	79,540	
Total anti-monopoly	1,923,317	1,979,069	1,919,750	1,829,982	2,143,514	3,133,850	3,238,800
Antideceptive practices:							
Investigation and litigation	1,229,400	985,167	927,840	1,093,448	1,232,638	1,130,770	1,396,390
Trade practice conference and small business	217,696	313,406	335,540	245,334	155,272	159,080	295,020
Wool and Fur Acts enforcement	308,104						
Wool, Fur, and Flammable Acts enforcement		271,813	286,640	258,938	270,242	350,650	460,160
Lanham Act and insurance	23,691	30,705	15,000	57,928	86,081	103,220	36,770
Total antideceptive practices	1,778,891	1,601,091	1,565,020	1,655,648	1,744,233	1,743,720	2,188,340
Executive direction and management	299,412	311,075	336,260	361,006	367,118	352,650	406,680
Administrative salaries	305,297	285,999	232,770	279,645	292,298	286,203	351,228
Total obligations incurred	4,306,917	4,177,234	4,053,800	4,126,281	4,547,163	5,516,423	6,185,048

LETTER TO ROBERT SKITOL, NEW YORK UNIVERSITY LAW SCHOOL, FROM
JOHN A. DELANEY, DATED JULY 22, 1969, RE AVERAGE NUMBER OF
ATTORNEYS IN BUREAUS OF RESTRAINT OF TRADE, DECEPTIVE PRAC-
TICES AND TEXTILES AND FURS, FOR PERIODS JULY 1, 1961, TO JUNE 30,
1962 AND JULY 1, 1962, TO JUNE 30, 1963

JULY 22, 1969.

ROBERT SKITOL,
*Law Review Office, New York University Law School,
New York, N.Y.*

DEAR MR. SKITOL: On July 14, 1969, you asked me for information as to the
average number of attorneys in our Bureaus of Restraint of Trade, Deceptive
Practices and Textiles and Furs, for the two periods from July 1, 1961 to June 30,
1962 and July 1, 1962 to June 30, 1963.

The information is:

July 1, 1961-June 30, 1962:

Restraint of trade	97
Deceptive practices	55
Textiles and furs	19

July 1, 1962-June 30, 1963:

Restraint of trade	122
Deceptive practices	69
Textiles and furs	22

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administrator.

JULY 11, 1969.

ROBERT SKITOL,
*Law Review Office, New York University Law School,
New York, N.Y.*

DEAR MR. SKITOL: Enclosed is the remainder of the material requested in your
letter of June 24, 1969, as amended by Mr. Pitofsky's letter of July 2, 1969.

You may remember that when we discussed Item No. 1 I told you we did not
maintain the personnel folders of any of our accountants, economists or
statisticians who left us, nor did we have any documents in regard to applicants
sent to us by the Civil Service Commission who were not employed. The material
submitted in response to Item No. 1 of your letter gives a brief sketch of all our
currently employed economists, statisticians, and accountants, who have come
with us during the last three years.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., June 24, 1969.

JOHN DELANEY, Esq.,
*Federal Trade Commission,
Washington, D.C.*

DEAR MR. DELANEY: Several members of our Commission have asked me to
request that additional information be furnished. The information requested is as
follows:

1. In Item 7 of Robert Pitofsky's June 9, 1969 letter to John Buffington,¹ he
requested the following:

¹ (See incoming letter dated 7-2-69.) Only a composite of data in each category is
requested. Law school affiliation, class standing, and law school aptitude score requests
withdrawn.

"A compilation of data for the present year and the past two years showing the following information with respect to each applicant to the FTC who accepted an offer of employment on the legal staff, or received and declined an offer :

- (a) home state
- (b) law school affiliation
- (c) rough estimate of class standing
- (d) law school aptitude score (when available).

We now request that the same information be made available with respect to economists, accountants, and statisticians who applied to and received or declined an offer of employment at the FTC.

2. With respect to senior staff personnel at the Commission, please indicate as to each the present age, total length of employment with the FTC (if interrupted, furnish total combined years of employment), home address prior to employment with the FTC, law school affiliation, and, if available, a rough estimate of class standing or other available pertinent data indicating law school record.

We hope you will use your good judgment in defining "senior staff" but, in any event, we wanted to include all Bureau and Section Chiefs and Assistant or Associate Bureau and Section Chiefs.

3. With respect to hearing examiners presently associated with the FTC, we would like to know the total number of hearing examiners on active duty.

With respect to each, please advise us of their average case load in the most recent year for which statistics are available and as to that year, the number of hearing and conference days and the general type of case with which each was involved.

4. With respect to hearing examiners presently affiliated, kindly furnish information showing age, length of FTC employment, home address prior to employment with the FTC, and employment record prior to appointment as a hearing examiner.¹

I note that you sent us the two most recent "Workload and Manpower Quarterly Reports". I assume, in response to Item 3 of our June 9 letter, that you will be sending us reports for the remaining quarters in each of the past 4 years.

Let me emphasize again that we would appreciate it if you would send material to us as soon as it is available.

Sincerely,

ROBERT SKITOL.
MICHELE BEIGEL.

ITEM NO. 1 OF MR. SKITOL'S LETTER OF JUNE 24, 1969

Date of entrance of duty in professional position : April 13, 1969.

Title and grade of position to which appointed : Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
University of Wisconsin.....	B.S.H.	1966	Honors.....	3.33
Washington University.....	M.A.	1968	.....	3.45

Other information.—Appointed from Economist Register, CSC rating 83.0; Phi Kappa Phi; NDEA Fellowships; American Economics Association (Committee for Environmental Information).

Date of entrance of duty in professional position : March 9, 1969.

Title and grade of position to which appointed : Economist, GS-5.

College degrees : School, Howard University, degree, B.A. ; Date, 1969 ; grade point average, 2.80.

Date of entrance of duty in professional position : November 22, 1967.

Title and grade of position to which appointed : Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
New York University		1958-59		
University of Tulsa	B.A.	1962		3.1
Georgetown Law School	LL.B.	1965		
Johns Hopkins University	M.I.	1967		
School of Advanced International Studies				

Other information.—FSEE—rating—90.6; member of Phi Alpha Delta—Legal Fraternity; Phi Alpha Delta—Honorary History Society; John Hopkins Fellowship; Woodrow Wilson Fellowship Nominee; Deans List at University of Tulsa.

Date of entrance of duty in professional position : 2-9-69.

Title and grade of position to which appointed : Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
St. Vincent's College	B.A.	1966	54/115	2.8
Georgetown University				

Other information. Appointed from Economist Register—CS rating—83.0.

Date of entrance of duty in professional position : July 9, 1967.

Title and grade of position to which appointed : Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Hunter College	1 year			
University of Maryland	B.S.	1967		

Other information.—FSEE rating—86.0.

Date of entrance on duty in professional position : 7/7/68.

Title and Grade of position to which appointed : Economist, GS-9.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Indiana University	B.S.	1965		
Indiana University	M.A.	1967		

Other information.—Economist Exam—rating—77.0.

Date of entrance on duty in professional position : 9-11-66.

Title and Grade of position to which appointed : Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Holy Cross.....	A.B.	1961.....		
Boston College.....		Summer, 1960.....		
St. John's University.....		Summer, 1961.....		
State University of New York at Buffalo.....	Ph. D.	1966.....		

Other information.—Economist Exam—CSC rating—92.0.

Date of entrance of duty in professional position : 8/15/68.

Title and Grade of position to which appointed : Economist, GS-14.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
St. Louis University.....	A.B.	1960	Summa cum laude.....	
Harvard University.....		1960-61		
Washington University.....	Ph. D.	1964		

Other information.—Woodrow Wilson Graduate—Fellowship—1960. National Science Foundation Fellowship—Summer 1963.

Date of entrance of duty in professional position : 4/21/68.

Title and grade of position to which appointed : Economist, GS-15.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Harvard (magna cum laude).....	A.B.	1951		
Harvard Graduate School.....	A.M.	1953		
Harvard University.....	Ph. D.	1958		

Other information.—Harvard College and Graduate Scholarship, Phi Beta Kappa.

Date of entrance of duty in professional position : July 10, 1966.

Title and Grade of position to which appointed : Accountant, GS-5.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Gallaudet College (Business Administration).....	B.S.	1965.....		
University of Hartford.....		Summer 1965.....		

Other information.—FSEE-rating—90.0.

Date of entrance of duty in professional position : 9/22/68.

Title and Grade of position to which appointed : Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Villanova University.....	B.S.	1964	.....	.....
Washington, University.....	M.A.	1967	.....	.....
	Ph. D.	1968	.....	.....

Other information.—Economist Exam—rating 92.0. Member of American Economic Association. Member of American Finance Association.

Date of entrance of duty in professional position : September 8, 1968.

Title and Grade of position to which appointed : Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Rice University.....	B.A.	1962	.....	3.0
Baylor State University.....	M.A.	1965	.....	.....
Oklahoma State University.....	Ph. D.	1969	.....	.....

Other information.—Previously with Justice Department (Antitrust Department) Field is Industrial Organization Economics. FSEE—rating—86.3. Beta Gamma Sigma—National Business Honor Fraternity. Order of Artus—National Economics Honor Fraternity.

Date of entrance of duty in professional position : February 12, 1967.

Title and Grade of position to which appointed : Accountant, GS-7.

College Degrees: School, University of Maryland; degree, B.S.; date, 1967; class standing, upper 25%; grade point average, 2.8.

Other information.—Appointed from Accountant register—CSC rating—93.0.

Date of entrance of duty in professional position : August 25, 1968.

Title and Grade of position to which appointed : Accountant, GS-7.

College Degrees: School, Delaware State College (business administration); degree, B.S.; date, June 1968; class standing, upper 25%; grade point average, 3.09.

Other information.—Accountant Exam No. 414 rating—91.0.

Date of entrance of duty in professional position : June 11, 1967.

Title and Grade of position to which appointed : Accountant, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Columbia University.....	B.C.S.	1952	.....	.....
School of Accounting.....	M.F.A.	1953	.....	.....

Other information.—transfer from G.A.O.

Date of entrance of duty in professional position : 1/12/69.

Title and Grade of position to which appointed : Accountant, GS-7.

College Degrees: School, Columbia Union University, Business Administration; degree, B.S.; date, 1968; class standing, upper 25%.

Other information.—Accountant Exam No. 414, rating—90.0.

Date of entrance of duty in professional position: September 24, 1967.

Title and Grade of position to which appointed: Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Grinnell College	B.A.	1964		
University of Wisconsin		1964-67		

Other information.—FSEE—rating—90.0. Is presently working on Ph. D. thesis.

Date of entrance of duty in professional position: 3/26/68.

Title and Grade of position to which appointed: Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
University of Maryland	B.A.	1966	Upper 1/4	
Do.	M.A.	1968		B

Other information.—FSEE rating 82.1; member of American Economic Association.

Date of entrance of duty in professional position: February 25, 1968.

Title and Grade of position to which appointed: Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Salem College		1960-61	Cum laude	3.1
Shepard College (business administration)	B.S.	1965		
University of Maryland (night, economics)	M.A.	June 1968		

Other information.—FSEE—rating—85.4.

Date of entrance of duty in professional position: June 27, 1967.

Title and Grade of position to which appointed: Economist GS-5.

College Degrees: School, University of Maryland—School of Business Administration; degree, B.S., date, January 1967.

Other information.—FSEE—rating—83.0; member of American Economic Association.

Date of entrance of duty in professional position: June 16, 1968.

Title and Grade of position to which appointed: Economist, GS-7.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
American University.....		1961-62		
Pennsylvania State University.....	B.S.	1965		3.5
University of Delaware.....	N.A.	1967		

Other information.—FSEE—rating—88.1; graduate student in business, semester.

Date of entrance of duty in professional position : July 14, 1968.

Title and Grade of position to which appointed : Economist, GS-5.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Marietta College.....	N.A.	September 1960-June 1961		
George Washington University.....	B.A.	1965		

Other information.—GRE scores—Aptitude, verbal, 630; quantitative, 640; advanced test in economics, 640. FSEE rating, 83.9; on military furlough since January 10, 1966. Leave without pay.

Date of entrance of duty in professional position : September 8, 1968.

Title and grade of position to which appointed. Economist, GS-11.

COLLEGE DEGREES

School	Degree	Date	Class standing	Grade point average
Indiana University.....	A.B.	1964		
Do.....	M.B.A.	1966		
Do.....	Ph. D.	1968		

Other information.—Field is Industrial Organization.

ITEM NO. 2 OF MR. SKITOL'S LETTER OF JUNE 24, 1969

Senior Level Officials

Attorney position :

1. Present age 62.
2. Total length of service with FTC, 26 years.
3. Home address prior to employment with FTC, Memphis, Tex.

Attorney position :

1. Present age 48.
2. Total length of service with FTC, 9 years.
3. Howe address prior to employment with FTC, Bethesda, Md.

Attorney position :

1. Present age 46.
2. Total length of service with FTC, 14 years.
3. Home address prior to employment with FTC, Silver Spring, Md.

Nonattorney position :

1. Present age 59.
2. Total length of service with FTC, 6 years.
3. Home address prior to employment with FTC, Tallahassee, Fla.

Attorney position :

1. Present age, 61.
2. Total length of service with FTC, 27 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 55.
2. Total length of service with FTC, 8 years.
3. Home address prior to employment with FTC, Arlington, Va.

Attorney position :

1. Present age, 62.
2. Total length of service with FTC, 30 years.
3. Home address prior to employment with FTC, Arlington, Va.

Attorney position :

1. Present age, 63.
2. Total length of service with FTC, 37 years.
3. Home address prior to employment with FTC, Washington, D.C.

Nonattorney position :

1. Present age, 63.
2. Total length of service with FTC, 39 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 49.
2. Total length of service with FTC, 19 years.
3. Home address prior to employment with FTC, Melrose, Mass.

Attorney position :

1. Present age 54.
2. Total length of service with FTC, 7 years.
3. Home address prior to employment with FTC, Atlanta, Ga.

Attorney position :

1. Present age 48.
2. Total length of service with FTC, 18 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age 57.
2. Total length of service with FTC, 26 years.
3. Home address prior to employment with FTC, Chicago, Ill.

Nonattorney position :

1. Present age 52.
2. Total length of service with FTC, 15 years.
3. Home address prior to employment with FTC, Falls Church, Va.

Attorney position :

1. Present age 61.
2. Total length of service with FTC, 28 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age 50.
2. Total length of service with FTC, 21 years.
3. Home address prior to employment with FTC, Washington, D.C.

Nonattorney position :

1. Present age 59.
2. Total length of service with FTC, 19.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age 55.
2. Total length of service with FTC, 12 years.
3. Home address prior to employment with FTC, Hopkinsville, Ky.

Attorney position :

1. Present age 60.
2. Total length of service with FTC, 27 years.
3. Home address prior to employment with FTC, Washington, D.C.

Nonattorney position :

1. Present age, 58.
2. Total length of service with FTC, 10 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 52.
2. Total length of service with FTC, 13 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 63.
2. Total length of service with FTC, 36½ years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 67.
2. Total length of service with FTC, 19 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Attorney position :

1. Present age, 49.
2. Total length of service with FTC, 21 years.
3. Home address prior to employment with FTC ; Birmingham, Ala.

Nonattorney position :

1. Present age, 37.
2. Total length of service with FTC, 5 years.
3. Home address prior to employment with FTC ; Cambridge, Mass.

Attorney position :

1. Present age, 61.
2. Total length of service with FTC, 25 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Nonattorney position :

1. Present age, 63.
2. Total length of service with FTC, 22 years.
3. Home address prior to employment with FTC ; Cleveland, Ohio.

Attorney position :

1. Present age, 49.
2. Total length of service with FTC, 19 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Attorney position :

1. Present age, 57.
2. Total length of service with FTC, 12 years.
3. Home address prior to employment with FTC ; Atlanta, Ga.

Attorney position :

1. Present age, 48.
2. Total length of service with FTC, 17 years.
3. Home address prior to employment with FTC ; Chicago, Ill.

Attorney position :

1. Present age, 43.
2. Total length of service with FTC, 7 years.
3. Home address prior to employment with FTC ; Fitchburg, Mass.

Attorney position :

1. Present age, 57.
2. Total length of service with FTC, 30 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Nonattorney position :

1. Present age, 52.
2. Total length of service with FTC, 16 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Attorney position :

1. Present age, 48.
2. Total length of service with FTC, 19 years.
3. Home address prior to employment with FTC ; Washington, D.C.

Attorney position :

1. Present age, 47.
2. Total length of service with FTC, 16 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 63.
2. Total length of service with FTC, 22 years.
3. Home address prior to employment with FTC, Baltimore, Md.

Attorney position :

1. Present age, 69.
2. Total length of service with FTC, 21 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 63.
2. Total length of service with FTC, 35 years.
3. Home address prior to employment with FTC, New York, N.Y.

Attorney position :

1. Present age, 37.
2. Total length of service with FTC, 12 years.
3. Home address prior to employment with FTC, Oklahoma City, Okla.

Attorney position :

1. Present age, 57.
2. Total length of service with FTC, 23 years.
3. Home address prior to employment with FTC, Boston, Mass.

Attorney position :

1. Present age, 65.
2. Total length of service with FTC, 19 years.
3. Home address prior to employment with FTC, Arlington, Virginia.

Attorney position :

1. Present age, 50.
2. Total length of service with FTC, 21 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 62.
2. Total length of service with FTC, 12 years.
3. Home address prior to employment with FTC, Decatur, Ga.

Attorney position :

1. Present age, 52.
2. Total length of service with FTC, 18 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 59.
2. Total length of service with FTC, 33 years.
3. Home address prior to employment with FTC, Maynardville, Tenn.

Nonattorney position :

1. Present age, 61.
2. Total length of service with FTC, 21 years.
3. Home address prior to employment with FTC, Washington, D.C.

Nonattorney position :

1. Present age, 44.
2. Total length of service with FTC, 17 years.
3. Home address prior to employment with FTC, Madison, Wis.

Attorney position :

1. Present age, 57.
2. Total length of service with FTC, 22 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 34.
2. Total length of service with FTC, 8 years.
3. Home address prior to employment with FTC, Washington, D.C.

Attorney position :

1. Present age, 47.
2. Total length of service with FTC, 18 years.
3. Home address prior to employment with FTC, Arlington, Va.

Attorney position :

1. Present age, 62.
2. Total length of service with FTC, 26 years.
3. Home address prior to employment with FTC, Mobile, Ala.

Attorney position :

1. Present age, 64.
2. Total length of service with FTC, 25 years.
3. Home address prior to employment with FTC, Fayette, Miss.

Attorney position :

1. Present age, 65.
2. Total length of service with FTC, 28 years.
3. Home address prior to employment with FTC, Jacksonville, Fla.

 ITEM NO. 3 OF MR. SKITOL'S LETTER OF JUNE 24, 1969

Cases on hand January 1, 1968	32
Assignments, 1968	19
Remand	1
Total	52

RÉSUMÉ OF HEARING EXAMINERS' WORK CALENDAR YEAR, 1968

FEDERAL TRADE COMMISSION CASES

Hearing examiner	DP	RT	TF	Totals	Hearings	Prehearing conferences
1.....	2	12		4	4	16
2.....	3	12		5	35	5
3.....		1		1	0	1
4.....	3	11		4	4	5
5.....	4	1		5	22	1
6.....	3	12		5	6	1
7.....	3		1	4	18	3
8.....	1	0		1	1	23
9.....	1	23		4	28	15
10.....	2	12		4	7	3
11.....	2	12		4	10	4
12.....	2	1	1	4	59	1
13.....	4	2	1	7	3	11
Total.....	30	19	3	52	197	89

¹ 1 merger.² 3 mergers.³ 2 mergers.

RÉSUMÉ OF HEARING EXAMINERS' WORK, CALENDAR YEAR 1968

Hearing examiner	Assignment for Commission	Days
4.....	Special assignment for Executive Director.....	69.5
	Special assignment for Executive Director, 10 cases.....	8
8.....	Special assignment for Executive Director.....	14
	Special assignment for Executive Director, 12 cases.....	13

RÉSUMÉ OF HEARING EXAMINERS' WORK, CALENDAR YEAR 1968

Hearing examiner	Assignment for other agencies	Days
2.....	HEW 7 cases.....	24
5.....	Justice, Board of Parole, 1 case.....	11
6.....	NLRB, 2 cases.....	27
9.....	HEW, 6 cases.....	18
10.....	NLRB, 1 case.....	6
11.....	NLRB, 3 cases.....	13
13.....	FHLBB, 1 case.....	4

[Item No. 3 of Mr. Skitol's letter of 6-24-69]

INFORMATION FOR THE ABM COMMISSION TO STUDY FTC

JULY 2, 1969.

JOHN A. DELANEY,
Director, Office of Administration.

My memorandum to the Hearing Examiners and their replies are attached.

There is also attached a summary of the records of this office showing the workload of each examiner—(1) Number of cases for Federal Trade Commission, (2) Number of cases for other agencies, and (3) Special Federal Trade Commission assignments.

The number of Hearing Examiners has been reduced from 22 in 1964 to 12 in 1969. Mr. Tinley was transferred from this Staff on February 28, 1968, so that during 1968, we had 13.2 Hearing Examiners, including the Director, Hearing Examiners. Mr. Kaufman retired afterward on February 28, 1969, reducing our number to 12.

EDWARD CREEL,
Director, Hearing Examiners.

[Item No. 4 of Mr. Skitol's letter of 6-24-69]

HEARING EXAMINER

1. Present age : 56.
2. Total length of service with FTC : 27 years.
3. Home address prior to employment with FTC : Washington, D.C.
4. Employment record prior to appointment as hearing examiner :
 - (a) Practiced law, 1934-36.
 - (b) Secretary to Congressman, 1937-39.
 - (c) Trial attorney, FTC, 1939-59.

1. Present age : 62.
2. Total length of service with FTC : 8 years 8 months.
3. Home address prior to employment with FTC : Scarsdale, N.Y.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 1931-41.
 - (b) Attorney, Dept. of Justice, 1941-60.

1. Present age : 66.
2. Total length of service with FTC : 10 years.
3. Home address prior to employment with FTC : Montville, N.J.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 1933-46.
 - (b) Attorney for several Federal agencies and engaged in private practice, 1946-59.

1. Present age : 49.
2. Total length of service with FTC : 24 years.
3. Home address prior to employment with FTC : Washington, D.C.
4. Employment record prior to appointment as hearing examiner :
 - (a) Trial Attorney, FTC, 1948-62.

1. Present age : 60.
2. Total length of service with FTC : 10 years.
3. Home address prior to employment with FTC : Silver Springs, Md.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 1930-48.
 - (b) Attorney for Federal Government, 1948-55.
 - (c) Private practice, 1955-57.
 - (d) Trial attorney and hearing examiner for Federal Government, 1957-59.

1. Present age : 54.
2. Total length of service with FTC : 8 years.
3. Home address prior to employment with FTC : Bethesda, Md.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 1939-40.
 - (b) Attorney, Departments of Labor, Army, Justice, 1940-61.

1. Present age : 71.
2. Total length of service with FTC : 11 years.
3. Home address prior to employment with FTC : Arlington, Va.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 1922-39.
 - (b) Attorney general (State), 1939-49.
 - (c) Private practice, 1949-58.

1. Present age : 58.
2. Total length of service with FTC : 17 years.
3. Home address prior to employment with FTC : Washington, D.C.
4. Employment record prior to appointment as hearing examiner :
 - (a) Private practice, 9 years.
 - (b) Attorney, Department of Labor, 4 years.
 - (c) Hearing examiner, 4 years (Federal Government).

1. Present age : 59 years.
 2. Total length of service with FTC : 9 years.
 3. Home address prior to employment with FTC : Chevy Chase, Md.
 4. Employment record prior to appointment as hearing examiner :
(a) Hearing examiner, CAB, 1948-60.
-
1. Present age : 54.
 2. Total length of service with FTC : 23 years.
 3. Home address prior to employment with FTC : Winston-Salem, N.C.
 4. Employment record prior to appointment as hearing examiner :
(a) Reporter-editor, various news media, 1937-46.
-
1. Present age : 66.
 2. Total length of service with FTC : 12 years.
 3. Home address prior to employment with FTC : Washington, D.C.
 4. Employment record prior to appointment as hearing examiner :
(a) Hearing examiner, FCC and CAB, 1946-56.
-
1. Present age : 64.
 2. Total length of service with FTC : 31 years.
 3. Home address prior to employment with FTC : Dubuque, Iowa.
 4. Employment record prior to appointment as hearing examiner :
(a) Trial attorney, FTC, 1938-62.

LETTER TO ROBERT SKITOL FROM JOHN A. DELANEY, DATED JULY 14, 1969 [sic], RESPONDING TO REQUEST LETTER FROM ROBERT PITOFSKY DATED JULY 15, 1969, TRANSMITTING SELECTED CASEWORK STATISTICS FOR FISCAL YEARS 1966, 1967, 1968 (3 SEPARATE TABLES).

FEDERAL TRADE COMMISSION,
Washington, D.C. July 14, 1969.

ROBERT SKITOL,
*Law Review Office,
New York University Law School,
New York, N.Y.*

DEAR MR. SKITOL: In response to your telephone request this morning, I am enclosing a copy of the Selected Casework Statistics for FY 1968. This will supplement the only other two charts on selected casework statistics that have been prepared by the Commission, namely FY 1966 and 1967, of which you have advised me that you have copies.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., July 15, 1969.

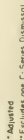
JOHN DELANEY, Esq.
*Federal Trade Commission,
Washington, D.C.*

DEAR MR. DELANEY: Confirming your conversation with Robert Skitol on July 14, I would like to request that you send a copy of "Selected Casework Statistics for FY 1968" to complete our file on this item.

Very truly yours,

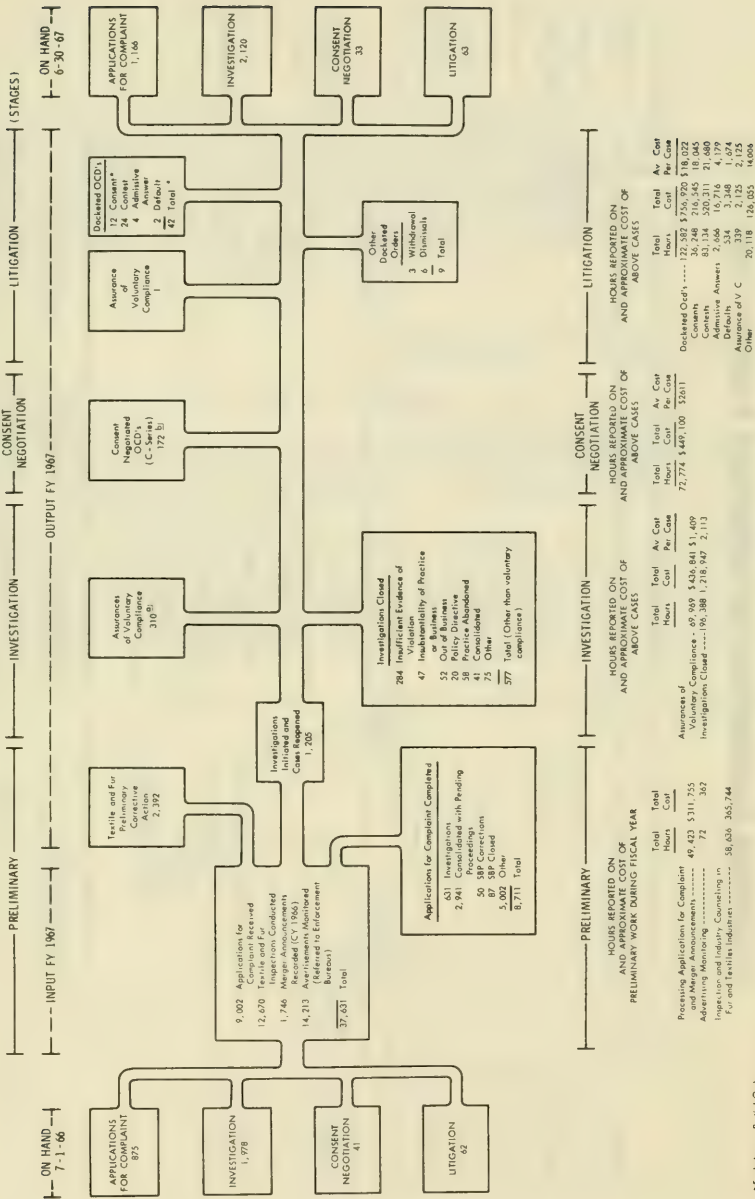
ROBERT PITOFSKY.

SELECTED CASEWORK STATISTICS FOR FY 1966



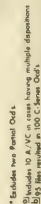
SELECTED CASEWORK STATISTICS FOR FY 1967

617



*Excludes one Partial Qud
 b) 775 files resulted in 12 C-Series Qud's
 c) 775 files resulted in 12 C-Series Qud's

SELECTED CASEWORK STATISTICS FOR FY 1968



LETTER TO ROBERT SKITOL FROM JOHN A. DELANEY, DATED AUGUST 6, 1969, ATTACHING TABLES SHOWING: COMPLAINTS AND ORDERS, FISCAL YEARS 1962, 1963, AND 1964; ASSURANCES OF VOLUNTARY COMPLIANCE FOR THE YEARS 1961 THROUGH 1969; MEDIAN ELAPSED TIME FOR FORMAL CASES FOR FISCAL YEARS 1962 THROUGH 1966

FEDERAL TRADE COMMISSION,
Washington, D.C., August 6, 1969.

ROBERT SKITOL,
*Law Review Office, New York University Law School,
New York, N.Y.*

DEAR MR. SKITOL: Enclosed are tables for fiscal years 1962, 1963 and 1964, applicable to item number 1 of Mr. Pitofsky's letter of June 9, 1969. This leaves fiscal years 1960 and 1961 yet to be completed. It is estimated now that these tables will be completed in about a week.

Tables pertaining to Assurances of Voluntary Compliance for the years 1961 through 1969 for the four bureaus are also enclosed. This pertains to item number 2 of Mr. Pitofsky's letter and was a special request also from you to Mr. Day.

In addition to the above, tables are enclosed which show the median elapsed time in days for formal cases for fiscal years 1962 through 1966. These are in response to item number 12 of Mr. Pitofsky's letter and complete this item.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

(619)

ITEM NO. 1

FEDERAL TRADE COMMISSION, WASHINGTON, D.C.
COMPLAINTS AND ORDERS, 1 FISCAL YEAR 1962

Complaints pending, July 1, 1961	Complaints docketed for litigation	Reopened	Complaints and complaints OGD's (C series)	Docketed orders to cease and desist			Complaints pending, June 30, 1962
				Consent	Contest	Admssive answers	Dismissed
FTC Act, sec. 5 (DP)	124	29	1	49	57	17	8
FTC Act, sec. 5, Insurance	3	---	---	---	---	1	2
FTC Act, sec. 5 (DP) and 12	43	3	---	10	16	6	4
FTC Act, sec. 5 (DP) and 12 and Textile	---	1	---	---	---	---	---
FTC Act, sec. 5 (DP) and 12 and Clayton 3	---	---	---	---	1	1	---
FTC Act, sec. 5 (DP) and 2a, d, e	1	1	---	---	---	---	---
FTC Act, sec. 5 (RT) and (DP)	2	---	---	---	---	---	---
FTC Act, sec. 5 (DP) and Clayton 2d	1	---	---	---	---	---	---
FTC Act, sec. 5 (RT)	43	3	---	3	2	1	11
FTC Act, sec. 5 (RT) and Clayton 3	---	---	---	---	---	---	---
FTC Act, sec. 5 (RT) and Clayton 3	15	---	---	---	1	1	---
Sec. 7	9	---	---	---	---	---	---
Sec. 2a	---	---	---	---	---	---	---
Sec. 2f	1	---	---	---	---	---	---
Sec. 2d	---	---	---	---	---	---	---
FTC Act, sec. 5 (RT) and Clayton, sec. 2a and 3	15	1	1	---	5	1	---
Clayton Act, sec. 7	---	---	---	---	---	---	---
Clayton Act:	---	---	---	---	---	---	---
Sec. 2a	41	1	---	1	2	5	1
Sec. 2c	30	1	---	12	23	3	---
Sec. 2d	56	21	---	4	11	6	3
Sec. 2e	2	---	---	---	2	---	---
Sec. 2f	4	---	---	---	---	1	---
Sec. 2g	11	---	---	---	2	---	---
Sec. 2a, d	2	---	---	---	---	---	---
Sec. 2a, d, e	1	1	---	---	---	---	---
Sec. 2a, e	1	---	---	---	---	---	---
Sec. 2c, d	1	---	---	---	---	---	---
Sec. 2a, f	1	---	---	---	---	---	---
FTC Act, sec. 5 (OP) and—	---	---	---	---	---	---	---
Wool	16	3	---	8	12	4	---
Fur	37	7	---	47	33	2	---
Flammable fabrics	1	3	---	10	---	4	1
Textile	9	1	---	9	4	1	---
Wool and textile	1	1	---	---	1	2	---
Flammable fabrics and textile	---	---	---	---	---	---	---
Wool, Fur, and textile	---	---	---	---	---	---	---
Wool and fur	---	---	---	---	---	---	---

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OCD—Order to cease and desist.

COMPLAINTS AND ORDERS,¹ FISCAL YEAR 1963

	Complaints pending July 1, 1962	Complaints docketed for litigation	Reopened	Complaints and consents OGD's ² (C series)	Docketed orders to cease and desist			Complaints pending June 30, 1963
					Consent	Admssive answers	Default	
FTC Act, sec. 5(OP).....	69	35	3	73	1	18	6	74
FTC Act, sec. 5, Insurance.....	3							
FTC Act, sec. 5(OP) and 12.....	18	8	1	11	1	7	1	17
FTC Act, sec. 5(OP) and 12 and Textile Act.....	2							1
FTC Act, sec. 5(RT) and (OP).....	30	8		1		5		2
FTC Act, sec. 5(RT).....								31
FTC Act, sec. 5(RT) and Clayton Act, sec. 7.....	13							
Sec. 7.....	9	1			2	1		1
Sec. 2a.....	1				1			1
Sec. 2f.....	1							1
Sec. 2d.....	10	1		1		1		1
Clayton Act, sec. 7.....								9
Clayton Act.....	34	4		3	1	3		33
Sec. 2a.....	5	1		12	1	2		1
Sec. 2c.....	57	2	1	194	9	21		30
Sec. 2d.....	3							3
Sec. 2a, d.....	9							1
Sec. 2a, d, e.....	3							3
Clayton Act.....	1							1
Sec. 2a, e.....	1							1
Sec. 2c, d.....								
Sec. 2d, e.....				2		2		
FTC Act, Sec. 5(OP) and—								
Wool.....	3	1		5		1		2
Fur.....	4	1		42		2		2
Flammable Fabrics.....	3	2		6		1		4
Textile.....	2	2		8		3		1
Wool, Fur, and Textile.....								
Wool, Textile.....				3				
Wool, Fur.....				1				
Fur, Textile.....				1				
Flammable Fabrics and Textiles.....				1				

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting, excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OGD—Order to cease and desist.

COMPLAINTS AND ORDERS,¹ FISCAL YEAR 1964

Complaints pending, July 1, 1963	Complaints docketed for litigation	Complaints and consents OGD's ² (C series)	Docketed orders to cease and desist				Dismissed	Rescinded	Complaints pending, June 30, 1964
			Reopened	Consent	Contest	Admissive answers	Default		
74	28	81		1	47	3	5	10	1
FTC Act, sec. 5(OP)		1							35
FTC Act, sec. 5(Insurance)		14		1	4			4	12
FTC Act, secs. 5(OP) and 12	4								
FTC Act, secs. 5(OP) and 12 and Textile Act									
FTC Act, sec. 5(RT) and (OP)	2	1		7	11			1	13
FTC Act, sec. 5(RT)	31	4						3	1
FTC Act, sec. 5(RT) and Clayton Act, sec. 7				1				2	6
FTC Act, sec. 5(RT) and Clayton, sec. 2a	9			1					8
FTC Act, sec. 5(RT) and Clayton, sec. 2f	1				1				
FTC Act, sec. 5(RT) and Clayton, sec. 2f	1							1	9
FTC Act, sec. 5(RT) and Clayton, sec. 2d	4	2			3				
Clayton Act, sec. 7									
Clayton Act:									
Sec. 2a	33			11	7	1		6	9
Sec. 2c	1								1
Sec. 2d	30	70		1	2			1	34
Sec. 2f	3								2
Sec. 2g	8			1	1			1	5
Sec. 2a,d	3	3		1	1				1
Sec. 2a,d,e	1							1	
Sec. 2a,e									
Sec. 2c,d	1								
Sec. 2d,e		1			1				
FTC Act, sec. 5(OP) and—									
Wool	2	10			1	2			1
Fur	2	51			2				
Flammable fabrics	4	7			1			3	
Textile	1	7							1
Wool, fur, and textile		3							
Wool and textile		2							
Wool and fur		1							
Flammable fabrics and textile		2							

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OGD—Order to cease and desist.

ITEM NO. 2.—ASSURANCES OF VOLUNTARY COMPLIANCE AND ASSURANCES OF DISCONTINUANCE ACCEPTED BY THE COMMISSION RESULTING FROM 7-DIGIT MATTERS

Fiscal year.....	Assurances of discontinuance									
	Assurances of voluntary compliance					By type—not by Bureau				
	1969	1968	1967	1966	1965	1964	1963	1962	1961	
BUREAU OF DECEPTIVE PRACTICES										
Division:										
Food and Drug.....	20	33	36	27	42	76				
General Practices.....	146	107	112	173	271	92				
General Advertising.....						135				
Special Projects.....	15	5								
Bureau total.....	181	145	148	200	313	303	224	255	207	
BUREAU OF RESTRAINT OF TRADE										
Division:										
Compliance.....		1								
Discriminatory Practices.....	14	17	50	39	23	8				
General Trade Restraints.....	30	13	11	7	12	7				
Mergers.....	1	2	1	2	1	1				
Bureau total.....		33	62	48	36	16	3	7	1	
BUREAU OF TEXTILES AND FURS										
Division: Enforcement, total.....	49	40	101	101	144	97	12	9	8	
BUREAU OF INDUSTRY GUIDANCE										
Division:										
TPC Rules.....	118	159	133	39						
Guides.....	108	123	107	72						
Trade Regulation Rules.....	10	7	8							
Bureau total.....	226	289	248	73						
Total accepted.....	511	507	559	422	493	416	239	271	216	

ITEM NO. 3

MEDIAN CASE TIME, ELAPSED TIME IN DAYS, COMPLAINT ISSUANCE TO ORDER ISSUANCE ¹

	Docketed orders issued	Median case	Shortest case	Longest case
FISCAL YEAR 1962				
Deceptive practices:				
FTC Act.....	113	269	84	1,655
FTC, Wool, Fur, Flammable Fabric and Textile Acts.....	66	138	83	1,255
Clayton 2.....	62	353	92	1,468
Clayton 7.....	7	420	181	1,626
FTC 5.....	15	2,978	295	2,978
FTC 5 and Clayton 7.....	2		726	2,263
FTC 5 and Clayton 3.....	1		902	
FTC 5 and Clayton 2 and 3.....	1		1,325	
FTC 5 and DP 5.....	1		278	
Clayton 2 and DP 5.....	1		179	
Clayton 3 and DP 5.....	1		438	
FISCAL YEAR 1963				
Deceptive practices:				
FTC Act.....	46	642	105	2799
FTC, Wool Fur, Flammable Fabric and Textile Acts..	9	297	194	557
Restraint of trade:				
Clayton 2.....	41	711	101	1718
Clayton 7.....	2		1181	1894
FTC 5 and Clayton 7.....	4	1000	765	3090
FTC 5 and Clayton 2.....	1		1241	
FTC 5.....	7	1207	494	2614
FISCAL YEAR 1964				
Deceptive practices:				
FTC Act.....	75	554	106	1,893
FTC, Wool, Fur, Flammable Fabric and Textile Acts..	10	413	119	932
Restraint of trade:				
Clayton 2.....	38	1,542	1	2,255
Clayton 7.....	4	1,354	856	2,755
FTC 5 and Clayton 7.....	3	1,918	1,918	2,729
FTC 5.....	22	1,346	1	2,174
FTC 5 and Clayton 2.....	3	992	630	1,494
FTC 5 and FTC (DP) 5.....	1		1,456	
FISCAL YEAR 1965				
Deceptive practices:				
FTC Act.....	36	442	103	1767
FTC, Wool, Fur, Flammable Fabric and Textile Acts..	2		361	447
Restraint of trade:				
Clayton 2.....	² 40	764	0	2531
Clayton 7.....	5	1477	544	1869
FTC 5.....	8	868	103	1941
FTC 5 and Clayton 2.....	5	1744	493	2972
FTC 5 and Clayton 7.....	2		1788	3161
FISCAL YEAR 1966				
Deceptive practices:				
FTC Act.....	18	368	1	189
FTC, Wool, Fur, Flammable Fabric and Textile Acts..	2		174	380
Restraint of trade:				
Clayton 2.....	8	1401	117	3240
Clayton 7.....	3	311	81	881
FTC 5.....	6	358	80	4741
FTC 5 and Clayton 2.....	3	2004	1863	2005
FTC 5 and Clayton 7.....	2		2498	3831

¹ D 8616 rescinded.² D 7881 entire record sealed, Jan. 5, 1965.

LETTER TO ROBERT SKITOL FROM JOHN A. DELANEY, DATED AUGUST 13, 1969, TRANSMITTING TABLES SHOWING COMPLAINTS AND ORDERS FOR FISCAL YEARS 1960 AND 1961 AND A CORRECTED COPY OF THE SAME INFORMATION FOR 1962

FEDERAL TRADE COMMISSION,
Washington, D.C., August 13, 1969.

ROBERT SKITOL,
*Law Review Office, New York University Law School,
New York, N.Y.*

DEAR MR. SKITOL: Enclosed are listings of complaints and orders for fiscal years 1960 and 1961 and a corrected copy of the same information for the year 1962. With this submission to you we have completed and mailed all of the information requested in Mr. Pitofsky's letter of June 9, 1969.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

(625)

COMPLAINTS AND ORDERS, FISCAL YEAR 1960¹

	Complaints pending, July 1, 1959	Complaints docketed for litigation	Docketed orders to cease and desist				Dismissed	Complaints pending, June 30, 1960
			Reopened	Consent	Contest	Default		
FTC Act, sec. 5 (DP)	94	230	---	138	21	1	10	154
FTC Act, sec. 5 (OP) insurance	4	---	---	---	---	---	---	3
FTC Act, sec. 5 (OP) and 12	21	27	---	15	4	---	1	28
FTC Act, sec. 5 (OP) and (RT) and Clayton 3	1	---	---	---	---	---	---	1
FTC Act, sec. 5 (OP) and 12 and Clayton 3	1	---	---	---	---	---	---	1
FTC Act, sec. 5 (OP) and Clayton 2a, d, e	---	---	---	---	---	---	---	---
FTC Act, sec. 5 (OP) and (RT)	---	2	---	1	---	---	---	1
FTC Act, sec. 5 (OP) and Clayton 2d	1	---	---	1	---	---	---	---
FTC Act, sec. 5 (RT)	31	13	---	3	2	---	2	37
FTC Act, sec. 5 (RT) and Clayton 3	1	4	---	---	---	---	---	---
FTC Act, sec. 5 (RT) and Clayton 7	11	4	---	---	---	---	---	15
FTC Act, sec. 5 (RT) and Clayton 2a	3	5	---	---	---	---	---	8
FTC Act, sec. 5 (RT) and Clayton 21	1	---	---	---	---	---	---	1
FTC Act, sec. 5 (RT) and Clayton 2a and 3	1	---	---	---	---	---	---	1
Clayton Act, sec. 7	11	7	---	2	3	---	---	13
Clayton Act, sec. 8	1	---	---	---	---	---	1	---
Clayton Act, sec. 3	1	---	---	---	---	---	---	---
Clayton Act, sec. 2a	19	31	---	5	---	---	---	1
Clayton Act, sec. 2c	10	44	---	5	---	---	1	45
Clayton Act, sec. 2d	21	33	1	27	2	---	---	48
Clayton Act, sec. 2e	---	1	---	---	---	---	---	26
Clayton Act, sec. 2f	3	4	---	1	---	---	---	1
Clayton Act, sec. 2g	5	8	---	2	---	---	---	6
Clayton Act, sec. 2h	---	2	---	---	---	---	---	11
Clayton Act, sec. 2i	1	1	---	---	---	---	---	2
Clayton Act, sec. 2j	1	1	---	---	---	---	---	1
Clayton Act, sec. 2k	1	1	---	---	---	---	---	1
Clayton Act, sec. 2l	2	1	---	1	---	---	---	1
Clayton Act, sec. 2m	---	---	---	---	---	---	---	---
Clayton Act, sec. 2n	1	1	---	---	---	---	---	1
Clayton Act, sec. 2o	---	---	---	---	---	---	---	---
Clayton Act, sec. 2p	1	---	---	1	---	---	---	1
Clayton Act, sec. 2q and 3	---	---	---	---	---	---	---	---
FTC Act, sec. 5 (DP) and:	1	---	---	1	---	---	(2)	---
Wool Act	---	---	---	---	---	---	---	---
Fur Act	21	34	---	30	9	---	---	16
Flammable Fabrics Act	38	54	---	52	17	---	1	22
Wool and Fur	2	---	---	---	1	---	---	1
Wool and Fur	1	1	---	---	---	---	---	1

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.² Sec. 3 dismissed.

COMPLAINTS AND ORDERS, FISCAL YEAR 1961¹

	Complaints pending, July 1, 1959	Complaints docketed for litigation	Docketed orders to cease and desist				Dismissed	Complaints pending, June 30, 1960
			Reopened	Consent	Contest	Default		
FTC Act, sec. 5(DP)	154	136		122	26	5	12	125
FTC Act, sec. 5(OP) insurance	3							33
FTC Act, sec. 5(OP) and 12	28	38		20	2		1	43
FTC Act, sec. 5(OP) and (RT) and Clayton 3	1				1			
FTC Act, sec. 5(OP) and 12 and Clayton 3								
FTC Act, sec. 5(OP) and Clayton 2a,d,e	1	1						1
FTC Act, sec. 5(OP) and (RT)	1	1						1
FTC Act, sec. 5(OP) and Clayton 2d		12		2				2
FTC Act, sec. 5(RT) and Clayton 3	37	2		1	5			42
FTC Act, sec. 5(RT) and Clayton 7	15	1						1
FTC Act, sec. 5(RT) and Clayton 2a	8	1		1	1		(2)	15
FTC Act, 5 sec. (RT) and Clayton 2f	1							8
FTC Act, 5 sec. (RT) and Clayton 2d	1	1		1			(2)	1
FTC Act, sec. 5(RT) and Clayton 2a and 3	1							1
Clayton Act, sec. 7	13	4			1		1	15
Clayton Act, sec. 8		1						
Clayton Act, sec. 3	1				1		1	
Clayton Act, sec. 2a	45	8		9	1		1	42
Clayton Act, sec. c	48	39		54	3			30
Clayton Act, sec. d	26	44	1	13			2	56
Clayton Act, sec. e	1	2						2
Clayton Act, sec. f	6	1		3	1			4
Clayton Act, sec. g	11	1		1				11
Clayton Act, sec. ad	2	1		1				2
Clayton Act, sec. ae	2			1				1
Clayton Act, sec. ad	1							1
Clayton Act, sec. af	1							1
Clayton Act, sec. de	1			1	1			
Clayton Act, sec. ac	1							
FTC Act, sec. 5(DP) and:				1				
Wool Act								
Fur Act	16	29		24				16
Flammable Fabrics Act	22	72		55	5		1	37
Textiles Act	1	2		1	1			1
Wool and Textile		10		1				9
Wool and Fur	1	1		2				1

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² Sec. 5 (RT) dismissed.

COMPLAINTS AND ORDERS, FISCAL YEAR 1962¹

	Complaints pending, July 1, 1961	Complaints docketed for litigation	Complaints and consents OGD's (C series) ²	Docketed orders to cease and desist				Complaints pending, June 30, 1962
				Reopened	Consent	Contest	Admssive answers	
FTC Act, sec. 5(DP)	125	29	1	49	58	17	1	8
FTC Act, sec. 5 insurance	3							69
FTC Act, sec. 5(DP) and 12	43	3		10	16	6	4	3
FTC Act, sec. 5(DP) and 12 and textile		1						18
FTC Act, sec. 5(DP) and 12 and Clayton 3								1
FTC Act, sec. 5(DP) and 2a, d, e	1	1			1	1		
FTC Act, sec. 5(RT) and (DP)	2							2
FTC Act, sec. 5(RT) and Clayton 2d	1							
FTC Act, sec. 5(RT)	42	3		3	2	2	1	30
FTC Act, sec. 5(RT) and Clayton 3	1							11
FTC, sec. 5(RT) and Clayton, sec. 7	15				1	1		13
FTC, sec. 5(RT) and Clayton, sec. 2a	8							39
FTC, sec. 5(RT) and Clayton, sec. 21	1							1
FTC, sec. 5(RT) and Clayton, sec. 2d	1	1						1
FTC, sec. 5(RT) and Clayton, sec. 2a and 3								
Clayton Act, sec. 7	15	1	1		5	1		10
Clayton Act, sec. 2a	42	1			2	5		34
Clayton Act, sec. c	30	1		12	23	3		5
Clayton Act, sec. d	56	21		4	11	6		57
Clayton Act, sec. e	2				2			
Clayton Act, sec. f	4					1		3
Clayton Act, sec. a, d	11				2			9
Clayton Act, sec. a, d, e	2		1					3
Clayton Act, sec. a, e	1							1
Clayton Act, sec. c, d	1							1
Clayton Act, sec. a, f	1							1
FTC Act, sec. 5(OP) and:								
Wool	16	3		8	12	4		3
Fur	37	7		47	33	2	4	4
Flammable fabrics	1	3		10	1			3
Textile	9	1		9	4	1	2	2
Wool and textile					1			
Flammable fabrics and textile				1				
Wool, fur, and textile				1				
Wool and fur				1				

¹ Excludes orders partially disposing of cases, excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.² Order to cease and desist.³ RT charge added to a Clayton 2a case.

LETTER TO ROBERT SKITOL FROM JOHN A. DELANEY, DATED JULY 2,
1969, TRANSMITTING ENCLOSURES RECITED THEREIN

FEDERAL TRADE COMMISSION,
Washington, D.C., July 2, 1969.

ROBERT SKITOL,
NYU Law Review Office,
New York University Law School,
New York, N.Y.

DEAR MR. SKITOL: The enclosed material is furnished in response to paragraphs 7, 8 and 9 of Mr. Pitofsky's letter of June 9, 1969. The enclosures consist of:

1. Information concerning law school seniors to whom appointment offers were made in our 1967, 1968 and 1969 recruitment programs. The information consists of:

Application number.—A number assigned to the application to facilitate alphabetical punched card sorting. Occasionally more than one application may be inadvertently assigned the same number—this has no effect on the consideration given the application.

Action begun.—This is the date the Division of Personnel began processing the appointment offer.

Bureau.—Bureau or office to which the applicant was to be assigned. The abbreviations have the following meanings:

GC—Office of the General Counsel

DP—Bureau of Deceptive Practices

FO—Bureau of Field Operations (The field office is also indicated in abbreviated form)

IG—Bureau of Industry Guidance

RT—Bureau of Restraint of Trade

T&F—Bureau of Textiles and Furs

Offer date.—The date the offer was signed.

Grade offered.—GS grade level of the offer. By action of the U.S. Civil Service Commission, the entrance-level hiring pattern for attorney positions, throughout the Federal service was revised in September 1968. Under the revised pattern, those graduating in the upper third of their law school class are eligible for appointment in grade GS-11. Also eligible for this grade are those whose law school records reflect other significant accomplishments, such as law review membership, involvement in legal aid, winning a moot court competition, etc. Previously the top entrance grade at the LL.B or J.D. level was GS-9, based upon graduation in the upper half of the class or other significant accomplishments.

Honors.—This column on the tabulations is coded to give a rough indication of the applicant's class standing and his participation in the kinds of activities that would serve to qualify him for GS-11 under the new hiring standards or GS-9 under the previous standards. A footnote is appended to each listing to explain the coding system. It should be noted that the system was changed in each of the three years here reported on. The 1967 listing simply indicated whether the applicant was qualified for grade GS-9 on the basis of class standing or other factors. The 1968 listing, in addition to reflecting "activities," shows whether the applicant was in the top 10%, top *quarter* or top half of his class. The 1969 listing shows top *third* rather than top quarter.

LSAT.—Law school aptitude test score, when known. The FTC application blank provides a space for this score, but does not include a positive requirement that the score be recorded.

Offer status.—This column shows whether the applicant accepted, declined, or failed to reply to the offer. Also shown are cases where the applicant with-

drew his application after he had been selected for appointment but before an offer was made.

EOD date.—Date the applicant entered on duty as an employee of FTC.

Year graduated.—Year of graduation.

Law school.—Law school from which graduated.

Home State.—Home or legal residence claimed by the applicant.

2. Information concerning 1967, 1968 and 1969 graduates who applied for and were considered for employment but to whom no offers were made. The data reflect the status of applications as of June 30, 1967 in the case of 1967 graduates; June 30, 1968 for 1968 graduates; and June 16, 1969 for this year's graduates. The column headings used in these tabulations have the same meanings as those explained above. The 1969 listing shows both the numerical code used for each law school in our ADP system and the interpretation of this code.

3. As requested, there is enclosed a copy of the FTC interview rating form used by interviewers to record their evaluation of an applicant.

It is important to recognize that the data recorded on the enclosed listings are fragmentary in nature—much too meager to provide a valid basis for comparing one applicant with another. Hiring decisions are not based on ADP print-outs, but rather on an in-depth appraisal of each applicant's overall qualifications, as evidenced by his application papers and interview evaluations.

Factors which are taken into consideration include (not necessarily in the order of their importance) :

- (a) Law school grades and class standing.
- (b) The nature and extent of participation in law school activities, e.g., law review, moot court competition, legal aid, legal research fellowships, etc.
- (c) Awards received for academic or extracurricular achievements.
- (d) Positions of leadership held on campus, both in law school and as an undergraduate.
- (e) Academic degrees received beyond the normal A.B.—LL.B. level, e.g., M.B.A. or LL.M.
- (f) Law school courses taken, and grades received, in fields related to the Commission's work, e.g., Administrative Law, Trade Regulation Law, Antitrust Law, Consumer Protection Law, etc.
- (g) Undergraduate studies related to the Commission's work, e.g., Economics, Accounting, Business Administration, Marketing and Advertising, etc.
- (h) Undergraduate grades, class standing and honors.
- (i) Pertinent extracurricular activities as an undergraduate, such as membership on a debate team.
- (j) Summer clerkships, their significance, and their relevance to the Commission's work.
- (k) The nature of other employment, and the degree to which it might have a bearing on the abilities required for service as an FTC lawyer—e.g., investigative experience, marketing experience, experience as a writer, etc.
- (l) The extent to which the applicant was self-supporting in law school.
- (m) Law school aptitude test (LSAT) scores.
- (n) Reputation of law school attended.
- (o) The applicant's appearance, bearing, manner, self-confidence, drive, vitality, maturity, and social relatedness, as evidenced in the interview situation.
- (p) His ability in oral expression.
- (q) His sense of values, mental alertness, willingness to defend ideas, and other related personal qualities.
- (r) His motivation toward working in the Federal Trade Commission, as evidenced by his career goals, courses taken, law review articles written, etc.

In each case, consideration is also given to the applicant's expressed interest in and availability for particular kinds of attorney positions or particular geographic locations. Allowance is made for variations among positions in terms of qualifications required. For example, the applicant who is reluctant to spend a substantial amount of his time in travel would be a poor risk for employment in a Commission field office.

Many of the apparent anomalies in the attached listings may be attributed to one or more of the foregoing factors. Candidates who ranked high in their graduating classes may have lacked the personal characteristics needed to make a highly favorable impression in interviews; other high ranking candidates may have been willing to accept appointments only in locations where no appointments were made; etc. It should also be pointed out that many of the better qualified candidates on the lists of "applicants who did not receive offers" were

passed over because of their failure to respond to invitations to appear for interview. Since interview dates or time limits are not ordinarily specified in such invitations, failure to report for interview is not in itself used as a basis for inactivation of the application; however, the applicant is no normally given further consideration until he has been interviewed.

For the foregoing reasons, the attached tabulations may fall short of giving a true picture of the qualifications or the availability of candidates. An attempt to judge the effectiveness of the law school recruitment program would be of questionable validity if it were based solely on a comparison of the attached tabulations of "graduates to whom offers were made" as against "graduates to whom no offers were made."

If you have any questions about these tabulations, please do not hesitate to let me know.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

1967 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1967

Applicant No.	Home State	Honors	Law school	LSAT
135	New York	(1)	George Washington	590
170	California	(1)	California University, Los Angeles	630
990	Texas	(1)	Texas	
1105	New York	(1)	St. John's University	511
1390	do	(1)	Brooklyn	
1516	do	(1)	St. John's University	547
1634	do	(1)	New York	600
2440	Indiana	(1)	Indiana	700
2723	Illinois		Notre Dame	583
2770	Maryland	(1)	Maryland University	529
3522	Pennsylvania	(1)	Temple University	500
3670	Texas		Texas	
3760	California	(1)	California University, Hastings	497
4600	Texas		Texas	
6168	New York	(1)	Rutgers	
6360	New Jersey	(1)	Seton Hall University	529
7965	Massachusetts	(1)	Suffolk University	
8334	California	(1)	California University, Los Angeles	651
9210	Pennsylvania	(1)	Pittsburgh	483
9410	Missouri	(1)	Oklahoma University	479
9580	Iowa	(1)	Creighton	475
10243	California	(1)	California University, Los Angeles	549
10398	New York	(1)	St. John's University	
11174	do	(1)	George Washington	
11810	do	(1)	New York University	737
12133	Montana		Idaho	
12948	Massachusetts	(1)	Suffolk University	
13043	Georgia		Georgia	505
13669	New York	(1)	George Washington	565
13875	Texas	(1)	Houston University	
13883	Pennsylvania	(1)	Duquesne	
13895	New York	(1)	Santa Clara	572
14100	Missouri	(1)	Washington University, St. Louis	590
14503	Pennsylvania	(1)	North Carolina University	627
14605	New York		George Washington	
14750	Maryland	(1)	Maryland University	726
16153	Missouri		Washington University, St. Louis	583
16608	California		California, Los Angeles	593
16910	West Virginia		West Virginia University	487
18075	Minnesota	(1)	Minnesota	523
18089	Louisiana		Loyola, New Orleans	
18278	District of Columbia		Pennsylvania	600
19521	Virginia	(1)	Virginia	617
19828	do		do	543
20422	New York	(1)	Brooklyn	590
21010	Illinois	(1)	Chicago University	
21470	Montana		Montana State University	
21995	California		California University, Los Angeles	
21997	New Jersey	(1)	Harvard	650
22018	Alabama		Cumberland	
22200	New York	(1)	Fordham University	
22560	Illinois	(1)	De Paul	
23380	California	(1)	San Francisco University	576
23394	New Jersey	(1)	Rutgers	
23645	Indiana	(1)	Indiana	585
24055	Kentucky	(1)	Kentucky	
24843	New York	(1)	Brooklyn	514
24920	Montana		Montana State University	528
25035	California		California University, Los Angeles	649
25	New York		Minnesota	
40	Maryland		Maryland	

See footnote at end of table, p. 635.

1967 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1967—Continued

Applicant No.	Home State	Honors	Law school	LSAT
60	Texas	(1)	Texas	501
345	Utah	(1)	Utah	512
365	New York	(1)	St. John's	594
663	do	(1)	do	585
860	do	(1)	Brooklyn	567
1010	Pennsylvania	(1)	Pittsburgh	480
1038	do	(1)	do	606
1072	California	(1)	San Francisco	555
1120	Maryland	(1)	George Washington	
1130	New York	(1)	St. John's University	667
1140	do	(1)	New York University	535
1315	Connecticut	(1)	Catholic	457
1630	New Jersey	(1)	Iowa	
1635	Illinois	(1)	Illinois	553
1838	Oklahoma	(1)	Oklahoma	593
1875	Maryland	(1)	American University	
2205	North Dakota	(1)	North Dakota	610
2390	Massachusetts	(1)	Portiz	482
2575	Illinois	(1)	Loyola, Chicago	500
2725	New York	(1)	Fordham University	494
2760	Michigan	(1)	Detroit	545
2765	California	(1)	California, Hastings	
2790	do	(1)	California, Los Angeles	549
3074	do	(1)	California, Berkeley	
3375	New York	(1)	Cornell	
3386	do	(1)	St. John's	571
3388	Connecticut	(1)	Catholic	582
3505	Pennsylvania	(1)	Pittsburgh	527
3535	Massachusetts	(1)	Suffolk	
3685	New York	(1)	Brooklyn	562
3775	Wisconsin	(1)	Marquette	481
4000	New York	(1)	St. John's	
4065	do	(1)	California, Berkeley	
4128	Pennsylvania	(1)	Pittsburgh	509
4153	New York	(1)	Cornell	667
4235	Massachusetts	(1)	Washington & Lee University	535
4290	Minnesota	(1)	Mercer	449
4295	Maryland	(1)	Maryland University	595
4700	Michigan	(1)	Wayne	
4955	New York	(1)	De Paul	550
5220	Connecticut	(1)	Catholic	547
5419	New York	(1)	St. John's	
5485	Kentucky	(1)	Kentucky	647
5515	New York	(1)	Pennsylvania	682
6135	do	(1)	Cincinnati	325
6492	Virginia	(1)	Georgetown	584
6690	Illinois	(1)	Loyola, Chicago	510
6780	Virginia	(1)	Georgetown	589
6840	Michigan	(1)	Michigan	604
6930	New York	(1)	New York University	597
6932	Oregon	(1)	Oregon	565
7325	Virginia	(1)	William & Mary	
7455	New Jersey	(1)	California, Hastings	601
7955	Illinois	(1)	De Paul	
8075	New York	(1)	St. John's	589
8132	Missouri	(1)	St. Louis	
8493	Illinois	(1)	Chicago	707
8654	Pennsylvania	(1)	Duquesne	
8658	Massachusetts	(1)	Boston University	612
8660	Virginia	(1)	George Washington	
8664	New York	(1)	Georgetown	630
9265	Virginia	(1)	Virginia	600
9825	Ohio	(1)	Northwestern	618
9830	California	(1)	Stanford	
10112	Massachusetts	(1)	Boston College	
10245	New York	(1)	Brooklyn	595
10394	do	(1)	St. John's	610
10515	do	(1)	Brooklyn	
10545	Ohio	(1)	Chicago	621
10550	do	(1)	Detroit	511
10655	do	(1)	Ohio	511
10798	New Mexico	(1)	Loyola, Los Angeles	670
10800	Ohio	(1)	Ohio Northern	589
10852	California	(1)	California, Hastings	
11035	Ohio	(1)	Ohio	494
11175	Virginia	(1)	George Washington	
11317	Utah	(1)	Utah	
11600	New York	(1)	Minnesota	638
11889	Michigan	(1)	Michigan	
12030	Arizona	(1)	Arizona	
12050	New York	(1)	George Washington	580
12195	Nebraska	(1)	Creighton	
12432	New York	(1)	New York University	

See footnote at end of table, p. 635.

1967 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1967—Continued

Applicant No.	Home State	Honors	Law school	LSAT
12433	Utah	(U)	Utah	517
12440	New York	(U)	Fordham	624
12582	do	(U)	New York University	590
12713	Illinois	(U)	De Paul	---
12946	Missouri	(U)	St. Louis	547
12980	Illinois	(U)	Michigan	---
13350	New York	(U)	Brooklyn	510
13441	California	(U)	Michigan	---
14094	Arkansas	(U)	Arkansas	---
14490	Connecticut	(U)	Georgetown	619
14527	Maryland	(U)	Catholic	---
14720	Pennsylvania	(U)	Temple	624
14735	Massachusetts	(U)	Notre Dame	521
14971	Pennsylvania	(U)	Pennsylvania	653
15085	Maryland	(U)	Georgetown	571
15135	Utah	(U)	Utah	---
15525	Virginia	(U)	American University	---
15713	New York	(U)	Fordham	---
15715	Michigan	(U)	Wayne State University	550
16601	New York	(U)	Syracuse	520
16698	New Jersey	(U)	Washington & Lee	618
16770	West Virginia	(U)	West Virginia	---
17050	California	(U)	California, Los Angeles	619
17274	Iowa	(U)	Tennessee	403
17385	New York	(U)	Cornell	691
17460	Ohio	(U)	Cincinnati	529
17490	Kansas	(U)	Creighton	---
17858	New York	(U)	New York University	---
17904	Illinois	(U)	Loyola, Chicago	---
18380	New Jersey	(U)	Catholic	550
18440	New York	(U)	Brooklyn	---
18804	Oregon	(U)	Oregon	---
19025	Virginia	(U)	Howard	---
19038	Florida	(U)	Tulane	571
19057	New York	(U)	New York University	620
19380	do	(U)	Fordham	---
19430	Missouri	(U)	Vanderbilt	537
19435	Colorado	(U)	Denver	---
19490	West Virginia	(U)	Pittsburgh	494
19535	Virginia	(U)	Virginia	587
19545	Texas	(U)	Baylor	---
19650	Illinois	(U)	De Paul	---
19780	Oklahoma	(U)	Oklahoma	400
19785	Illinois	(U)	Chicago	665
19840	West Virginia	(U)	West Virginia	453
19898	New York	(U)	St. John's	511
19914	District of Columbia	(U)	Washington & Lee	---
19943	Maryland	(U)	George Washington	---
20185	New York	(U)	St. John's	565
20189	do	(U)	Cornell	---
20205	do	(U)	Brooklyn	---
20265	New Jersey	(U)	Vanderbilt	---
20268	Florida	(U)	Miami	601
20380	Michigan	(U)	Wayne State	457
20510	New York	(U)	Fordham	---
20520	Florida	(U)	Florida	498
21275	Wisconsin	(U)	Wisconsin	---
21550	New York	(U)	George Washington	---
21744	Connecticut	(U)	Georgetown	570
21769	California	(U)	California, Hastings	667
21880	Maryland	(U)	American University	450
21955	New York	(U)	New York University	605
21972	West Virginia	(U)	West Virginia	---
22013	New York	(U)	St. John's	565
22040	Massachusetts	(U)	Suffolk	---
22375	Ohio	(U)	Cincinnati	---
22377	Alabama	(U)	Alabama	---
22645	Maryland	(U)	Georgetown	580
22660	New York	(U)	Miami	601
22685	Oregon	(U)	Oregon	571
22758	Minnesota	(U)	Minnesota	560
22950	Massachusetts	(U)	Boston University	470
22990	New York	(U)	Cornell	590
23390	do	(U)	American University	537
23495	California	(U)	California	---
23650	Michigan	(U)	Wayne State	505
23660	Ohio	(U)	Cincinnati	514
24345	Indiana	(U)	Indiana	629
24583	Michigan	(U)	Wayne State	---
24635	California	(U)	California, Hastings	604
24636	Texas	(U)	Southern Methodist	595
24639	North Dakota	(U)	North Dakota	549
24641	Ohio	(U)	Cincinnati	527

See footnote at end of table, p. 635.

1967 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1967—Continued

Applicant No.	Home State	Honors	Law school	LSAT
24680	Florida.....	(1)	Creighton.....	
24750	Colorado.....		Denver.....	
24751	Illinois.....	(1)	Chicago.....	627
24755	New York.....	(1)	Columbia.....	630
24833	do.....	(1)	Brooklyn.....	
24835	Pennsylvania.....	(1)	Miami.....	475
25124	Illinois.....	(1)	Illinois.....	679
25140	Wisconsin.....	(1)	Marquette.....	
25330	Pennsylvania.....		Duquesne.....	618
25690	California.....	(1)	California, Los Angeles.....	572
25720	New York.....	(1)	Cornell.....	631
26089	do.....	(1)	New York University.....	767

¹ Indicates applicant who would have qualified for appointment in grade GS-9 on the basis of standing in the upper 1/2 of his class or other evidence of superior academic accomplishment, e.g., membership on law review staff, winning of moot court competition, legal aid activities, summer law clerk experience, etc

1967 GRADUATES TO WHOM OFFERS WERE MADE—as of June 30, 1967

Applica- tion Number	Action begun	Bureau	Offer date	Grade offered	Honors	LSAT	Offer status	EOD date	Year graduated	Law school	Home State
00161	Jan. 10, 1967	IG	Jan. 12, 1967	9	(1)	595	Decline		1967	UCLA	California.
00230	Dec. 13, 1966	Com Jones	Dec. 13, 1966	9	(1)	559	Accept	July 5, 1967	1967	Northwestern	Kentucky.
00360	May 24, 1967	FO/N.O.	June 13, 1967	9	(1)	559	Failed to reply		1967	Maryland University	Maryland.
00600	Jan. 10, 1967	RT	Jan. 12, 1967	9	(1)		Decline		1967	University of Detroit	Michigan.
00885	do	RT/GTR	do	9	(1)	533	Failed to reply		1967	University of Michigan	District of Columbia
01035	May 24, 1967	FO/SEAT	May 27, 1967	9	(1)	513	Accept	June 19, 1967	1967	Maryland University	New Jersey.
01090	Mar. 30, 1967	FO/N.Y.	Apr. 10, 1967	9	(1)	513	do	June 26, 1967	1967	Brooklyn	New York.
01095	Feb. 16, 1967	FO/CH	Mar. 17, 1967	9	(1)	538	Accept	June 26, 1967	1967	Temple	Ohio.
01098	Jan. 10, 1967	FO/CLV	Jan. 12, 1967	9	(1)	538	do	Aug. 7, 1967	1967	St. John's	Pennsylvania.
01110	do	FO/F.C.	do	9	(1)		Decline		1967	Denver	New York.
01445	do	FO/CH	do	9	(1)		Decline		1967	Loyola-Chicago	Colorado.
01620	May 9, 1967	FO/CH	May 23, 1967	9	(1)	659	Accept	June 19, 1967	1967	Northwestern	Illinois.
02208	Jan. 27, 1967	FO/LA	Feb. 3, 1967	9	(1)	503	do	June 19, 1967	1967	UCLA	Do.
02310	April 3, 1967	DP/SP		9	(1)		Appointment withdrawn		1967	University of Wisconsin	California.
02454	Mar. 6, 1967	FO/CLV	Mar. 10, 1967	9	(1)	580	Decline		1967	University of Buffalo	Wisconsin.
02750	Mar. 1, 1967	FO/CH	Mar. 6, 1967	9	(1)	620	do		1967	Harvard	New York.
02795	Jan. 16, 1967	DP	Jan. 13, 1967	9	(1)	631	do		1967	University of Kentucky	Ohio.
03077	Apr. 11, 1967	RT/Merg	Apr. 14, 1967	9	(1)	490	Accept	Apr. 24, 1967	1967	Georgetown	Kentucky.
03780	Dec. 29, 1966	FO/S.F.	Jan. 24, 1967	9	(1)		do		1967	American University	Virginia.
04150	June 8, 1967	FO/F.C.	June 13, 1967	9	(1)	489	do	Sept. 11, 1967	1967	Brooklyn	District of Columbia.
04190	Dec. 22, 1966	DP/SP	Jan. 12, 1967	9	(1)	582	Accept	Aug. 7, 1967	1967	Vanderbilt	New York.
04800	Jan. 6, 1967	FO/ATL	Mar. 14, 1967	9	(1)	582	Appointment withdrawn		1967	Emory	North Carolina.
05235	Feb. 6, 1967	IG	Apr. 28, 1967	9	(1)	635	Accept	Aug. 21, 1967	1967	University of Michigan	Georgia.
05500	Apr. 2, 1967	FO/CH	June 8, 1967	9	(1)	550	do	Aug. 14, 1967	1967	University of Alabama	Michigan.
05745	May 9, 1967	DP/FDA	Jan. 12, 1967	9	(1)		do	June 29, 1967	1967	Catholic	Alabama.
07470	Jan. 10, 1967	RT/DP	Mar. 1, 1967	9	(1)		do	June 26, 1967	1967	University of Nebraska	Virginia.
07560	Feb. 24, 1967	FO/N.O.	Mar. 1, 1967	9	(1)		do	July 10, 1967	1967	University of Tulsa	Nebraska.
07630	Jan. 10, 1967	DP	Jan. 12, 1967	9	(1)		Apptn withdrawn		1967	Wayne	Oklahoma.
08040	Dec. 29, 1966	RT	Jan. 10, 1967	9	(1)		Decline		1967	New Mexico	Michigan.
08130	Jan. 10, 1967	RT	do	9	(1)		do		1967	Wyoming	New Mexico.
08580	Dec. 30, 1966	RT/DP	Jan. 10, 1967	9	(1)		Accept	Aug. 7, 1967	1967	Vanderbilt	Wyoming.
08651	Apr. 4, 1967	RT/C	Apr. 10, 1967	9	(1)	573	Decline		1967	University of Virginia	Maryland.
08680	Jan. 16, 1967	DP/SP	Feb. 8, 1967	9	(1)	559	Accept	Sept. 11, 1967	1967	Vanderbilt	Illinois.

District of Columbia.

1967 GRADUATES TO WHOM OFFERS WERE MADE—as of June 30, 1967—Continued

Applica- tion Number	Action begun	Bureau	Offer date	Grade offered	Honors	LSAT	Offer status	EOD date	Year graduated	Law school	Home State
09140	June 21, 1967	F0/Seattle	June 30, 1967	9	(1)	---	do	Aug. 14, 1967	1967	George Washington	Virginia
09120	Feb. 6, 1967	DP/SP	Feb. 24, 1967	9	(1)	---	do	Aug. 7, 1967	1967	St. Louis	Missouri
09290	Apr. 17, 1967	RT	May 23, 1967	9	(1)	434	Decline	---	1967	DePaul	Illinois
09576	Jan. 10, 1967	RT	Jan. 12, 1967	9	(1)	523	Failed reply	---	1967	S.M.U.	Texas
10115	do	F0/Clev	do	9	(1)	529	Decline	---	1967	St. John's	New York
10503	Apr. 6, 1967	F0/Atl.	Apr. 17, 1967	9	(1)	---	do	---	1967	Wake Forest	North Carolina
11169	Jan. 13, 1967	DP	Jan. 19, 1967	9	(1)	470	Failed reply	---	1967	Marquette	Wisconsin
11170	Jan. 10, 1967	F0/N.Y.	Jan. 12, 1967	9	(1)	---	Decline	---	1967	Rutgers	New Jersey
11900	do	F0/N.Y.	do	9	(1)	615	Accept	Aug. 14, 1967	1967	N.Y.U.	New York
12425	do	RT	Feb. 1, 1967	9	(1)	---	Decline	---	1967	U.C.L.A.	California
13320	Jan. 11, 1967	DP	Jan. 19, 1967	9	(1)	---	Accept	Aug. 28, 1967	1967	George Washington	Ohio
13454	Mar. 17, 1967	DP	Apr. 4, 1967	9	(1)	458	Decline	---	1967	Villanova	Pennsylvania
13885	May 9, 1967	RT	May 27, 1967	9	(1)	---	do	---	1967	Northwest	Illinois
14097	Jan. 25, 1967	F0/Chi	Jan. 30, 1967	9	(1)	661	do	---	1967	Notre Dame	Ohio
14500	Feb. 16, 1967	F0/F.C.	Feb. 21, 1967	9	(1)	---	Accept	Aug. 7, 1967	1967	Denver	Colorado
15098	Jan. 10, 1967	F0/L.A.	Feb. 8, 1967	9	(1)	---	do	Aug. 28, 1967	1967	New Mexico	New Mexico
16100	May 9, 1967	F0/N.Y.	May 23, 1967	9	(1)	---	do	Aug. 14, 1967	1967	Fordham	New York
16580	Feb. 6, 1967	F0/N.Y.	Feb. 7, 1967	9	(1)	---	do	Sept. 11, 1967	1967	U.C.L.A.	California
16605	Jan. 20, 1967	IG	Feb. 1, 1967	9	(1)	586	do	July 3, 1967	1967	American	District of Columbia
16900	Apr. 28, 1967	F0/Seattle	May 23, 1967	9	(1)	---	Decline	---	1967	University of Oregon	Washington
17795	Jan. 10, 1967	RT	Jan. 12, 1967	9	(1)	540	Failed Reply	---	1967	Iowa	Iowa
17920	Feb. 23, 1967	F0/Chi	Feb. 24, 1967	9	(1)	615	Decline	---	1967	Loyola	Illinois
18078	Mar. 21, 1967	F0/Clev	Apr. 4, 1967	9	(1)	455	Accept	July 31, 1967	1967	Western Reserve	Ohio
18275	Jan. 10, 1967	F0/F.C.	Jan. 12, 1967	9	(1)	521	do	Aug. 7, 1967	1967	Denver	Colorado
18560	May 24, 1967	F0/K.C.	June 22, 1967	9	(1)	445	Decline	---	1967	do	Do.
18793	Mar. 2, 1967	F0/N.Y.	Mar. 22, 1967	9	(1)	550	Accept	June 26, 1967	1967	Fordham	New York
19020	Jan. 5, 1967	RT/DP	June 29, 1967	9	(1)	---	do	Sept. 3, 1967	1967	Houston	Texas
19026	do	RT/Merg.	Jan. 12, 1967	9	(1)	638	do	July 3, 1967	1967	Iowa	Iowa
19340	do	RT	do	9	(1)	473	Decline	---	1967	Loyola	Illinois

19385	Feb. 6, 1967	FO/N.Y.	Mar. 2, 1967	9	(1)	565	do	1967	Brooklyn	New York.
19829	May 24, 1967	FO/Clev.	June 9, 1967	9	(1)	517	do	1967	Cincinnati	West Virginia.
19940	Jan. 10, 1967	FO/Atl.	Feb. 1, 1967	9	(1)	405	do	1967	Mississippi	Mississippi.
20313	May 9, 1967	FO/N.Y.	May 23, 1967	9	(1)	405	Accept.	1967	St. Johns	New York.
20330	Jan. 10, 1967	FO/F.C.	Jan. 12, 1967	9	(1)	570	Decline	June 26, 1967	W & L	Virginia.
21290	Dec. 13, 1966	Com. Eiman	Dec. 19, 1966	9	(1)	570	Decline	July 31, 1967	Pennsylvania	New York.
21545	Jan. 10, 1967	FO/K.C.	Feb. 9, 1967	9	(1)	415	do	1967	Western Reserve	Ohio.
21583	Feb. 24, 1967	RT	Mar. 9, 1967	9	(1)	601	Accept.	1967	Wisconsin	Wisconsin.
21596	May 24, 1967	FO/Chi.	May 27, 1967	9	(1)	601	Decline	Aug. 28, 1967	Wayne	Michigan.
21830	Jan. 10, 1967	RT	Jan. 12, 1967	9	(1)	601	Decline	1967	Villanova	New Jersey.
21885	Jan. 13, 1967	RT/DP	do	9	(1)	481	Accept	June 29, 1967	Iowa	Iowa.
22372	Feb. 10, 1967	DP	Mar. 9, 1967	9	(1)	481	Failed to reply	1967	Kentucky	Kentucky.
22769	Mar. 21, 1967	FO/Clev.	Apr. 6, 1967	9	(1)	461	Decline	1967	Wayne	Michigan.
22783	Mar. 13, 1967	DP/SP	Apr. 4, 1967	9	(1)	461	Accept	1967	Maryland	Maryland.
22895	Feb. 6, 1967	FO/N.Y.	Feb. 21, 1967	9	(1)	429	do	1967	St. Johns	New York.
23040	Mar. 10, 1967	FO/Chi.	Apr. 4, 1967	7	(1)	429	Failed to reply	1967	DePaul	Illinois.
23403	Apr. 4, 1967	FO/N.Y.	Apr. 7, 1967	9	(1)	559	Accept	June 26, 1967	Syracuse	New York.
23420	Jan. 10, 1967	RT/Merg	Jan. 12, 1967	9	(1)	559	do	1967	W & L	Oklahoma.
23450	May 18, 1967	DP/FDA	Jun. 8, 1967	9	(1)	559	do	1967	New Mexico	New Mexico.
23455	Mar. 21, 1967	FO/F.C.	Mar. 27, 1967	9	(1)	559	Decline	1967	Georgetown	New York.
23765	Dec. 12, 1966	DP	Jan. 12, 1967	9	(1)	559	Application withdrawn	1967	Tennessee	Pennsylvania.
24625	Jan. 5, 1967	IG	Jan. 23, 1967	9	(1)	595	Failed to reply	1967	Denver	Colorado.
24643	May 9, 1967	FO/Chi	May 23, 1967	7	(1)	595	Declined	1967	Minnesota	Minnesota.
24649	Jan. 10, 1967	FO/Clev.	Jan. 13, 1967	9	(1)	613	Accept	1967	St. Johns	New York.
24855	Dec. 12, 1966	RT	Jan. 12, 1967	9	(1)	613	Declined	Aug. 28, 1967	Kentucky	Kentucky.
25110	Jan. 10, 1967	FO/L.A.	Feb. 8, 1967	9	(1)	450	Accept	1967	U.C.L.A.	California.
25220	Mar. 30, 1967	RT/GTR	Apr. 18, 1967	9	(1)	450	do	June 19, 1967	George Washington	Missouri.
25245	Mar. 21, 1967	FO/K.C.	Apr. 4, 1967	9	(1)	559	Failed to reply	July 31, 1967	Minnesota	Minnesota.
25457	June 8, 1967	DP/FDA	June 13, 1967	9	(1)	559	Accept	June 19, 1967	Georgetown	Ohio.
25465	Feb. 16, 1967	FO/N.Y.	Mar. 9, 1967	9	(1)	541	do	June 26, 1967	Brooklyn	New York.
25928	Jan. 11, 1967	DP/C	Jan. 19, 1967	9	(1)	541	do	July 31, 1967	George Washington	Ohio.
26085	Apr. 5, 1967	RT/GTR	Apr. 10, 1967	9	(1)	541	do	Oct. 2, 1967	do	Virginia

¹ Indicates applicant who would have qualified for appointment in grade GS-9 on the basis of standing in the upper one-half of his class or other evidence of superior academic accomplishment, for example, membership on law review staff, winning of moot court competition, legal aid activities, summer law clerk experience, etc.

HONORS CODE FOR 1969 GRADUATES

1. Top 10 percent plus activities.
2. Top 10 percent.
3. Top third plus activities.
4. Top third.
5. Top 50 percent plus activities.
6. Top 50 percent.
7. Lower 50 percent plus activities.
8. Lower 50 percent.
9. Standing not indicated.

"Activities" means:

Academic standing in the upper third of the law school graduating class;

Work or achievement of significance as a member of the staff of his law school's official law review;

Special high-level honors for academic excellence in law school, such as election to the Order of the Coif;

Winning a moot court competition or serving on the moot court team which represents the law school in competition with other schools;

Full-time or continuous participation in a legal aid program (as opposed to one-time, intermittent or casual participation);

Significant summer law-office clerk experience; or

Other equivalent evidence of clearly superior achievement.

1969 GRADUATES TO WHOM OFFERS WERE MADE (AS OF JUNE 16, 1969)

Application No.	Action begun	Bureau	Offer date	Grade offered	Honors *	Offer status	EOD date	Year graduated	Law school	Home State
*00261	Dec. 12, 1968	FO/New York	Dec. 13, 1968	11	3 590	Declined		1969	University of Texas	Texas
*00350	Dec. 3, 1968	DP	Dec. 5, 1968	11	1 621	Failed to reply		1969	William and Mary	Virginia
*00360	Apr. 23, 1969	FO/New York	Apr. 29, 1969	11	3 583	Accepted	Aug. 25, 1969	1969	St. Johns University	New York
*00690	Dec. 3, 1968	DP	Dec. 5, 1968	11	3 552	Declined		1969	Boston College	Massachusetts
*00815	Dec. 17, 1968	DP	Dec. 18, 1968	11	3	Failed to reply		1969	Dickinson University	Pennsylvania
*00850	Feb. 7, 1969	RT	Feb. 10, 1969	11	1 677	Accepted	July 14, 1969	1969	St. Louis University	Texas
*01240	Dec. 17, 1968	DP	Dec. 18, 1968	11	5 616	do	July 7, 1969	1969	University of Wisconsin	Wisconsin
*01420	Dec. 13, 1968	RT	Dec. 13, 1968	11	3 709	Declined		1969	University of Virginia	Virginia
*01514	Feb. 6, 1969	FO/Kansas City	Feb. 10, 1969	11	3 615	do		1969	University of Missouri	Missouri
*01806	Dec. 12, 1968	FO/Los Angeles	Dec. 13, 1968	11	3 526	Accepted	July 7, 1969	1969	University of Southern California	California
*01811	Feb. 5, 1969	RT	Feb. 7, 1969	11	5 638	Failed to reply		1969	Northwestern	Illinois
*01810	Dec. 3, 1968	DP	Dec. 5, 1968	11	3 500	Declined		1969	Brooklyn	New York
*02205	Mar. 28, 1969	DP	Apr. 3, 1969	11	3 630	do		1969	Georgetown University	Maryland
*02374	Dec. 17, 1968	DP	Dec. 18, 1968	11	5	Accepted	Sept. 8, 1969	69	University of Virginia	Virginia
*02461	May 28, 1969	DP	May 29, 1969	11	9	Awaiting reply	do	69	Howard University	District of Columbia
*02722	Dec. 3, 1968	DP	Dec. 5, 1968	11	11	Declined		69	Catholic University	Maryland
*02730	Feb. 10, 1969	FO/Cleveland	Feb. 13, 1969	9	8	Accepted	Mar. 24, 1969	69	Western Reserve	Ohio
*02754	Dec. 9, 1968	GC	Dec. 12, 1968	11	3	Failed to reply		69	University of Iowa	Iowa
*02799	Dec. 17, 1968	DP	Dec. 18, 1968	11	3	Declined		69	New York University	New York
*03085	Apr. 21, 1969	FO/Boston	Apr. 24, 1969	11	3	Failed to reply		69	University of West Virginia	West Virginia
03360	Apr. 21, 1969	FO/Chicago	Apr. 24, 1969	11	2	Declined		69	Loyola (Chicago)	Illinois
*03762	Jan. 13, 1969	FO/New Orleans	Jan. 14, 1969	11	5 465	do		69	University of Alabama	Alabama
*04070	Dec. 3, 1968	DP	Dec. 5, 1968	11	3 637	do		69	New York University	New Jersey
*04017	Dec. 4, 1968	GC	Dec. 5, 1968	11	1 532	Accepted	Sept. 15, 1969	69	California (Hastings)	California
*04068	Dec. 2, 1968	DP	Dec. 5, 1968	11	1	Failed to reply		69	George Washington	Ohio
*04065	Dec. 31, 1968	RT	Jan. 3, 1969	11	1 743	do		69	St. Louis University	Virginia
*04140	Jan. 27, 1969	DP	Jan. 29, 1969	11	8	Failed to reply		1969	Vanderbilt University	Massachusetts
*04230	Dec. 4, 1968	GC	Dec. 5, 1968	11	3 730	Declined		1969	University of Virginia	New York
*05245	Feb. 7, 1969	FO/New York	Feb. 10, 1969	11	7	Accepted	July 14, 1969	1969	Brooklyn	Do.
*05362	Feb. 25, 1969	FO/Chicago	Feb. 26, 1969	11	5 613	Declined		1969	Emory University	Alabama
*05725	Dec. 4, 1968	DP	Dec. 5, 1968	11	4 529	do		1969	University of Arkansas	Oklahoma
*05770	Dec. 17, 1968	DP	Dec. 18, 1968	11	3 783	do		1969	University of Pennsylvania	New York
*05815	Dec. 3, 1968	DP	Dec. 5, 1968	11	3	do		1969	American University	New Jersey
*06125	Feb. 7, 1969	FO/Kansas City	Feb. 10, 1969	11	3 520	Accepted	Sept. 8, 1969	1969	University of New Mexico	New Mexico
*06365	Dec. 20, 1968	RT	Feb. 13, 1969	11	5 701	Request canceled		1969	Stanford University	Kansas
*07329	Feb. 10, 1969	FO/Cleveland	Feb. 13, 1969	11	3 582	Accepted	Aug. 11, 1969	1969	Fordham University	New York
*07328	Apr. 23, 1969	FO/New York	Apr. 25, 1969	11	3 411	do	July 14, 1969	1969	University of Connecticut	Connecticut

1969 GRADUATES TO WHOM OFFERS WERE MADE (AS OF JUNE 16, 1969) - Continued

Application No.	Action begun	Bureau	Offer date	Grade offered	Honors *	Offer status	EOD date	Year graduated	Law school	Home State
*07485	Feb. 5, 1969	RT	Feb. 7, 1969	11	3	494	do	1969	De Paul University	Illinois.
*07482	Mar. 28, 1969	DP	Apr. 3, 1969	11	3	118	Declined	1969	Ohio State University	Do.
*07483	Dec. 3, 1968	DP	Dec. 3, 1968	11	3	600	do	1969	do	Ohio.
*07719	Dec. 12, 1968	IG	Dec. 23, 1968	11	7	698	do	1969	University of Virginia	New York.
*07725	Dec. 31, 1968	RT	Jan. 3, 1969	11	1	698	do	1969	University of Indiana	Indiana.
*07824	Dec. 3, 1968	RT	Dec. 5, 1968	11	3	560	do	1969	New York University	New Jersey.
*08000	Dec. 4, 1968	RT/C	Dec. 13, 1968	11	1	466	Accepted	1969	Memphis State	Tennessee.
*08130	Apr. 7, 1969	DP	Apr. 9, 1969	11	5	625	do	1969	Rutgers University	New Jersey.
*08658	Feb. 5, 1969	RT	Feb. 7, 1969	11	5	736	do	1969	University of Pennsylvania	District of Columbia.
*09115	do	RT	do	11	1	748	Declined	1969	University of Maryland	Maryland.
*09420	Feb. 25, 1969	FO/New York	Feb. 26, 1969	11	3	643	do	1969	Fordham University	New York.
*09579	Apr. 22, 1969	FO/Seattle	Apr. 24, 1969	11	5	599	Failed to reply	1969	University of Iowa	Iowa.
*09860	Dec. 17, 1968	DP	Dec. 18, 1968	11	1	500	Accepted	1969	William and Mary	Virginia.
*10112	Dec. 3, 1968	DP	Dec. 5, 1968	11	1	500	do	1969	University of Tulsa	Oklahoma.
*10470	Dec. 17, 1968	DP	Dec. 18, 1968	11	1	686	Declined	1969	St. Johns University	New York.
*10510	Dec. 12, 1968	IG	Dec. 13, 1968	11	5	695	Declined	1969	University of Virginia	Michigan.
*10816	Jan. 17, 1969	RT	Jan. 22, 1969	11	3	517	do	1969	University of Indiana	Indiana.
*11182	Feb. 20, 1969	IG	Feb. 25, 1969	11	5	630	do	1969	George Washington	Maryland.
*11657	Dec. 6, 1968	DP	Dec. 11, 1968	11	3	559	Accepted	1969	University of Wisconsin	Wisconsin.
*11700	Mar. 21, 1969	FO/San Francisco	Mar. 25, 1969	11	4	559	Declined	1969	University of Indiana	Connecticut.
*11886	Jan. 15, 1969	IG	Jan. 22, 1969	11	3	674	Accepted	1969	University of Pennsylvania	California.
*11900	Jan. 2, 1969	FO/Cleveland	Jan. 3, 1969	11	3	601	do	1969	Duquesne University	Pennsylvania.
*12037	Dec. 31, 1968	DP	Dec. 3, 1968	11	4	601	do	1969	University of Oklahoma	Oklahoma.
*12390	Jan. 31, 1969	DP	Feb. 5, 1969	11	3	601	Declined	1969	George Washington	Virginia.
*13358	Feb. 6, 1969	FO/Chicago	Feb. 11, 1969	11	3	601	do	1969	University of Illinois	Illinois.
*13923	Feb. 3, 1969	RT	Feb. 8, 1969	11	4	583	Accepted	1969	University of Michigan	Michigan.
*14085	May 6, 1969	FO/F.C.	May 8, 1969	11	5	583	Declined	1969	University of Texas	Texas.
*14530	May 19, 1969	FO/New York	May 21, 1969	11	4	678	Awaiting reply	1969	University of Iowa	Iowa.
*14600	Feb. 5, 1969	RT	Feb. 7, 1969	11	5	730	do	1969	University of Virginia	New Jersey.
*14680	Dec. 17, 1968	DP	Jan. 3, 1969	11	1	665	Failed to reply	1969	De Paul University	Illinois.
*14980	do	DP	Dec. 18, 1968	11	1	665	Accepted	1969	Rutgers University	New Jersey.
*15415	Feb. 6, 1969	FO/Chicago	Feb. 10, 1969	11	3	486	Declined	1969	Villanova University	Connecticut.
*15425	Jan. 23, 1969	FO/F.C.	Jan. 24, 1969	11	3	486	do	1969	University of West Virginia	West Virginia.
*15824	Feb. 20, 1969	DP	Feb. 25, 1969	11	5	505	Accepted	1969	Catholic University	District of Columbia.
*15930	Dec. 3, 1968	DP	Dec. 5, 1968	11	3	606	Declined	1969	California Berkeley	California.
*16221	Apr. 25, 1969	FO/F.C.	Apr. 30, 1969	11	3	606	Failed to reply	1969	Western Reserve	Ohio.
*16600	Dec. 12, 1968	FO/New York	Dec. 13, 1968	11	3	593	Declined	1969	Rutgers University	New Jersey.
*17072	Dec. 6, 1968	DP	Dec. 11, 1968	11	3	593	Failed to reply	1969	University of Chicago	Illinois.

*17430	Apr. 18, 1969	FO/New York	11	3	Declined	1969	New York University	New York
*17627	Dec. 11, 1968	RT	11	1 887	do	1969	George Washington	Virginia
*18091	Feb. 25, 1969	FO/New York	11	5 685	Accepted	1969	Fordham University	New Jersey
*18390	Jan. 23, 1969	RT	11	3 630	Failed to reply	1969	American University	Maryland
*18415	Dec. 12, 1968	RT	11	1 671	Declined	1969	University of Virginia	Kansas
*18460	Jan. 3, 1969	FO/New York	11	3 547	Failed to reply	1969	Fordham University	New York
*19061	Dec. 17, 1968	DP	11	7 715	Declined	1969	University of Virginia	Virginia
*19150	do	DP	11	3 680	Accepted	1969	Washington University	Missouri
*19440	Dec. 13, 1968	FO/San Francisco	11	3 695	Declined	1959	California, Berkeley	California
19547	Jan. 17, 1969	FO/New Orleans	11	5 470	Accepted	1969	Louisiana State University	Louisiana
*19899	Dec. 16, 1968	DP	11	3 647	Failed to reply	1969	George Washington	New York
*20310	Dec. 3, 1968	DP	11	3 ---	Accepted	1969	New York University	Do.
*20830	Jan. 31, 1969	DP	11	3 697	do	1969	University of Minnesota	Minnesota
*21297	Dec. 5, 1968	DP	11	3 ---	Declined	1969	University of Pennsylvania	Pennsylvania
21580	Mar. 27, 1969	RT	11	7 586	Accepted	1969	University of Virginia	Virginia
*21582	Dec. 9, 1968	FO/New York	11	3 899	do	1969	Rutgers University	New Jersey
*21699	Dec. 16, 1968	RT	11	3 748	do	1969	Vanderbilt University	Tennessee
*21860	Feb. 7, 1969	FO/Kansas City	11	3 475	do	1969	Washington University	Kansas
*21885	Apr. 21, 1969	FO/Kansas City	11	3 489	Declined	1969	University of Kansas	Do.
*21999	Dec. 9, 1968	FO/Cleveland	11	3 671	Accepted	1969	Western Reserve	Ohio
*22021	Dec. 17, 1968	DP	9	6 593	Declined	1969	University of Wisconsin	Wisconsin
*22382	Jan. 3, 1969	FO/Kansas City	11	5 653	Accepted	1969	University of Indiana	Indiana
22549	Jan. 28, 1969	DP	11	1 600	Declined	1969	De Paul University	Illinois
*22670	Dec. 12, 1968	RT	11	3 ---	do	1969	University of Virginia	Virginia
*22895	Jan. 15, 1969	RT	11	1 630	Accepted	1969	William & Mary	Illinois
*22902	Jan. 13, 1969	RT	11	7 565	do	1969	University of Maryland	Maryland
*23205	Dec. 17, 1968	FO/Atlanta	11	1 ---	Declined	1969	Tennessee	Tennessee
*23397	do	IG	11	4 659	do	1969	University of Texas	Texas
*23418	Feb. 7, 1969	FO/Chicago	11	3 676	do	1969	University of Washington	Washington
*24110	Dec. 2, 1968	DP	11	3 718	Accepted	1969	Rutgers University	New Jersey
*24338	Dec. 13, 1968	FO/Cleveland	11	5 ---	do	1969	St. Johns University	New York
*24538	Feb. 3, 1969	RT	11	5 730	Declined	1969	University of Chicago	Illinois
*24646	Dec. 12, 1968	RT	11	3 604	Failed to reply	1969	University of Washington	Ohio
*24645	Feb. 7, 1969	FO/F.C.	11	1 724	Declined	1969	University of Washington	Washington
*24647	Feb. 20, 1969	FO/Kansas City	11	4 519	do	1969	University of Denver	Colorado
*24695	Mar. 6, 1969	FO/San Francisco	11	4 707	Accepted	1969	California-Hastings	California
*24700	Dec. 17, 1968	IG	11	3 715	Failed to reply	1969	California-Berkeley	Do.
*24715	do	DP	11	4 606	Declined	1969	New York University	New York
*25108	Dec. 9, 1968	GC	11	1 683	do	1969	Notre Dame University	Iowa
*25123	Feb. 7, 1969	FO/F.C.	11	5 504	Accepted	1969	Louisiana State University	Louisiana
*25130	May 1, 1969	FO/Chicago	11	5 537	do	1969	University of Tennessee	Tennessee
*25165	Dec. 12, 1968	RT	11	1 534	Declined	1969	University of Oklahoma	Oklahoma

HONORS CODE FOR 1969 GRADUATES

1. Top 10 percent plus activities
2. Top 10 percent
3. Top third plus activities
4. Top third
5. Top 50 percent plus activities
6. Top 50 percent
7. Lower 50 percent plus activities
8. Lower 50 percent
9. Standing not indicated

"Activities" means:

Academic standing in the upper third of the law school graduating class;

Work or achievement of significance as a member of the staff of his law school's official law review;

Special high-level honors for academic excellence in law school, such as election to the Order of the Coif;

Winning a moot court competition or serving on the moot court team which represents the law school in competition with other schools;

Full-time or continuous participation in a legal aid program (as opposed to one-time, intermittent or casual participation);

Significant summer law-office clerk experience; or

Other equivalent evidence of clearly superior achievement.

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law School	LSAT
27	October 1968	New York	GS-11	5	1969	065	621
30	November 1968	Illinois	GS-11	3	1969	026	520
35	do	Kentucky	GS-11	3	1969	047	
165	October 1968	North Carolina	GS-11	3	1969	031	624
211	September 1968	California	GS-11	4	1969	010	624
223	November 1968	Georgia	GS-11	4	1969	104	653
230	October 1968	Utah	GS-9	7	1969	100	
260	do	Minnesota	GS-11	7	1969	044	575
262	November 1968	California	GS-11	5	1969	039	715
263	October 1968	Oklahoma	GS-11	3	1969	072	517
264	do	New York	GS-11	3	1969	008	
287	November 1968	Kansas	GS-11	5	1969	045	555
300	October 1968	Texas	GS-9	5	1969	035	670
305	do	District of Columbia	GS-11	5	1969	066	
315	do	Pennsylvania	GS-11	7	1969	102	589
320	November 1968	Virginia	GS-11	3	1969	104	
347	October 1968	Georgia	GS-11	5	1969	038	
363	November 1968	Missouri	GS-11	3	1969	060	506
483	do	Oklahoma	GS-11	4	1969	072	552
510	October 1968	Connecticut	GS-11	4	1969	021	
541	do	Illinois	GS-11	3	1969	015	
630	do	Massachusetts	GS-11	3	1969	006	
679	January 1969	Pennsylvania	GS-9	6	1969	032	695
700	November 1968	Illinois	GS-11	9	1969	026	
811	October 1968	Louisiana	GS-11	3	1969	048	
825	do	California	GS-11	1	1969	063	
855	November 1968	Michigan	GS-11	4	1969	110	582
877	do	New York	GS-11	7	1969	035	540
900	February 1969	Missouri	GS-9	8	1969	108	564
991	November 1968	New York	GS-11	7	1969	035	604
993	October 1968	Montana	GS-11	4	1969	062	514
1042	do	Iowa	GS-11	7	1969	044	640
1142	December 1968	Massachusetts	GS-11	4	1969	091	
1145	November 1968	do	GS-11	2	1969	091	
1230	December 1968	New York	GS-11	5	1969	092	511
1305	October 1968	Texas	GS-11	3	1969	095	530
1323	do	Virginia	GS-11	5	1969	094	480
1335	April 1969	Florida	GS-9	8	1969	034	467
1345	October 1968	Connecticut	GS-11	5	1969	021	647
1370	do	New York	GS-11	3	1969	008	552
1378	do	do	GS-11	3	1969	008	529
1597	November 1968	do	GS-11	1	1969	035	600
1599	October 1968	Texas	GS-11	3	1969	095	612
1600	do	Tennessee	GS-9	8	1969	094	
1603	do	Virginia	GS-11	1	1969	098	505
1605	do	Illinois	GS-11	4	1969	042	581
1620	November 1968	do	GS-11	3	1969	042	516
1633	do	Iowa	GS-11	5	1969	030	535
1640	do	New Jersey	GS-11	4	1969	103	547
1807	October 1968	California	GS-9	8	1969	011	
1809	do	New Jersey	GS-11	1	1969	078	649
8151	do	do	GS-11	4	1969	008	525

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law school	LSAT
1839	March 1969	California	GS-11	1	1969	011	
1900	February 1969	Texas	GS-11	5	1969	095	
2137	October 1968	Michigan	GS-11	4	1969	115	610
2150	November 1968	Louisiana	GS-11	5	1969	048	
2200	October 1968	Missouri	GS-11	3	1969	108	671
2203	November 1968	Michigan	GS-11	3	1969	057	
2290	do.	Illinois	GS-11	3	1969	042	570
2295	March 1969	California	GS-11	3	1969	087	575
2365	November 1968	Michigan	GS-11	3	1969	057	665
2405	do	Connecticut	GS-9	8	1969	104	649
2415	October 1968	Indiana	GS-11	2	1969	043	650
2442	January 1969	Texas	GS-11	3	1969	095	
2444	October 1968	Oklahoma	GS-11	3	1969	072	622
2445	March 1969	Illinois	GS-11	1	1969	070	511
2460	November 1968	Maryland	GS-11	3	1969	054	550
2568	October 1968	New York	GS-11	1	1969	008	606
2576	December 1968	California	GS-9	8	1969	012	
2580	November 1968	Kentucky	GS-11	1	1969	047	494
2619	do.	Florida	GS-9	8	1969	065	511
2620	October 1968	New York	GS-9	7	1969	065	616
2621	November 1968	California	GS-11	5	1969	012	600
2749	March 1969	Mississippi	GS-11	3	1969	059	
2762	October 1968	New York	GS-11	5	1969	065	656
2763	do.	Colorado	GS-11	3	1969	019	529
2764	December 1968	North Carolina	GS-11	3	1969	037	610
2815	March 1969	New York	GS-11	5	1969	022	
3359	October 1968	do	GS-11	3	1969	115	
3363	do.	Pennsylvania	GS-11	2	1969	032	715
3367	October 1968	Minnesota	GS-11	3	1969	058	485
3367	November 1968	Pennsylvania	GS-9	8	1969	103	
3370	October 1968	California	GS-11	3	1969	010	665
3372	November 1968	Massachusetts	GS-9	6	1969	007	588
3373	do.	Pennsylvania	GS-9	9	1969	103	522
3374	October 1968	New Jersey	GS-9	8	1969	035	
3380	November 1968	Virginia	GS-11	3	1969	037	588
3390	do.	Wisconsin	GS-11	3	1969	115	
3391	December 1968	Louisiana	GS-11	4	1969	048	
3395	October 1968	Illinois	GS-9	4	1969	069	
3677	February 1969	New York	GS-11	3	1969	002	653
3690	October 1968	Pennsylvania	GS-11	1	1969	032	495
3765	do.	do	GS-11	3	1969	932	
3779	do.	Texas	GS-11	3	1969	095	
3894	do.	Ohio	GS-11	7	1969	071	554
3895	do.	North Carolina	GS-9	6	1969	067	624
3896	do.	Missouri	GS-11	5	1969	108	
3897	November 1968	Maryland	GS-11	3	1969	054	550
4009	October 1968	New York	GS-9	6	1969	047	
4015	September 1968	Pennsylvania	GS-11	3	1969	029	553
4016	October 1968	California	GS-11	3	1969	089	
4019	November 1968	Texas	GS-11	5	1969	064	
4070	October 1968	Maryland	GS-11	3	1969	054	693
4133	November 1968	Massachusetts	GS-11	5	1969	006	656
4137	do.	New Jersey	GS-11	5	1969	084	576
4170	October 1968	New York	GS-11	3	1969	079	549
4185	do.	California	GS-11	4	1969	011	
4250	November 1968	Massachusetts	GS-11	3	1969	091	560
4273	February 1969	Georgia	GS-9	6	1969	033	
4274	November 1968	New York	GS-11	7	1969	035	560
4275	December 1968	Texas	GS-11	5	1969	123	556
4279	November 1968	Iowa	GS-11	5	1969	104	636
4286	October 1968	Virginia	GS-9	8	1969	111	498
4288	do.	Alabama	GS-9	8	1969	001	494
4289	do.	Massachusetts	GS-11	3	1969	007	687
4650	do.	Maryland	GS-11	3	1969	036	683
4705	November 1968	Massachusetts	GS-11	5	1969	091	
4707	January 1969	New Jersey	GS-9	4	1969	094	
4710	October 1968	Nebraska	GS-11	7	1969	063	
4720	do.	Illinois	GS-11	3	1969	070	
4943	March 1969	Virginia	GS-11	5	1969	077	
4956	October 1968	South Dakota	GS-11	3	1969	086	501
4960	December 1968	California	GS-11	3	1969	011	606
5218	April 1969	Wyoming	GS-11	3	1969	116	
5221	December 1968	Maryland	GS-11	5	1969	020	667
5223	November 1968	Virginia	GS-11	7	1969	104	642
5225	October 1968	California	GS-11	5	1969	095	
5227	do.	New York	GS-9	8	1969	079	527
5231	November 1968	do.	GS-11	3	1969	037	560
5232	do.	Virginia	GS-11	4	1969	037	558
5233	do.	do.	GS-9	8	1969	104	660
5367	do.	Maryland	GS-11	3	1969	074	630
5375	October 1968	do.	GS-9	5	1969	094	545
5399	do.	Illinois	GS-9	8	1969	026	520

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law school	LSAT
5400	October 1968	New York	GS-11	3	1969	070	577
5410	do	do	GS-11	3	1969	065	---
5430	November 1968	do	GS-11	3	1969	112	---
5513	February 1969	Maryland	GS-11	5	1969	054	624
5514	October 1968	Michigan	GS-9	6	1969	110	---
5730	do	Virginia	GS-11	1	1969	037	604
5768	do	Arkansas	GS-9	6	1969	004	588
5787	January 1969	New York	GS-11	5	1969	037	612
5788	November 1968	Illinois	GS-11	4	1969	026	---
5820	October 1968	Kentucky	GS-11	1	1969	047	636
5930	April 1969	Texas	GS-11	8	1969	095	550
6145	October 1968	New York	GS-11	4	1969	008	---
6155	do	Idaho	GS-11	1	1969	100	---
6170	do	Indiana	GS-9	8	1969	043	---
6172	do	Ohio	GS-11	5	1969	071	549
6173	November 1968	Massachusetts	GS-11	3	1969	035	620
6335	October 1968	Missouri	GS-11	3	1969	108	589
6362	January	Utah	GS-9	5	1969	100	---
6363	do	Pennsylvania	GS-9	6	1969	032	---
6625	October 1968	Oklahoma	GS-9	8	1969	072	583
6631	do	New York	GS-9	8	1969	002	524
6935	January 1969	New Jersey	GS-11	7	1969	038	553
6940	November 1968	Massachusetts	GS-11	3	1969	091	---
7087	October 1968	Indiana	GS-9	8	1969	043	599
7038	December 1968	California	GS-9	9	1969	011	---
7091	January 1969	Virginia	GS-11	7	1969	002	511
7100	October 1968	Texas	GS-11	6	1969	004	547
7322	do	Pennsylvania	GS-11	1	1969	093	618
7324	do	Texas	GS-11	3	1969	088	527
7325	do	Illinois	GS-11	5	1969	042	---
7326	November 1968	New York	GS-11	3	1969	035	589
7331	October 1968	do	GS-11	5	1969	065	---
7332	November 1968	New Jersey	GS-11	5	1969	036	660
7333	do	Illinois	GS-11	3	1969	050	588
7350	October 1968	Maryland	GS-11	3	1969	002	---
7481	September 1968	New York	GS-11	3	1969	079	547
7490	January 1969	do	GS-11	3	1969	008	553
7573	October 1968	do	GS-11	3	1969	079	529
7577	November 1968	New Jersey	GS-11	5	1969	035	565
7637	October 1968	New York	GS-9	6	1969	035	640
7712	November 1968	Virginia	GS-11	2	1969	037	560
7720	do	Iowa	GS-11	3	1969	057	571
7720	October 1968	Wisconsin	GS-11	3	1969	053	---
7722	November 1968	Connecticut	GS-11	3	1969	021	600
7723	April 1969	Maryland	GS-11	5	1969	054	565
7724	December 1968	New York	GS-11	9	1969	037	---
7830	October 1968	do	GS-11	3	1969	035	629
7835	March 1969	Florida	GS-11	3	1969	024	422
7995	November 1968	Kansas	GS-11	2	1969	037	571
7998	do	Maine	GS-11	5	1969	007	---
8095	do	New York	GS-9	8	1969	065	---
8235	do	Illinois	GS-9	6	1969	026	---
8320	October 1968	Virginia	GS-11	4	1969	037	---
8322	March 1969	New York	GS-9	6	1969	008	---
8336	October 1968	New Jersey	GS-11	3	1969	078	---
8345	November 1968	New York	GS-11	3	1969	065	500
8510	October 1968	Connecticut	GS-11	5	1969	057	600
8550	do	New York	GS-11	2	1969	079	616
8555	do	do	GS-11	9	1969	074	---
8600	do	do	GS-11	3	1969	078	570
8637	January 1969	do	GS-11	3	1969	096	---
8656	October 1968	Tennessee	GS-9	5	1969	094	595
8656	November 1968	Mississippi	GS-11	1	1969	059	600
8658	October 1968	New York	GS-11	3	1969	079	---
8675	do	Montana	GS-11	1	1969	062	600
8683	November 1968	New Mexico	GS-11	3	1969	064	---
8685	March 1969	Ohio	GS-11	4	1969	017	421
8800	October 1968	New York	GS-11	4	1969	079	636
8820	February 1969	District of Columbia	GS-11	3	1969	036	---
9107	October 1968	New York	GS-11	3	1969	079	612
9220	September 1968	Utah	GS-9	5	1969	100	---
9225	November 1968	Illinois	GS-11	3	1969	030	520
9227	February 1969	Pennsylvania	GS-11	2	1969	032	---
9246	October 1968	Illinois	GS-11	7	1969	026	500
9264	do	West Virginia	GS-11	3	1969	111	544
9265	February 1969	Ohio	GS-11	1	1969	017	652
9268	October 1968	Arkansas	GS-9	9	1969	004	549
9269	November 1968	do	GS-11	5	1969	091	---
9560	October 1968	Indiana	GS-9	8	1969	143	629
9572	do	Tennessee	GS-11	1	1969	094	599
9574	October 1968	Alabama	GS-11	3	1969	001	576
9574	do	New York	GS-11	3	1969	092	649
9576	November 1968	Massachusetts	GS-11	1	1969	007	649

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Year Honors graduated	Law school	LSAT
9577	February 1969	Pennsylvania	GS-11	8 1969	075	494
9577	January 1969	Tennessee	GS-11	4 1969	094	
9581	October 1968	Arkansas	GS-9	8 1969	004	
9584	September 1968	Michigan	GS-11	3 1969	037	
9586	October 1968	Iowa	GS-9	8 1969	044	
9587	November 1968	Illinois	GS-11	3 1969	050	544
9590	October 1968	Indiana	GS-11	1 1969	043	640
9700	do	Iowa	GS-11	3 1969	030	
9855	do	Illinois	GS-11	5 1969	042	606
9856	November 1968	Kentucky	GS-11	3 1969	049	
9857	do	Oregon	GS-11	4 1969	073	630
9865	October 1968	California	GS-11	5 1969	016	701
10115	do	Maryland	GS-11	7 1969	002	623
10146	January 1969	Florida	GS-11	3 1969	034	511
10147	October 1968	Ohio	GS-9	8 1969	071	618
10150	do	California	GS-11	3 1969	011	611
10151	do	Massachusetts	GS-11	5 1969	091	
10151	do	Wisconsin	GS-11	3 1969	115	701
10152	do	Maryland	GS-9	6 1969	080	660
10239	November 1968	Connecticut	GS-9	8 1969	007	
10350	October 1968	Wisconsin	GS-11	5 1969	115	583
10460	do	New York	GS-11	7 1969	079	659
10530	do	Arkansas	GS-9	8 1969	004	559
10550	do	California	GS-11	3 1969	010	626
10551	do	do	GS-11	5 1969	087	653
10570	March 1969	Maryland	GS-9	4 1969	040	
10665	November 1968	Michigan	GS-11	7 1969	068	
10667	do	Arizona	GS-11	9 1969	003	
10668	February 1969	Maryland	GS-11	3 1969	104	724
10670	October 1968	New York	GS-11	3 1969	079	595
10675	November 1968	Kansas	GS-11	7 1969	104	594
10730	April 1969	Maryland	GS-9	7 1969	054	632
10802	March 1969	do	GS-11	5 1969	054	
10805	January 1969	New York	GS-11	5 1969	008	
10822	October 1968	Indiana	GS-11	3 1969	043	683
10830	March 1969	South Carolina	GS-9	8 1969	085	520
11030	January 1969	Pennsylvania	GS-11	7 1969	032	495
11125	November 1968	Wisconsin	GS-9	9 1969	115	
11168	do	Alabama	GS-11	3 1969	104	630
11176	October 1968	Kansas	GS-11	3 1969	089	701
11183	do	do	GS-9	5 1969	095	604
11185	do	New York	GS-11	7 1969	065	653
11190	do	Illinois	GS-11	5 1969	016	665
11260	do	New York	GS-11	3 1969	079	505
11265	do	South Dakota	GS-11	5 1969	086	425
11302	do	Arkansas	GS-9	9 1969	004	
11318	do	Illinois	GS-11	1 1969	069	588
11320	October 1968	Wisconsin	GS-11	5 1969	043	
11321	November 1968	Tennessee	GS-11	3 1969	129	450
11324	October 1968	Wisconsin	GS-11	3 1969	115	
11325	do	New York	GS-11	3 1969	068	535
11326	do	California	GS-11	7 1969	057	584
11359	November 1968	Virginia	GS-9	8 1969	104	
11406	April 1969	West Virginia	GS-9	6 1969		594
11410	October 1968	New York	GS-11	7 1969	007	
11417	November 1968	Pennsylvania	GS-11	3 1969	074	731
11420	October 1968	Missouri	GS-11	5 1969	016	701
11470	November 1968	Arizona	GS-9	6 1969	003	
11585	October 1968	California	GS-11	7 1969	016	667
11615	do	Maryland	GS-11	1 1969	040	380
11661	do	New Jersey	GS-11	3 1969	095	571
11666	December 1968	New York	GS-11	4 1969	008	570
11813	October 1968	do	GS-9	6 1969	094	
11814	November 1968	Maryland	GS-11	4 1969	010	
11815	October 1968	Missouri	GS-11	5 1969	108	500
11817	March 1969	Massachusetts	GS-9	6 1969	091	
11820	October 1968	New York	GS-11	5 1969	008	624
11879	do	Iowa	GS-11	3 1969	044	638
11890	do	Ohio	GS-11	7 1969	017	520
12023	do	Massachusetts	GS-11	4 1969	091	
12035	do	do	GS-11	3 1969	070	618
12036	do	Ohio	GS-11	2 1969	071	588
12038	April 1969	New York	GS-9	6 1969	099	629
12042	November 1968	Connecticut	GS-11	3 1968	021	598
12055	do	New York	GS-11	5 1969	020	654
12191	do	Massachusetts	GS-11	3 1969	091	468
12193	do	Illinois	GS-11	5 1969	023	
12197	January 1969	Massachusetts	GS-9	6 1969	091	
12385	October 1968	Virginia	GS-11	5 1969	036	649
12437	do	New York	GS-11	4 1969	008	549
12505	April 1969	Missouri	GS-9	3 1969	037	
12525	January 1969	South Dakota	GS-9	6 1969	086	
12573	October 1968	New York	GS-11	1 1969	008	600

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law school	LSAT
12574	November 1968	Maryland	GS-11	3	1969	037	612
12585	do	Connecticut	GS-11	3	1969	037	
12590	October 1968	New Jersey	GS-11	3	1969	103	600
12801	do	Tennessee	GS-11	7	1969	102	
12804	December 1968	Iowa	GS-11	4	1969	030	647
12805	November 1968	Massachusetts	GS-11	2	1969	091	
12880	October 1968	California	GS-11	4	1969	011	
12911	November 1968	Iowa	GS-9	6	1969	030	
12912	do	New Jersey	GS-11	3	1969	047	
12949	April 1969	Michigan	GS-9	6	1969	051	586
12958	November 1968	Florida	GS-11	7	1969	047	
12960	do	Louisiana	GS-11	7	1969	097	
12965	January 1969	New York	GS-9	6	1969	129	513
12970	March 1969	Iowa	GS-11	3	1969	044	660
12985	October 1968	Illinois	GS-11	3	1969	042	653
13000	do	Mississippi	GS-11	1	1969	059	
13015	November 1968	Maryland	GS-11	3	1969	037	530
13050	October 1968	Massachusetts	GS-11	7	1969	006	619
13320	November 1969	Pennsylvania	GS-11	3	1969	126	463
13355	do	Kentucky	GS-11	1	1969	047	445
13357	October 1969	Michigan	GS-9	5	1969	115	576
13375	do	Nebraska	GS-11	3	1969	063	
13380	November 1968	Indiana	GS-11	3	1969	049	541
13445	do	Missouri	GS-11	3	1969	060	
13449	do	New York	GS-11	5	1969	008	
13455	February 1969	Ohio	GS-11	4	1969	032	603
13665	October 1969	New York	GS-11	7	1969	065	610
13666	November 1968	do	GS-11	1	1969	079	576
13668	October 1968	do	GS-11	1	1969	079	593
13675	do	Illinois	GS-11	1	1969	050	509
13900	December 1968	New York	GS-11	3	1969	079	541
13924	November 1968	Connecticut	GS-11	3	1969	037	636
13930	October 1968	Virginia	GS-11	7	1969	104	660
13932	November 1968	Georgia	GS-9	8	1969	033	429
14088	October 1968	Indiana	GS-11	5	1969	043	
14090	do	New Hampshire	GS-11	7	1969	070	517
14091	November 1968	Virginia	GS-11	5	1969	002	
14095	October 1968	Michigan	GS-9	6	1969	110	
14097	do	California	GS-11	5	1969	069	
14121	February 1969	Louisiana	GS-11	4	1969	048	
14137	October 1968	California	GS-11	5	1969	010	701
14145	do	Massachusetts	GS-11	3	1969	007	
14674	do	New York	GS-9	5	1969	079	506
14678	do	Massachusetts	GS-11	3	1969	007	
14679	do	New Jersey	GS-11	3	1969	078	550
14740	do	Massachusetts	GS-9	5	1969	006	672
14755	December 1968	Illinois	GS-9	9	1969	050	
14757	November 1968	New Jersey	GS-11	5	1969	103	593
14759	October 1968	Wisconsin	GS-11	3	1969	115	621
14977	December 1968	New York	GS-11	3	1969	065	
14978	November 1968	Pennsylvania	GS-11	7	1969	029	
14979	March 1969	Ohio	GS-9	3	1969	112	652
15010	October 1968	do	GS-11	3	1969	071	726
15300	do	Texas	GS-11	3	1969	095	476
15402	April 1969	Virginia	GS-9	6	1969	037	
15406	March 1969	Maryland	GS-9	5	1969	054	604
15410	October 1968	Illinois	GS-11	1	1969	026	
15418	do	New York	GS-9	5	1969	102	638
15420	do	Virginia	GS-9	8	1969	094	
15512	November 1968	Utah	GS-9	8	1969	100	493
15515	October 1968	Oklahoma	GS-11	5	1969	072	530
15641	do	New York	GS-11	3	1969	065	493
15642	do	Illinois	GS-11	7	1969	070	491
15667	November 1968	Connecticut	GS-11	7	1969	104	570
15706	March 1969	Ohio	GS-11	4	1969	126	560
15707	November 1968	Connecticut	GS-9	5	1969	002	455
15813	do	Nebraska	GS-11	3	1969	023	523
15823	do	Massachusetts	GS-11	4	1969	007	
15840	October 1968	New Jersey	GS-11	4	1969	078	659
15842	November 1968	Ohio	GS-11	3	1969	031	638
15843	October 1968	Texas	GS-11	3	1969	095	522
15845	do	Ohio	GS-11	5	1969	071	606
15890	April 1969	New Jersey	GS-11	3	1969	084	
16150	October 1968	New York	GS-9	8	1969	079	
16155	April 1969	New Mexico	GS-11	9	1969	064	
16170	October 1968	New York	GS-11	3	1969	036	714
16198	do	Oregon	GS-11	1	1969	073	594
16230	November 1968	Alabama	GS-11	3	1969	024	500
16596	October 1968	Ohio	GS-9	8	1969	071	616
16602	do	do	GS-11	7	1969	071	
16612	November 1968	Arizona	GS-11	7	1969	097	554
16614	do	Pennsylvania	GS-11	9	1969	074	624
16615	March 1969	California	GS-11	5	1969	083	475

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated Law school	LSAT
16699	November 1968	Tennessee	GS-11	5	1969	129 685
16780	October 1968	Utah	GS-11	5	1969	100
16870	do	New Jersey	GS-11	9	1969	078
16875	March 1969	Tennessee	GS-11	5	1969	129 553
16915	April 1969	Missouri	GS-9	8	1969	060 647
16920	October 1968	New York	GS-11	7	1969	079 535
16935	do	North Carolina	GS-9	6	1969	094 500
17045	November 1968	Illinois	GS-9	6	1969	069 652
17050	April 1969	Tennessee	GS-11	5	1969	102 570
17073	November 1968	Massachusetts	GS-9	8	1969	091
17271	January 1969	Florida	GS-11	3	1969	034 582
17274	October 1968	Connecticut	GS-11	1	1969	079 530
17295	do	Oklahoma	GS-11	7	1969	072 570
17300	November 1968	Ohio	GS-11	5	1969	031 675
17387	do	New York	GS-11	3	1969	036 600
17414	January 1969	Pennsylvania	GS-11	1	1969	029 514
17420	November 1968	Illinois	GS-11	4	1969	115 643
17435	October 1968	District of Columbia	GS-9	7	1969	043 540
17437	do	New York	GS-11	7	1969	007 653
17440	do	Massachusetts	GS-11	5	1969	091
17505	November 1968	New York	GS-9	8	1969	037 582
17617	December 1968	Missouri	GS-11	4	1969	040
17625	October 1968	New York	GS-11	5	1969	094
17632	November 1968	do	GS-11	4	1969	065
17637	do	Tennessee	GS-9	9	1969	129 532
17638	October 1968	Texas	GS-11	3	1969	095 533
17640	do	Oklahoma	GS-11	5	1969	098
17642	November 1968	Wisconsin	GS-11	4	1969	115
17650	October 1968	New Jersey	GS-11	5	1969	105
17655	November 1968	Pennsylvania	GS-11	5	1969	074 689
17660	October 1968	Alabama	GS-11	3	1969	001 576
17851	do	New Jersey	GS-11	3	1969	006 569
17859	do	Illinois	GS-11	7	1969	089 671
17870	December 1968	Pennsylvania	GS-11	9	1969	020 700
17905	October 1968	California	GS-9	8	1969	011 593
17911	November 1968	Illinois	GS-11	4	1969	026
17924	October 1968	New York	GS-9	8	1969	079 529
17935	April 1969	New Jersey	GS-11	3	1969	078 600
17970	October 1968	Wisconsin	GS-11	7	1969	115 595
18080	do	do	GS-11	3	1969	002
18085	do	Indiana	GS-11	3	1969	043 538
18092	do	Pennsylvania	GS-11	3	1969	002
18093	do	Wisconsin	GS-11	5	1969	115 683
18096	February 1969	Washington	GS-11	3	1969	042 571
18100	March 1969	Arkansas	GS-11	4	1969	004 518
18216	October 1968	New York	GS-11	5	1969	079
18231	November 1968	District of Columbia	GS-9	6	1969	036
18233	October 1968	Pennsylvania	GS-11	4	1969	002 511
18237	November 1968	Arizona	GS-11	3	1969	003 566
18275	October 1968	Massachusetts	GS-11	4	1969	091 409
18318	November 1968	Arizona	GS-11	1	1969	003
18325	October 1968	Indiana	GS-9	6	1969	043
18355	do	New York	GS-11	1	1969	091 458
18377	November 1968	Iowa	GS-11	5	1969	030 497
18382	November 1968	Illinois	GS-11	5	1969	069
18383	September 1968	Massachusetts	GS-11	3	1969	006 624
18444	April 1969	New York	GS-9	7	1969	065
18453	October 1968	Rhode Island	GS-9	8	1969	107 594
18462	do	New Jersey	GS-11	4	1969	078
18470	do	Massachusetts	GS-11	3	1969	091
18545	February 1969	New York	GS-11	2	1969	035
18630	November 1968	Alabama	GS-9	8	1969	001 549
18665	April 1969	California	GS-11	4	1969	011
18700	December 1968	New York	GS-11	1	1969	009 524
18845	October 1968	Pennsylvania	GS-11	3	1969	009 428
18860	November 1968	Virginia	GS-11	5	1969	104
18875	October 1968	Ohio	GS-11	3	1969	071 616
18895	do	New York	GS-11	1	1969	079 616
18938	do	Missouri	GS-11	3	1969	108 650
18939	do	Kentucky	GS-9	8	1969	047 535
18945	January 1969	Michigan	GS-11	3	1969	028 539
19058	July 1968	Virginia	GS	-----	1969	036 588
19059	November 1968	New Hampshire	GS-11	7	1969	074 633
19060	October 1968	Kentucky	GS-9	8	1969	102 550
19065	November 1968	New York	GS-11	7	1969	035 571
19155	do	North Carolina	GS-11	4	1969	031 718
19310	October 1968	Massachusetts	GS-11	7	1969	102 582
19395	April 1969	Georgia	GS-11	5	1969	033 591
19430	October 1968	New York	GS-11	3	1969	065
19433	November 1968	Kansas	GS-9	8	1969	045 577
19434	April 1969	Missouri	GS-11	3	1969	060 571
19485	March 1969	Nebraska	GS-11	5	1969	063

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Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law school	LSAT
19527	February 1969	Louisiana	GS-9	6	1969	048	529
19528	November 1968	Massachusetts	GS-11	7	1969	007	580
19660	October 1968	Tennessee	GS-11	1	1969	129	---
19663	November 1968	Pennsylvania	GS-11	5	1969	074	638
19665	October 1968	Indiana	GS-9	6	1969	043	612
19810	November 1968	Virginia	GS-11	5	1969	104	546
19838	October 1968	Wisconsin	GS-11	1	1969	115	---
19842	do	Ohio	GS-11	5	1969	071	588
19846	March 1969	Illinois	GS-9	6	1969	042	636
19892	October 1968	New York	GS-11	5	1969	006	---
19894	do	California	GS-11	5	1969	010	---
19895	November 1968	New York	GS-11	1	1969	091	594
19896	October 1968	Indiana	GS-9	8	1969	043	---
19905	November 1968	New York	GS-11	3	1969	074	---
19915	October 1968	Connecticut	GS-11	4	1969	091	494
19936	March 1969	New Jersey	GS-11	5	1969	065	---
19940	October 1968	New Mexico	GS-11	1	1969	064	616
19947	do	New York	GS-11	1	1969	008	671
20272	do	Pennsylvania	GS-9	3	1969	103	---
20280	November 1968	Massachusetts	GS-11	4	1969	091	517
20305	do	Louisiana	GS-11	5	1969	048	---
20421	do	Washington	GS-11	8	1969	109	618
20425	do	Pennsylvania	GS-11	3	1969	074	---
20515	October 1968	New York	GS-11	4	1969	079	563
20655	September 1968	Nebraska	GS-11	7	1969	063	---
20670	October 1969	California	GS-9	8	1969	011	570
20727	do	Wisconsin	GS-11	5	1969	115	---
20730	do	Texas	GS-9	8	1969	188	506
20740	November 1968	Arizona	GS-9	8	1969	003	---
20833	March 1969	Pennsylvania	GS-11	3	1969	060	529
20840	November 1968	Illinois	GS-11	3	1969	074	---
20850	October 1968	do	GS-11	3	1969	069	630
21008	do	New York	GS-11	3	1969	091	458
21020	do	do	GS-11	7	1969	022	630
21055	do	do	GS-11	3	1969	008	630
21057	November 1968	Kentucky	GS-11	4	1969	049	532
21060	October 1968	Illinois	GS-11	4	1969	016	787
21280	do	Pennsylvania	GS-9	6	1969	032	560
21282	do	Massachusetts	GS-11	5	1969	006	550
21288	December 1968	Ohio	GS-11	3	1969	112	---
21295	November 1968	New York	GS-11	5	1969	008	---
21299	do	do	GS-11	5	1969	035	500
21320	October 1968	Missouri	GS-11	3	1969	054	559
21495	February 1969	do	GS-9	8	1969	106	---
21520	November 1968	Wisconsin	GS-9	6	1969	115	596
21558	October 1968	Missouri	GS-11	7	1969	108	571
21562	January 1969	New York	GS-9	6	1969	079	---
21563	October 1968	do	GS-11	3	1969	036	606
21577	do	do	GS-11	5	1969	008	---
21581	do	do	GS-9	5	1969	043	543
21583	November 1968	New York	GS-11	7	1969	035	660
21696	do	Virginia	GS-11	7	1969	036	698
21697	October 1968	New York	GS-11	3	1969	008	---
21742	November 1968	do	GS-11	5	1969	035	575
21775	do	Arizona	GS-11	3	1969	057	730
21780	January 1969	Pennsylvania	GS-9	8	1969	036	594
21882	December 1968	Texas	GS-11	1	1969	127	---
21887	October 1968	Massachusetts	GS-11	1	1969	006	636
21945	September 1968	Texas	GS-11	4	1969	081	422
21992	October 1968	Oklahoma	GS-11	3	1969	072	549
21999	November 1968	Ohio	GS-11	3	1969	112	671
22045	do	Kentucky	GS-11	3	1969	049	570
22049	do	Connecticut	GS-11	7	1969	104	600
22329	do	Massachusetts	GS-11	5	1969	039	731
22360	March 1969	do	GS-9	6	1969	104	632
22380	November 1968	Virginia	GS-11	1	1969	002	582
22445	October 1968	New York	GS-11	3	1969	127	476
22543	December 1968	Texas	GS-11	3	1969	003	---
22547	November 1968	Arizona	GS-9	6	1969	003	---
22562	do	do	GS-11	5	1969	003	---
22565	December 1968	New York	GS-11	5	1969	009	571
22570	October 1968	do	GS-11	3	1969	008	---
22650	do	Illinois	GS-11	5	1969	037	---
22663	November 1968	Pennsylvania	GS-9	8	1969	103	559
22667	do	New York	GS-11	7	1969	079	553
22770	do	Pennsylvania	GS-11	3	1969	074	645
22775	do	California	GS-9	8	1969	087	662
22885	October 1968	Texas	GS-11	3	1969	095	643
22894	do	New York	GS-9	8	1969	079	523
22896	November 1968	do	GS-11	5	1969	033	559
22897	October 1968	Arkansas	GS-9	5	1969	004	---
22898	do	Louisiana	GS-11	5	1969	048	---
22900	do	California	GS-11	5	1969	010	654
22901	do	Delaware	GS-11	3	1969	036	632

MASTER LIST OF ATTORNEY APPLICANTS AS OF JUNE 16, 1969—Continued

Application No.	Date of application	Home State	Minimum grade	Honors	Year graduated	Law school	LSAT
22903	November 1968	California	GS-11	4	1969	011	630
22905	February 1969	Florida	GS-11	1	1969	090	516
22906	March 1969	Missouri	GS-11	5	1969	060	
22910	October 1968	Iowa	GS-11	9	1969	044	765
22920	do	Louisiana	GS-11	4	1969	048	526
22976	do	Indiana	GS-11	5	1969	070	488
22980	do	Kansas	GS-9	8	1969	045	
23250	November 1968	Pennsylvania	GS-11	3	1969	074	675
23253	do	Virginia	GS-11	7	1969	104	600
23263	do	Illinois	GS-11	5	1969	030	535
23298	do	Virginia	GS-9	6	1969	104	
23300	October 1968	New York	GS-11	1	1969	008	522
23385	do	Massachusetts	GS-9	8	1969	006	630
23400	do	Illinois	GS-11	3	1969	016	630
23416	do	do	GS-11	7	1969	016	600
23419	November 1968	New York	GS-11	3	1969	078	623
23575	do	do	GS-11	4	1969	091	
23600	October 1968	Indiana	GS-11	1	1969	043	593
23665	do	Ohio	GS-11	3	1969	071	638
23763	do	Tennessee	GS-9	8	1969	094	527
23780	do	Oklahoma	GS-9	8	1969	072	378
23870	November 1968	New Jersey	GS-11	5	1969	056	
23897	March 1969	Ohio	GS-11	6	1969	126	490
23900	November 1968	Kentucky	GS-11	5	1969	047	525
23940	October 1968	Illinois	GS-11	3	1969	080	647
24112	December 1968	Georgia	GS-11	3	1969	033	514
24115	October 1968	Texas	GS-11	3	1969	095	588
24337	January 1969	Pennsylvania	GS-9	8	1969	112	535
24342	February 1969	Florida	GS-9	4	1969	090	621
24342	October 1968	Michigan	GS-11	5	1969	044	632
24533	do	New Jersey	GS-11	3	1969	078	
24536	do	Kansas	GS-11	7	1969	045	520
24540	do	Ohio	GS-11	7	1969	071	560
24588	do	New Jersey	GS-11	7	1969	078	724
24589	do	Missouri	GS-11	3	1969	080	541
24595	do	do	GS-11	3	1969	102	687
24630	November 1968	do	GS-11	5	1969	069	571
24638	October 1968	New York	GS-11	7	1969	065	
24648	do	South Carolina	GS-11	3	1969	085	
24697	November 1968	Kansas	GS-11	1	1969	106	
24705	October 1968	Mississippi	GS-11	3	1969	059	
24707	December 1968	South Dakota	GS-11	5	1969	086	
24710	October 1968	Missouri	GS-9	6	1969	108	580
24732	do	New York	GS-9	8	1969	079	541
24734	August 1968	Minnesota	GS-11	3	1969	023	
24755	November 1968	District of Columbia	GS-11	7	1969	057	620
24837	September 1968	Massachusetts	GS-11	3	1969	006	605
24840	February 1969	California	GS-11	7	1969	082	575
24859	October 1968	New Jersey	GS-11	7	1969	102	600
24872	March 1969	Ohio	GS-9	6	1969	129	649
24875	November 1969	Illinois	GS-11	4	1969	050	
24930	October 1968	Louisiana	GS-11	7	1969	048	
24933	do	West Virginia	GS-11	7	1969	107	547
24934	November 1968	Virginia	GS-9	6	1969	037	
25055	do	Nebraska	GS-11	1	1969	023	677
25060	do	California	GS-11	3	1969	087	641
25105	December 1968	Arizona	GS-11	5	1969	003	580
25107	do	Virginia	GS-9	8	1969	077	541
25109	October 1968	New Jersey	GS-11	9	1969	016	642
25110	do	Oklahoma	GS-11	3	1969	072	
25121	do	Massachusetts	GS-9	8	1969	044	
25129	do	Texas	GS-11	4	1969	095	
25160	do	Oklahoma	GS-9	6	1969	072	420
25162	December 1968	Mississippi	GS-9	8	1969	059	627
25335	November 1968	Rhode Island	GS-9	6	1969	007	580
25339	October 1968	Iowa	GS-11	5	1969	044	549
25341	do	Ohio	GS-9	8	1969	071	
25430	do	Wisconsin	GS-11	5	1969	115	
25575	April 1969	California	GS-11	3	1969	012	623
25700	October 1968	Maryland	GS-9	6	1969	095	594
25727	December 1968	Kansas	GS-11	3	1969	045	565
25736	October 1968	California	GS-11	3	1969	011	
25742	January 1969	New York	GS-11	9	1969	074	599
25900	November 1968	Rhode Island	GS-11	1	1969	091	
25905	October 1968	Massachusetts	GS-11	5	1969	006	
25940	April 1969	Florida	GS-11	5	1969	034	500
Total applicants							636

HONORS CODE FOR 1968 GRADUATES

1. Top 10 percent plus activities
2. Top 10 percent
3. Top 25 percent plus activities
4. Top 25 percent
5. Top 50 percent plus activities
6. Top 50 percent
7. Lower 50 percent plus activities
8. Lower 50 percent
9. Standing not indicated

"Activities" means:

Academic standing in the upper third of the law school graduating class;

Work or achievement of significance as a member of the staff of his law school's official law review;

Special high-level honors for academic excellence in law school, such as election to the Order of the Coif;

Winning a moot court competition or serving on the moot court team which represents the law school in competition with other schools;

Full-time or continuous participation in a legal aid program (as opposed to one-time, intermittent or casual participation);

Significant summer law-office clerk experience; or

Other equivalent evidence of clearly superior achievement.

1968 GRADUATES TO WHOM OFFERS WERE MADE (AS OF JUNE 30, 1968)

Applica- tion No.	Action begun	Bureau	Offer date	Grade offered	Honors*	Offer status	EOD date	Year graduated	Law school	Home State
*00045	Dec. 18, 1967	IG	Dec. 21, 1967	7	5 417	Accepted.	Sept. 9, 1968	1968	Wake Forest	North Carolina.
*00138	do	FO/New York	do	9	5 616	Declined.		1968	New York University	New York.
*00315	do	IG	do	9	3 571	do		1968	University of North Carolina.	Maryland.
*00370	do	FO/Cleveland	do	9	1 677	Failed to reply		1968	Temple University	Pennsylvania
*00379	Feb. 9, 1968	FO/Los Angeles	Feb. 20, 1968	9	7 685	Accepted.	July 15, 1968	1968	University of Southern California.	California.
01015	Dec. 18, 1967	FO/Chicago	Dec. 21, 1967	9	3	Failed to reply		1968	New York University	New York.
*01020	do	IG	do	9	1	Declined		1968	California (Hastings)	California.
01322	do	DP	Dec. 22, 1967	9	5	Failed to reply		1968	University of Texas	Texas.
01610	do	FO/New Orleans	do	9	3	do		1968	do	Do.
*01840	Feb. 9, 1968	FO/Chicago	Apr. 26, 1968	9	5 500	Accepted	July 15, 1968	1968	University of Indiana	Indiana.
02565	May 20, 1968	FO/New York	Feb. 29, 1968	9	1	Declined		1968	University of Kentucky	New York.
*02615	Dec. 18, 1967	FO/Chicago	May 21, 1968	9	5	Accepted	Sept. 9, 1968	1968	De Paul University	Illinois.
02610	Dec. 9, 1968	FO/F.C.	Feb. 20, 1968	7	3 569	Failed to reply		1968	University of Kentucky	Kentucky.
*03660	Dec. 18, 1967	RT	Dec. 21, 1967	9	5	Accepted	Apr. 8, 1968	1968	George Washington	Maryland.
*03668	do	DP	do	9	1 575	Declined		1968	Boston College	Massachusetts.
03668	do	RT	Dec. 22, 1967	9	9	do		1968	University of Pennsyl- vania.	New Jersey.
*03785	do	RT	Dec. 21, 1967	9	1	Failed to reply		1968	De Paul University	Illinois.
03890	Apr. 1, 1968	FO/Cleveland	Dec. 21, 1967	9	3	Declined		1968	University of Michigan	Connecticut.
04013	Feb. 29, 1968	IG	Apr. 12, 1968	9	3 594	do		1968	Albany	New York.
*05746	Dec. 18, 1967	FO/Los Angeles	Mar. 25, 1968	9	7	Failed to reply		1968	Syracuse University	Do.
*06345	do	FO/New York	Dec. 21, 1967	9	5 622	Accepted	Jul. 1, 1968	1968	Montana State	Montana.
*06475	Apr. 1, 1968	FO/Cleveland	do	9	5 561	do	do	1968	Western Reserve	Ohio.
*06775	Dec. 18, 1967	DP	Dec. 21, 1967	9	3 599	Declined		1968	University of Colorado	Colorado.
*07315	do	FO/Chicago	do	9	1 594	Failed to reply	do	1968	University of Kentucky	Kentucky.
*07328	Dec. 18, 1967	RT	Dec. 21, 1967	9	5	do		1968	Loyola (Chicago)	Illinois.
*07995	do	DP	do	9	1	Declined		1968	Harvard University	New York.
08645	do	IG	Dec. 22, 1967	9	3 500	Accepted		1968	University of Michigan	Michigan.
*08650	do	DP	Dec. 21, 1967	9	3 697	Declined	Apr. 8, 1968	1968	University of Kentucky	Ohio.
*08990	do	RT	do	9	3 624	Accepted	Aug. 12, 1968	1968	Ohio State University	Do.
09250	Feb. 20, 1968	DP	Feb. 21, 1968	9	5 545	Declined		1968	Boston University	New York.
*09585	Jan. 3, 1968	FO/Cleveland	Feb. 13, 1968	9	1	Failed to reply		1968	University of Pennsyl- vania.	Do.
*09832	Dec. 18, 1967	RT	Dec. 21, 1967	9	3 590	Accepted	July 1, 1968	1968	Western Reserve	Ohio.
*09975	do	FO/F.C.	do	7	1 555	Declined		1968	Boston University	Pennsylvania.
*09985	do	FO/Cleveland	Dec. 22, 1967	9	3 610	Failed to reply		1968	Vanderbilt University	Ohio.
*10095	do	RT	Dec. 21, 1967	9	1	do		1968	Western Reserve	New York.
*10241	do	FO/Kansas City	do	9	5 585	Declined		1968	Notre Dame University	Michigan.
*10549	do	FO/Atlanta	do	9	5	Accepted	July 15, 1968	1968	Duquesne University	Kentucky.
*10659	Apr. 12, 1968	FO/Cleveland	Apr. 12, 1968	9	7 529	do	Aug. 26, 1968	1968	University of Kentucky	Pennsylvania.
*10805	Dec. 18, 1967	FO/Kansas City	Dec. 21, 1967	9	5	do	July 15, 1968	1968	University of Kansas	Kansas.

1968 GRADUATES TO WHOM OFFERS WERE MADE (AS OF JUNE 30, 1968) - Continued

Applica- tion No.	Action begun	Bureau	Offer date	Grade offered	Honors*	Offer status	EOD date	Year graduated	Law school	Home State
*11300	Mar. 20, 1968	FO/New York	Apr. 12, 1968	9	6	Declined		1968	University of Texas	Texas.
11305	Mar. 19, 1968	IG	Apr. 3, 1968	9	6	do.		1968	University of West Virginia.	West Virginia.
11338	Dec. 18, 1967	DP	Dec. 22, 1967	9	5	550		1968	Western Reserve	Ohio.
*11335	do.	RT	Dec. 21, 1967	9	3	Failed to reply		1968	Cal-Hastings	California.
*12032	Feb. 16, 1968	FO/New York	Feb. 20, 1967	9	3	Declined	July 15, 1968	1968	University of Virginia	Connecticut.
12431	Dec. 18, 1967	DP	Dec. 22, 1967	9	5	633	Accepted	Mar. 4, 1968	University of Oklahoma	Oklahoma.
13230	Apr. 16, 1968	FO/San Francisco	Apr. 30, 1968	9	7	560	do.	Sept. 9, 1968	University of Colorado	Colorado.
*13358	Dec. 18, 1967	IG	Dec. 21, 1967	9	3	630	Declined	1968	American University	Virginia.
*14760	do.	RT	do.	9	1	do.		1968	Harvard University	Connecticut.
*15503	do.	RT	do.	9	3	718	do.	1968	University of Michigan	Michigan.
*5714	May 27, 1968	FO/New York	May 28, 1968	9	5	580	Accepted	1968	Georgetown University	Pennsylvania.
15810	Jan. 23, 1968	I & F/REG	Feb. 23, 1968	9	7	549	Declined	1968	University of Missouri	Missouri.
*15844	Dec. 18, 1967	RT	Dec. 21, 1967	9	3	Accepted	Sept. 16, 1968	1968	University of West- ington	Washington.
*16125	Mar. 12, 1968	DP	Mar. 11, 1968	9	3	Declined		1968	Boston University	Massachusetts.
*16375	Dec. 18, 1967	FO/F.C.	Dec. 21, 1967	9	3	501	Failed to reply	1968	South Dakota State	South Dakota.
*16392	do.	RT	do.	9	1	653	Declined	1968	University of Illinois	Illinois.
16395	May 21, 1968	FO/Cleveland	May 21, 1968	9	1	do.		1968	University of Toledo	New York.
*16613	Apr. 2, 1968	FO/F.C.	Apr. 12, 1968	9	9	541	Accepted	1968	University of South Carolina	South Carolina.
16919	Dec. 18, 1967	RT	Dec. 22, 1967	9	1	527	do.	1968	University of Indiana	Indiana.
*16921	Apr. 4, 1968	DP	Apr. 12, 1968	9	5	Failed to reply	Apr. 22, 1968	1968	Temple University	Pennsylvania.
*16927	Feb. 28, 1968	DP	do.	9	3	572	Accepted	1968	University of Indiana	Indiana.
*17283	Dec. 18, 1967	FO/Cleveland	Dec. 21, 1967	9	1	Failed to reply	May 13, 1978	1968	University of Texas	Texas.
*17413	Mar. 12, 1968	DP	Mar. 20, 1968	9	3	565	Declined	1968	University of Georgia	Georgia.
*17630	do.	DP	do.	9	3	525	Failed to reply	1968	Boston College	Massachusetts.
*17633	Dec. 18, 1967	FO/New York	Dec. 22, 1967	9	5	630	Accepted	1968	Western Reserve	Massachusetts.
17910	Aug. 18, 1967	DP	Sept. 5, 1967	9	3	535	do.	1968	Washington & Lee	Arkansas.
*18383	Mar. 12, 1968	DP	Mar. 20, 1968	9	3	535	Failed to reply	1968	Boston College	Minnesota.
18855	Dec. 18, 1967	DP	Dec. 22, 1967	7	7	558	Accepted	1968	University of Michigan	Connecticut.
*19225	do.	FO/New York	Dec. 21, 1967	9	1	524	Failed to reply	1968	University of Michigan	Michigan.
*19270	do.	RT	do.	9	1	570	Declined	1968	Brooklyn	New York.
*19787	do.	RT	do.	9	5	708	Failed to reply	1968	Memphis State	Tennessee.
									Harvard University	Massachusetts.

*19942	do	IG	do	9	3 494	do	1968	Notre Dame University	Michigan.
*19944	do	RT	Dec. 28, 1967	9	3 511	Declined	1968	University of Oklahoma.	Oklahoma.
20417	do	F0/F.C.	Dec. 22, 1967	9	5 531	Accepted	1968	University of Tennessee	Tennessee.
*20435	do	F0/New Orleans	Dec. 21, 1967	7	7 535	Declined	1968	University of Maryland	Maryland.
*21277	do	RT	do	9	1 612	do	1968	University of Indiana	Indiana.
*21490	Jan. 29, 1968	RT	Jan. 29, 1968	9	3 674	Failed to reply	1968	Notre Dame University	Do.
*21845	Mar. 22, 1968	DP	Apr. 1, 1968	9	5 610	Failed to reply	1968	University of Michigan	Michigan.
*21900	Dec. 18, 1967	F0/Chicago	Dec. 21, 1967	9	5 697	Declined	1968	University of Idaho	Idaho.
*21940	Jan. 23, 1968	RT	Jan. 29, 1968	9	1 629	do	1968	Notre Dame University	Ohio.
*21954	Dec. 18, 1967	F0/New York	Dec. 22, 1967	9	3 529	Accepted	1968	Brooklyn	New York.
*21965	do	RT	do	9	3 624	do	1968	De Paul University	Illinois.
*22305	Apr. 2, 1968	F0/New York	Apr. 12, 1968	9	5 616	Declined	1968	University of Tennessee	Tennessee.
22385	Mar. 25, 1968	IG	Mar. 27, 1968	9	3 629	Accepted	1968	George Washington	District of Columbia.
22540	May 13, 1968	RT/Chicago	May 16, 1968	9	5 577	Failed to reply	1968	do	Virginia.
*22780	Dec. 18, 1967	RT	Dec. 21, 1967	9	3 612	do	1968	Boston University	Massachusetts.
*23300	do	DP	do	9	3 612	do	1968	St. Johns University	New York.
*23403	Aug. 21, 1967	F0/New Orleans	Sept. 7, 1967	9	3 612	Accepted	1968	Wake Forest	New Jersey.
23403	do	IG	do	9	3 612	do	1968	University of South Carolina	Virginia.
*23467	Dec. 18, 1967	DP	Dec. 21, 1967	9	3 547	Failed to reply	1968	University of Indiana	Indiana.
23580	Apr. 29, 1968	DP	Apr. 30, 1968	9	5 547	Accepted	1968	University of Tennessee	Tennessee.
23590	May 20, 1968	F0/New Orleans	May 21, 1968	9	3 547	do	1968	George Washington	Virginia.
23657	Dec. 18, 1967	DP	Dec. 22, 1967	9	3 587	Declined	1968	Emory University	Georgia.
24125	Apr. 24, 1968	DP	Apr. 24, 1968	9	1 574	Accepted	1968	University of Florida	Florida.
*24346	Feb. 9, 1968	F0/New York	Feb. 15, 1968	7	7 576	Failed to reply	1968	Western Reserve	Ohio.
*24589	Dec. 18, 1967	DP	Dec. 21, 1967	9	1 540	do	1968	Southern Methodist University	Texas.
*24613	Apr. 4, 1968	DP	Apr. 12, 1968	9	5 596	Accepted	1968	Catholic University	Connecticut.
*24638	Dec. 18, 1967	DP	Dec. 21, 1967	9	3 587	Declined	1968	Northwestern	Illinois.
*24670	Apr. 2, 1968	F0/Fed Gov't	Apr. 12, 1968	9	3 603	Accepted	1968	George Washington	Virginia.
*24895	Dec. 18, 1967	F0/Fed Gov't	Dec. 21, 1967	9	3 603	Declined	1968	Montana State University	Montana.
*25327	do	RT	do	9	3 668	do	1968	Boston College	Massachusetts.
*25730	do	DP	do	9	1 630	Application withdrawn	1968	Western Reserve	Ohio.
*25750	Feb. 7, 1968	RT	Mar. 19, 1968	9	5 630	Declined	1968	University of Pennsylvania	New York.

HONORS CODE FOR 1968 GRADUATES

1. Top 10% plus activities
 2. Top 10%
 3. Top 25% plus activities
 4. Top 25%
 5. Top 50% plus activities
 6. Top 50%
 7. Lower 50% plus activities
 8. Lower 50%
 9. Standing not indicated
- "Activities" means :

Academic standing in the upper third of the law school graduating class ;

Work or achievement of significance as a member of the staff of his law school's official law review ;

Special high-level honors for academic excellence in law school, such as election to the Order of the Coif ;

Winning a moot court competition or serving on the moot court team which represents the law school in competition with other schools ;

Full-time or continuous participation in a legal aid program (as opposed to one-time, intermittent or casual participation) ;

Significant summer law-office clerk experience ; or

Other equivalent evidence of clearly superior achievement.

1968 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1968

Application No.	Home State	Honors	Law school	LSAT
20	New York	5	New York University	599
47	Tennessee	1	Tennessee	582
58	Indiana	5	Indiana	500
130	New York	3	William and Mary	645
136	Pennsylvania	5	Duquesne	
140	New York	6	St. John's	475
158	Oregon	7	Williamette	469
160	Indiana	5	Stetson	425
207	Massachusetts	3	Boston	645
209	New York	3	Fordham	604
213	do	3	Brooklyn	
262	North Dakota	5	North Dakota	621
278	Massachusetts	5	Duke	601
294	Texas	5	Texas	
480	Indiana	1	Indiana	656
547	New York	5	Syracuse	593
550	Virginia	7	George Washington	540
595	New York	5	Brooklyn	633
678	Illinois	7	Illinois	635
680	Rhode Island	7	Suffolk	668
685	Texas	6	Texas	
815	Pennsylvania	5	Pittsburgh	610
880	do	5	St. John's	529
1034	New York	5	George Washington	541
1036	do	7	St. John's	523
1040	California	3	California Hastings	469
1043	New York	7	St. John's	549
1300	Connecticut	7	Boston Univeristy	501
1405	Texas	1	do	
1505	Missouri	5	Michigan	589
1585	New Jersey	5	Fordham	
1803	New York	5	St. John's	501
1808	Colorado	5	Colorado	541
1848	New York	3	Fordham	642
2180	Wisconsin	7	Wisconsin	
2280	California	5	Stanford	639
2350	Virginia	7	Virginia	
2380	North Carolina	5	North Carolina	489
2410	Missouri	5	Washington University, St. Louis	586
2444	California	5	Baylor	525
2447	New York	5	Brooklyn	
2724	do	7	Albany	581
2753	do	1	Brooklyn	520
2794	Ohio	1	Ohio State	618
2805	New York	7	St. John's	600
3090	Illinois	5	Loyola, Chicago	
3365	Ohio	5	Ohio State	567
3364	California	7	California University Hastings	606
3368	Massachusetts		Boston	
3366	New York	7	Cornell	581
3389	Nebraska	7	Nebraska	
3620	New York	7	New York	599
3773	do	7	St. John's	

1968 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1968—Continued

Application No.	Home State	Honors	Law school	LSAT
3778	New Mexico	5	Utah	612
3780	Maryland	3	Maryland University	512
4010	Washington	7	Washington University Seattle	600
4011	Illinois		Illinois	677
4012	Indiana		Nebraska	
4014	Massachusetts	5	Boston College	619
4044	do	7	Boston College	523
4135	Montana	3	Montana State	
4150	Texas	6	Texas	
4155	Ohio	5	Western Reserve	495
4190	New York	3	St. John's	588
4265	New Jersey	7	Seton Hall	520
4270	Missouri		St. Louis	485
4285	Kansas	7	Kansas City	536
4287	Tennessee	1	Tennessee	
4957	California	5	California, Los Angeles	594
5210	Tennessee	7	Tennessee	522
5234	Nebraska	3	Nebraska	565
5421	Ohio	5	Michigan	585
5520	Illinois	8	Loyola Chicago	
5723	Michigan	5	Michigan	601
5748	New York	7	Ohio State	
5749	Ohio	7	do	
5765	West Virginia	7	West Virginia	
5790	Pennsylvania	7	Boston University	452
5785	New York	1	St. John's	610
5810	Illinois	5	Illinois	565
5910	Minnesota	7	Minnesota	520
5915	Ohio	5	Ohio	
6130	Nebraska	5	Nebraska	
6139	New York	3	Brooklyn	
6330	do	7	St. John's	520
6340	do	3	Cumberland	480
6489	Wisconsin	7	Marquette	
6629	Illinois	3	De Paul	
6885	District of Columbia	5	New York	645
6895	Rhode Island		Boston	
7085	South Carolina	5	South Carolina	589
7090	Ohio	7	American University	560
7095	New Jersey	7	Vanderbilt	565
7320	Ohio	3	Western Reserve	595
7478	New York	5	New York University	
7479	Massachusetts	5	Pennsylvania	581
7480	New York	7	New York University	
7570	Oklahoma	3	Tulsa	485
7575	Maryland	5	American University	
7820	New York	3	Brooklyn	
7945	do	3	St. John's	512
7960	do	3	Brooklyn	
7999	do		Oklahoma	
8070	do	8	Vanderbilt	500
8223	Michigan	3	Michigan	
8225	New York	7	Virginia	
8245	do	3	New York	
8317	do	7	St. John's	600
8340	Pennsylvania	3	Temple	
8503	Illinois	8	De Paul	
8635	New York	5	Brooklyn	
8640	Texas		S. Texas	
8636	Vermont	7	St. John's	630
8647	New York	3	Brooklyn	525
8651	do	3	New York	
8654	Tennessee	1	Vanderbilt	647
8660	New York	1	Brooklyn	515
8670	do	3	do	515
8985	do	8	New York University	
8980	Connecticut	1	Connecticut	710
9105	New York	5	Brooklyn	623
9205	Maryland	7	Maryland	
9243	Indiana	3	Valpariso	600
9244	Iowa	5	Iowa	
9245	Maryland	7	Georgetown	616
9267	California	7	California, Los Angeles	501
9266	Georgia	5	Mercer	582
9268	Illinois	7	Chicago University	612
9500	Georgia	7	Emory	667
9525	New York	7	St. John's	
9568	Illinois	3	Washington University, St. Louis	588
9583	Michigan	3	Wayne	
9610	Connecticut		Suffolk	
9850	New York	5	Virginia	633
10153	Illinois	5	Northwestern	662
10433	do	5	Notre Dame	525

1968 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1968—Continued

Application No.	Home State	Honors	Law school	LSAT
10504	New York	5	St. John's	599
10565	Illinois	5	Illinois	466
10817	Virginia	3	Georgetown	525
10970	Colorado	1	Colorado	599
11020	California	1	California, Hastings	587
11045	North Carolina	6	North Carolina	
11160	Maryland	7	Maryland University	500
11785	New York	5	Harvard	610
11323	do	5	New York	576
11350	do	5	George Washington	586
11390	Illinois	3	Illinois	
11575	Colorado		Harvard	693
11800	New York	3	Brooklyn	
11827	Ohio	7	Ohio State	500
11885	Pennsylvania	5	Boston College	540
11888	New Jersey	3	Columbia	645
12015	Virginia	1	George Wash	868
12027	California	3	Stanford	626
12028	Kansas	7	Kansas	616
12145	Michigan	1	Wayne State	
12200	Ohio	7	New York U	609
12380	New York	1	St. John's	593
12460	Virginia	7	Virginia	674
12583	New York	3	Syracuse	
12720	North Dakota	5	N. Dakota	445
12838	Pennsylvania	5	Villanova	587
12839	Illinois	4	Loyola Chic	
12841	New York	7	St. John's	595
12853	Pennsylvania	5	American U	535
12865	Illinois	5	Loyola Chic	559
12875	Tennessee	3	Boston U	
12953	Indiana	5	Notre Dame	575
12951	Virginia	7	Virginia	744
12957	New York	3	Brooklyn	
12990	California	3	California, Los Angeles	
13335	Indiana	5	Indiana	582
13354	New Jersey	6	Denver	533
13357	Maryland	7	Maryland University	535
13430	Massachusetts	1	Boston College	
13440	Ohio	7	Northwestern	651
13448	California	5	Western Reserve	564
13620	Pennsylvania	7	Pittsburgh	604
13667	Connecticut	5	Pennsylvania	
13862	Ohio	5	American	696
13868	Pennsylvania	5	Duquesne	480
13935	Illinois	7	Northwestern	
14093	Massachusetts	1	Suffolk	431
14118	Ohio	5	Michigan	691
14130	California	5	California, Berkeley	
14135	New York	5	Indiana	541
11440	Maryland	5	Catholic	517
14480	New York	8	Brooklyn	627
14485	Massachusetts	5	Boston College	
14597	New York	5	Fordham	
14615	Florida	5	Florida	675
14672	Illinois	5	Indiana	388
14675	North Carolina	5	North Carolina	552
14715	Virginia	7	Virginia	
15140	Michigan	5	Michigan	
15146	Virginia	3	George Washington	653
15400	Indiana	7	Indiana	570
15705	Connecticut	7	Connecticut	
15710	Indiana	7	Notre Dame	636
15711	New York	8	Fordham	541
15820	Massachusetts	7	New York University	651
16111	New York	5	Fordham	
16145	do	5	St. John's	
16222	North Carolina	3	Duke	594
16225	New York	1	Brooklyn	547
16573	Massachusetts		Washington and Lee	
16605	Colorado	7	Colorado	
16591	Virginia	5	Catholic	600
16593	Ohio	3	Western Reserve	426
16597	New Jersey	5	Pennsylvania	671
16650	New York	1	Harvard	713
16683	Maryland	5	Vanderbilt	638
17040	New York	5	Brooklyn	
17276	do	3	do	
17277	Maryland	3	Maryland	564
17280	Ohio	3	Marquette	525
17416	New York	5	Boston U	581
17500	North Carolina	7	Wake Forest	
17504	Texas	5	Southern Methodist	639
17506	Tennessee	3	Tennessee	571

1968 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1968—Continued

Application No.	Home State	Honors	Law school	LSAT
17620	Kentucky	5	Chicago	672
17653	Oklahoma	5	Oklahoma	
17850	New York		New York	620
17853	Indiana	5	Indiana	
17932	Connecticut	5	New York University	
18082	New York	4	do	
18274	Ohio	7	Notre Dame	530
18375	New York	5	St. John's	541
18412	Virginia	3	George Washington	570
18449	Connecticut		Harvard	687
18451	California	5	Stanford	596
18455	New York	1	Columbia	714
18547	do	5	St. John's	
18548	Florida	5	Miami	500
18550	Massachusetts	5	Boston University	
18553	Pennsylvania	5	Temple	518
18560	New York	5	Harvard	639
18610	Massachusetts	5	Suffolk	506
18626	North Dakota	1	North Dakota	482
18840	New York	3	St. John's	616
18895	Ohio	5	Western Reserve	
18886	New York	5	St. John's	581
18890	Illinois	5	Loyola Chicago	500
18898	Pennsylvania	1	Villanova	443
18910	Maryland		Mt. Vernon	
19300	Tennessee	7	Tulane	574
19387	Maine		Harvard	616
20250	Tennessee	7	Tennessee	
19425	New York	1	Brooklyn	583
19477	do	1	Georgetown	639
19181	Ohio	5	Ohio Northern	
19478	Michigan	3	Wayne State	
19500	New York	5	George Washington	
19529	Illinois	6	Loyola Chicago	
19531	New York	5	St. John's	
19540	New Jersey	7	Boston University	580
19790	Illinois	6	De Paul	549
19800	South Carolina	5	South Carolina	
19820	Illinois	8	Loyola, Chicago	500
19830	Michigan	5	Michigan	
19897	Texas	3	Texas	882
19900	New York	1	Villanova	582
19935	New Jersey	1	New York University	
20170	Washington	6	Washington Seattle	743
20210	Maryland	7	Georgetown	583
20213	New York	3	New York	639
20275	do	7	Brooklyn	550
20285	Pennsylvania	3	Villanova	593
20406	West Virginia	7	Vanderbilt	519
20423	Arkansas	1	Arkansas	
29427	Iowa	6	Oklahoma University	449
20440	New York		New York University	600
20508	Virginia	7	William and Mary	529
29650	New York	5	Syracuse	506
20725	Illinois	1	De Paul	600
21007	Minnesota	5	Minnesota	
21045	Ohio	3	Ohio	511
21285	Michigan	6	Michigan	615
21289	Rhode Island	3	Boston University	616
21291	New York	7	Brooklyn	511
21475	Illinois	3	Notre Dame	651
21500	New York	3	St. John's	642
21555	do	3	New York University	
21560	do	5	Buffalo	550
21575	Connecticut	1	Columbia	
21695	Ohio	7	Ohio	535
21770	North Carolina	5	Duke	676
21795	Massachusetts	5	Boston University	584
21989	Maryland	1	Maryland University	517
22000	New York	7	Brooklyn	
22009	do	7	do	494
22011	Pennsylvania	6	Villanova	583
22023	Tennessee	3	Tennessee	
22150	Georgia	1	Emory	748
22350	Pennsylvania	5	Villanova	656
22394	Michigan	5	Wayne State	558
22438	New Jersey	5	George Washington	
22542	New York	7	Fordham	
22550	Nebraska	1	Northwestern	593
22648	Virginia	5	Howard	
22649	District of Columbia	5	Catholic University	
22652	New York		Texas	
22867	do		New York University	550
22882	do	5	Brooklyn	

1968 GRADUATES WHO DID NOT RECEIVE OFFERS AS OF JUNE 30, 1968—Continued

Application No.	Home State	Honors	Law school	LSAT
22975	California	5	Califorina Berkeley	586
23200	Illinois	5	Loyola Chicago	
23215	Ohio	7	Indiana	599
23255	Massachusetts	5	Boston University	
23260	New York	7	Virginia	642
23297	Illinois	7	Loyola Chicago	576
23391	Maryland	5	Catholic University	550
23392	New York	1	St. John's	651
23396	do	5	Brooklyn	599
23398	Georgia	3	Georgia	511
23585	New York	3	St. John's	516
23985	Pennsylvania	3	Notre Dame	540
24020	New York	5	St. John's	495
24030	Indiana	5	Indiana	
24040	New York	5	New York University	
24070	Michigan	5	Wayne State	606
24077	do	7	Michigan	
24341	Nebraska	5	Creighton	
24355	New York	7	George Washington	
24537	do	7	Forkham	500
24535	Oregon	3	Oregon	695
24654	Illinois	3	Northwestern	604
24690	New York	5	New York	
24733	West Virginia	5	West Virginia	
24749	Montana	5	Montana	
24845	New Jersey	5	Rutgers	575
24858	do	3	Tennessee	
24905	New York	5	Fordham	587
24910	Pennsylvania	5	Temple	558
25101	New York	7	Brooklyn	
25103	do	7	Boston College	
25106	Illinois	3	De Paul	
25120	California	5	California Hastings	555
25345	New Jersey		Michigan	547
25440	Pennsylvania	5	Temple	524
25462	New York	5	Brooklyn	495
25565	Pennsylvania	9	Temple	552
25683	California	6	Boston University	433
25735	Rhode Island	5	do	506
25739	Tennessee	5	Tennessee	
25910	do	5	do	525
25915	New York	5	Syracuse	
25930	do	7	Fordham	555

LETTER TO PROFESSOR ROBERT PITOFSKY FROM PAUL RAND DIXON,
CHAIRMAN, DATED JULY 10, 1969, RESPONDING TO LETTER FROM
ROBERT PITOFSKY DATED JULY 2, 1969

FEDERAL TRADE COMMISSION,
Washington, D.C., July 10, 1969.

Prof. ROBERT PITOFSKY,
*Vanderbilt Hall, New York University Law School,
New York, N.Y.*

DEAR PROFESSOR PITOFSKY: Your letter of July 2, 1969, modifying and clarifying previous requests for information is acknowledged.

With respect to the information requested in paragraphs 7 and 8 of your letter to Mr. John V. Buffington dated June 9, 1969, all available information was mailed to Mr. Skitol on July 2, 1969.

In his letter transmitting this material, Mr. Delaney set forth factors considered in making hiring decisions and indicated the fragmentary nature of the data itself. I am sorry that your letter was not received prior to our sending you this data inasmuch as one is always reluctant to present information from which no valid conclusions can really be drawn.

The modifications in regard to the other data currently in preparation will certainly help us in its expeditious development.

Sincerely yours,

PAUL RAND DIXON, *Chairman.*

AMERICAN BAR ASSOCIATION,
Chicago, Ill., July 2, 1969.

Chairman PAUL RAND DIXON,
*Federal Trade Commission,
Washington, D.C.*

DEAR CHAIRMAN DIXON: In light of our discussion with you in Washington on June 30, I would like to clarify and modify several of the requests for information that we previously submitted.

With respect to the information requested in paragraphs 7 and 8 of my letter to John Buffington dated June 9, 1969, and the information requested in paragraphs 1, 2, and 4 of Robert Skitol's letter to John Delaney, dated June 24, 1969, we desire only a composite of data in each category. We seek no data with respect to particular, identified individuals.

In addition, we have decided to withdraw all requests in the above designated paragraphs of those letters which call for information concerning law school affiliation, class standing and law school aptitude score.

I hope these modifications dissipate the problems that you mentioned in your talk with us. It was a great pleasure to see you again, and to hear your views concerning the proper role and accomplishments of the Federal Trade Commission.

Very truly yours,

ROBERT PITOFSKY.

(659)

LETTER TO ROBERT SKITOL FROM JOHN A. DELANEY, DATED JULY 3,
1969, TRANSMITTING ENCLOSURES RECITED THEREIN

JULY 3, 1969.

ROBERT SKITOL,
Law Review Office, New York University Law School,
New York, N.Y.

DEAR MR. SKITOL: In further response to Mr. Pitofsky's letter of June 9, 1969, I am enclosing a partial response to items 1 and 12. For item 1 the data covers fiscal years 1965 through 1968 and the first eleven months of fiscal year 1969. For item 12 the information is for fiscal years 1967 and 1968 and the first eleven months of fiscal year 1969. We are continuing our work on these two items and hope to have them completed in several weeks.

Also enclosed are the complete answers to items 4 and 10.

In our original submission to you we included a copy of our Rules of Practice and a copy of our Administrative Manual Chapter on "Investigations." These two documents give the basic information in response to item 13. I asked our Bureaus of Deceptive Practices, Restraint of Trade, and Textiles and Furs if they had any additional internal instructions. Our Bureau of Deceptive Practices has supplied me with some additional information on item 13 and this is enclosed. All three of these Bureaus have responded to item 11 and this material is also enclosed.

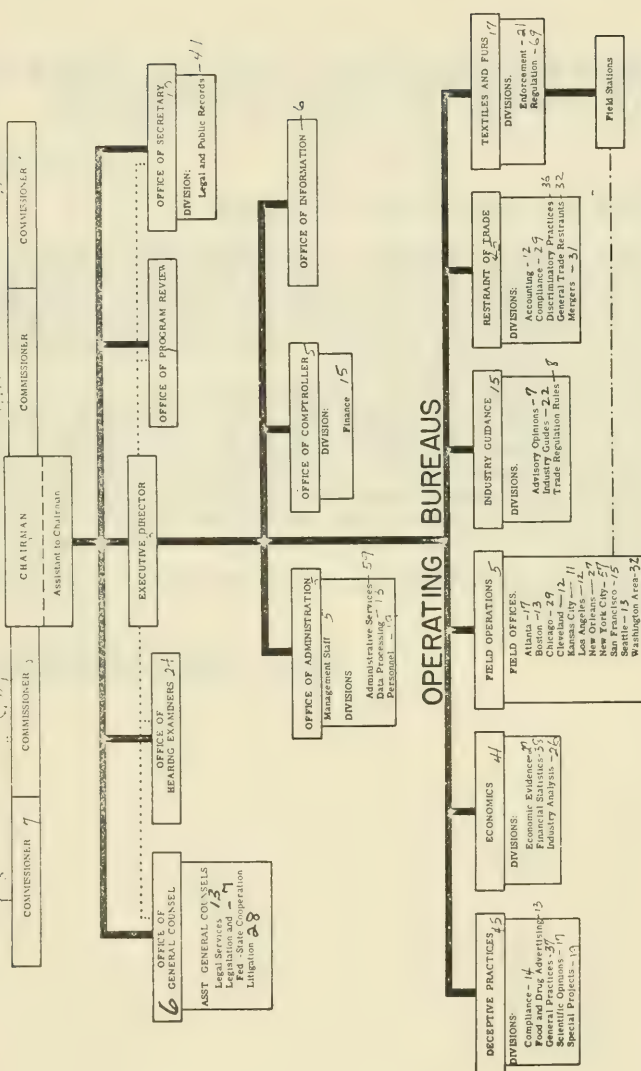
I am also sending you the material requested by Miss Beigell concerning the nature of our complaint letters.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

(661)

FEDERAL TRADE COMMISSION



----- ADMINISTRATION ONLY.

----- ADMINISTRATIVE SERVICES AND
FORMAL INVESTIGATIVE MATTERS.

Approved: *Carl R. Wilson*
Chairman

June 1969

Management Staff

** All figures are as of 6/26/69.*

FEDERAL TRADE COMMISSION—TREASURY EXPENDITURES BY BUREAU, JULY 1, 1958 TO JUNE 30, 1968
[In thousands of dollars]

Bureau	Fiscal year—									
	1968	1967	1966	1965	1964	1963	1962	1961	1960	1959
Commissioners and offices.....	590	589	567	533	460	409	372	288	261	249
Office of the Secretary.....	358	335	344	351	320	285	265	171	202	192
Office of Program Review.....	41	43	46							
Executive Director.....	109	122	140	389	662	649	534	453	366	336
Office of Admini. Tration.....	865	877	734							
Office of the Comptroller.....	178	181	253	250	212	212	427	376	331	312
Office of the General Counsel.....	856	800	784	846	633	556	502	634	542	472
Hearing examiners.....	451	445	470	563	527	485	414	332	286	249
Bureau of Litigation.....								1,152	1,013	927
Bureau of Restraint of Trade.....	2,653	2,469	2,370	2,411	2,168	1,960	1,664			
Bureau of Investigation.....								3,110	2,604	2,423
Bureau of Deceptive Practices.....	1,840	1,572	1,509	1,552	1,329	1,239	1,146			
Bureau of Textiles and Furs.....	1,200	1,098	1,006	1,000	870	801	634	180	148	111
Bureau of Field Operations.....	3,241	3,007	2,885	2,926	2,675	2,647	2,008			
Bureau of Consultation.....								432	377	358
Bureau of Industry Guidance.....	782	753	670	645	531	465	388			
Bureau of Economics.....	1,261	1,201	1,201	1,131	971	931	502	305	305	289
General operating costs.....	768	638	729	559	656	679	620	381	284	185
Total.....	15,193	14,090	13,708	13,656	12,014	11,318	9,476	7,814	6,719	6,103

Total program costs—fiscal year 1969 (first 9 months only)

Total funds available, 1969		\$16, 900, 000
Antimonopoly:		
F.T.C. Act, section 5	\$2, 049, 351	
Clayton Act, section 2	1, 845, 956	
Clayton Act, section 3	26, 906	
Clayton Act, section 7	1, 181, 446	
Clayton Act, section 8		
Trademarks	926	
		5, 104, 585
Deceptive practices:		
F.T.C. Act, section 5	3, 600, 048	
F.T.C. Act, section 12	462, 083	
Insurance	24, 329	
Wool Act	272, 070	
Fur Act	515, 292	
Flammable Fabrics Act	116, 122	
Fabrics Identification Act	489, 172	
		5, 479, 116
Truth in lending		202, 096
Truth in packaging		132, 086
Export Trade Act		39, 612
Industry guidance		662, 552
Economic and financial reports		862, 844
Net obligations incurred to Mar. 31, 1969		12, 482, 891

Total program costs, fiscal year 1968

Total funds available, 1968		\$15, 281, 000
Antimonopoly:		
F.T.C. Act, section 5	\$2, 757, 592	
Clayton Act, section 2	2, 238, 246	
Clayton Act, section 3	28, 600	
Clayton Act, section 7	1, 348, 276	
Calyton Act, section 8		
Trademarks	21, 000	
		6, 393, 714
Deceptive practices:		
F.T.C. Act, section 5	4, 515, 501	
F.T.C. Act, section 12	473, 890	
Insurance	40, 615	
Wool Act	447, 501	
Fur Act	401, 610	
Flammable Fabrics Act	201, 830	
Fabrics Identification Act	564, 964	
		6, 645, 911
Truth in packaging		92, 161
Export Trade Act		49, 809
Industry guidance		986, 590
Economic and financial reports		1, 152, 973
Total program costs		15, 321, 185
DEDUCT: Net unfunded operating costs		—41, 000
Net obligations incurred		15, 280, 158

SUMMARY OF PROGRAM COSTS

[Comparison with prior years by percent of cost]

	Fiscal years—			
	1968	1967	1966	1965
Antimonopoly:				
FTC Act, sec. 5	18.0	17.8	18.9	19.9
Clayton Act, sec. 2	14.7	15.6	17.1	19.9
Clayton Act, sec. 3	.2	.1	.2	.1
Clayton Act, sec. 7	8.8	10.7	10.3	9.9
Clayton Act, sec. 8		.1	.2	.2
Compliance—Attorney General				1.2
Trademarks	.1	.2	.2	.2
Total, antimonopoly	41.8	44.5	46.9	51.4
Deceptive practices:				
FTC Act, sec. 5	29.5	26.8	23.8	21.6
FTC Act, sec. 12	3.1	3.5	4.8	5.4
Insurance	.3	.4	.3	.1
Wool Act	2.9	2.5	2.7	2.4
Fur Act	2.6	2.2	2.3	2.4
Flammable Fabrics Act	1.3	1.1	.7	.8
Fabrics Identification Act	3.7	4.2	4.5	4.1
Total, deceptive practices	43.4	40.7	39.1	36.8
Truth in packaging	.6			
Export Trade Act	.3	.4	.5	.4
Industry guidance	6.4	6.7	5.9	4.1
Economic and financial reports	7.5	7.7	7.6	7.3
Total	100.0	100.0	100.0	100.0
Total program costs	\$15,321,158	\$14,323,742	\$13,657,057	\$13,460,089

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1968		Fiscal year 1967		Fiscal year 1966	
	Amount	Percent to total section 2	Amount	Percent to total section 2	Amount	Percent to total section 2
Section 2(a)	\$1,519,587	67.8	\$1,330,779	59.4	\$1,401,809	59.9
Section 2(c)	278,682	12.5	314,730	14.0	279,418	11.9
Section 2(d)	263,598	11.8	315,764	14.0	401,710	17.2
Section 2(e)	19,899	.9	21,798	1.0	9,900	.4
Section 2(f)	156,480	7.0	259,168	11.6	247,431	10.6
Total	2,238,246	100.0	2,242,239	100.0	2,340,268	100.0

Total program costs, fiscal year 1967

Total funds available, 1967----- \$14,378,000

Antimonopoly:

F.T.C. Act, section 5	\$2,537,610
Clayton Act, section 2	2,242,239
Clayton Act, section 3	16,104
Clayton Act, section 7	1,528,372
Clayton Act, section 8	19,504
Trademarks	30,496

6,374,325

Deceptive practices:

F.T.C. Act, section 5	3,835,535
F.T.C. Act, section 12	502,052
Insurance	58,206
Wool Act	365,938
Fur Act	310,042
Flammable Fabrics Act	157,979
Fabrics Identification Act	605,525

5,835,277

Truth in packaging-----	\$4, 797
Export Trade Act-----	52, 293
Industry guidance-----	960, 093
Economic and financial reports-----	1, 096, 957
Total program costs-----	14, 323, 742
Deduct: Net unfunded operating costs-----	-19, 000
Net obligations incurred-----	14, 304, 742

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	1967	Fiscal year— 1966	1965	1964
Antimonopoly:				
FTC Act, sec. 5-----	17.8	18.9	19.9	17.7
Clayton Act, sec. 2-----	15.6	17.1	19.9	19.7
Clayton Act, sec. 3-----	.1	.2	.1	.2
Clayton Act, sec. 7-----	10.7	10.3	9.9	10.6
Clayton Act, sec. 8-----	.1	.2	.2	.1
Compliance, Attorney General-----			1.2	4.8
Trademarks-----	.2	.2	.2	.2
Total antimonopoly-----	44.5	46.9	51.4	53.3
Deceptive practices:				
FTC Act, sec. 5-----	26.8	23.8	21.6	21.8
FTC Act, sec. 12-----	3.5	4.8	5.4	4.8
Insurance-----	.4	.3	.1	
Wool Act-----	2.5	2.7	2.4	2.2
Fur Act-----	2.2	2.3	2.4	3.0
Flammable Fabrics Act-----	1.1	.7	.8	.9
Fabrics Identification Act-----	4.2	4.5	4.1	3.4
Total deceptive practices-----	40.7	39.1	36.8	36.1
Export Trade Act-----	.4	.5	.4	.3
Industry guidance-----	6.7	5.9	4.1	3.9
Economic and financial reports-----	7.7	7.6	7.3	6.4
Total-----	100.0	100.0	100.0	100.0
Total program costs-----	\$14, 323, 742	\$13, 657, 057	\$13, 460, 089	\$12, 275, 700

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1967		Fiscal year 1966		Fiscal year 1965	
	Amount	Percent to total section 2	Amount	Percent to total section 2	Amount	Percent to total section 2
Section 2(a)-----	\$1, 330, 779	59.4	\$1, 401, 809	59.9	\$1, 620, 155	60.9
Section 2(c)-----	314, 730	14.0	279, 418	11.9	223, 886	8.4
Section 2(d)-----	315, 764	14.0	401, 710	17.2	533, 143	20.1
Section 2(e)-----	21, 798	1.0	9, 900	.4	22, 350	.8
Section 2(f)-----	259, 168	11.6	247, 431	10.6	259, 719	9.8
Total-----	2, 242, 239	100.0	2, 340, 268	100.0	2, 659, 253	100.0

Total program costs, fiscal year 1966

Total funds available, 1966-----	\$13, 860, 000
Antimonopoly:	
F.T.C. Act, section 5-----	\$2, 580, 119
Clayton Act, section 2-----	2, 340, 268
Clayton Act, section 3-----	25, 442
Clayton Act, section 7-----	1, 407, 160
Clayton Act, section 8-----	19, 932
Trademarks-----	31, 856
	6, 404, 777

Deceptive practices:

F.T.C. Act, section 5	\$3, 257, 588
F.T.C. Act, section 12	653, 070
Insurance	37, 767
Wool Act	363, 136
Fur Act	314, 273
Flammable Fabrics Act	94, 931
Fabrics Identification Act	615, 331
	\$5, 336, 096
Export Trade Act	72, 723
Industry guidance	801, 424
Economic and financial reports	1, 042, 037
Total program costs	13, 657, 057
Add: Net unfunded operating costs	14, 500
Net obligations incurred	13, 671, 557

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1966	1965	1964	1963
Antimonopoly:				
FTC Act, sec. 5	18.9	19.9	17.7	13.9
Clayton Act, sec. 2	17.1	19.9	19.7	18.3
Clayton Act, sec. 3	.2	.1	.2	.3
Clayton Act, sec. 7	10.3	9.9	10.6	11.7
Clayton Act, sec. 8	.2	.2	.1	.2
Compliance-Attorney General		1.2	4.8	8.3
Trademarks	.2	.2	.2	.2
Total, antimonopoly	46.9	51.4	53.3	52.7
Deceptive practices:				
FTC Act, sec. 5	23.8	21.6	21.8	22.2
FTC Act, sec. 12	4.8	5.4	4.8	6.3
Insurance	.3	.1		
Wool Act	2.7	2.4	2.2	1.9
Fur Act	2.3	2.4	3.0	3.5
Flammable Fabrics Act	.7	.8	.9	.6
Fabrics Identification Act	4.5	4.1	3.4	3.2
Total, deceptive practices	39.1	36.8	36.1	37.7
Export Trade Act	.5	.4	.3	.1
Industry guidance	5.9	4.1	3.9	3.7
Economic and financial reports	7.6	7.3	6.4	5.8
Total	100.0	100.0	100.0	100.0
Total, program costs	\$13, 657, 057	\$13, 460, 089	\$12, 275, 700	\$11, 456, 007

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1966		Fiscal year 1965		Fiscal year 1964	
	Amount	Percent to total section 2	Amount	Percent to total section 2	Amount	Percent to total section 2
Section 2(a)	\$1, 401, 809	59.9	\$1, 620, 155	60.9	\$1, 422, 644	58.9
Section 2(c)	279, 418	11.9	223, 886	8.4	217, 606	9.0
Section 2(d)	401, 710	17.2	533, 143	20.1	620, 542	25.7
Section 2(e)	9, 900	.4	22, 350	.8	45, 163	1.9
Section 2(f)	247, 431	10.6	259, 719	9.8	108, 226	4.5
Total	2, 340, 268	100.0	2, 659, 253	100.0	2, 414, 181	100.0

Total program costs, fiscal year 1965

Total funds available, 1965-----		\$13, 509, 369
Antimonopoly:		
F.T.C. Act, section 5-----	\$2, 673, 636	
Clayton Act, section 2-----	2, 659, 253	
Clayton Act, section 3-----	20, 112	
Clayton Act, section 7-----	1, 328, 509	
Clayton Act, section 8-----	26, 214	
Compliance—Attorney General-----	155, 277	
Trademarks-----	24, 288	
		6, 887, 289
Deceptive practices:		
F.T.C. Act, section 5-----	2, 925, 820	
F.T.C. Act, section 12-----	732, 698	
Insurance-----	7, 671	
Wool Act-----	328, 115	
Fur Act-----	329, 707	
Flammable Fabrics Act-----	111, 210	
Fabrics Identification Act-----	545, 584	
		4, 980, 805
Export Trade Act-----		57, 913
Industry guidance-----		555, 820
Economic and financial reports-----		978, 262
Total program costs-----		13, 460, 089
Add: Net unfunded operating costs-----		230
Net obligations incurred-----		13, 460, 319

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1965	1964	1963	1962
Antimonopoly:				
FTC Act, sec. 5-----	19.9	17.7	13.9	11.8
Clayton Act, sec. 2-----	19.9	19.7	18.3	18.1
Clayton Act, sec. 3-----	.1	.2	.3	.7
Clayton Act, sec. 7-----	9.9	10.6	11.7	12.4
Clayton Act, sec. 8-----	.2	.1		
Compliance, Attorney General-----	1.2	4.8	8.3	7.1
Trademarks-----	.2	.2	.2	.4
Total antimonopoly-----	51.4	53.3	52.7	50.5
Deceptive practices:				
FTC Act, sec. 5-----	21.6	21.8	22.2	21.0
FTC Act, sec. 12-----	5.4	4.8	6.3	6.5
Insurance-----	.1			
Wool Act-----	2.4	2.2	1.9	2.0
Fur Act-----	2.4	3.0	3.5	3.7
Flammable Fabrics Act-----	.8	.9	.6	.5
Fabrics Identification Act-----	4.1	3.4	3.2	3.4
Total deceptive practices-----	36.8	36.1	37.7	37.1
Export Trade Act-----	.4	.3	.1	.2
Industry guidance (except advisory opinions)-----	4.1	3.9	3.7	4.9
Economic and financial reports-----	7.3	6.4	5.8	7.3
Total-----	100.0	100.0	100.0	100.0
Total program costs-----	\$13, 460, 089	\$12, 275, 700	\$11, 456, 007	\$9, 963, 000

DETAIL OF CLAYTON ACT, SECTION 2

	Fiscal year 1965		Fiscal year 1964		Fiscal year 1963	
	Amount	Percent to total section 2	Amount	Percent to total section 2	Amount	Percent to total section 2
Section 2(a).....	\$1,620,155	60.9	\$1,422,644	58.9	\$1,228,894	58.9
Section 2(c).....	223,886	8.4	217,606	9.0	253,129	12.1
Section 2(d).....	533,143	20.1	620,542	25.7	422,924	20.3
Section 2(e).....	22,350	.8	45,163	1.9	42,390	2.0
Section 2(f).....	259,719	9.8	108,226	4.5	139,053	6.7
Total.....	\$2,659,253	100.0	2,414,181	100.0	2,086,390	100.0

Total program costs, fiscal year 1964

Total funds available, appropriation 1964.....	\$12,214,750
Antimonopoly:	
F.T.C. Act, section 5.....	\$2,169,895
Clayton Act, section 2.....	2,414,181
Clayton Act, section 3.....	30,607
Clayton Act, section 7.....	1,299,537
Clayton Act, section 8.....	10,982
Compliance, Attorney General.....	586,433
Trademarks.....	28,312
	6,539,947
Deceptive practices:	
F.T.C. Act, section 5.....	2,677,448
F.T.C. Act, section 12.....	590,382
Insurance.....	908
Wool Act.....	265,067
Fur Act.....	371,098
Flammable Fabrics Act.....	113,205
Fabrics Identification Act.....	417,281
	4,435,389
Export Trade Act.....	34,386
Industry guidance.....	484,381
Economic and financial reports.....	781,597
	12,275,700
Total program costs.....	12,275,700
Less: Unfunded operating costs.....	68,617
	12,207,083
Net obligations incurred.....	12,207,083

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1964	1963	1962	1961
Antimonopoly:				
FTC Act, sec. 5	17.7	13.9	11.8	10.8
Clayton Act:				
Sec. 2	19.7	18.3	18.1	22.2
Sec. 3	.2	.3	.7	1.1
Sec. 7	10.6	11.7	12.4	13.8
Sec. 8	.1			.1
Compliance—Attorney General	4.8	8.3	7.1	
Trademarks	.2	.2	.4	.3
Total antimonopoly	53.3	52.7	50.5	48.3
Deceptive practices:				
FTC Act:				
Sec. 5	21.8	22.2	21.0	23.8
Sec. 12	4.8	6.3	6.5	4.5
Insurance				.1
Wool Act	2.2	1.9	2.0	2.0
Fur Act	3.0	3.5	3.7	3.3
Flammable Fabrics Act	.9	.6	.5	.3
Fabrics Identification Act	3.4	3.2	3.4	2.9
Total deceptive practices	36.1	37.7	37.1	36.9
Export Trade Act	.3	.1	.2	.4
Industry guidance (except advisory opinions)	3.9	3.7	4.9	5.7
Economic and financial reports	6.4	5.8	7.3	8.7
Total	100.0	100.0	100.0	100.0
Total program costs	\$12,275,700	\$11,456,007	\$9,963,000	\$8,003,124

DETAIL OF CLAYTON ACT, SEC. 2

	Fiscal year 1964		Fiscal year 1963	
	Amount	Percent to total, sec. 2	Amount	Percent to total, sec. 2
Sec. 2(a)	\$1,422,644	58.9	\$1,228,894	58.9
Sec. 2(c)	217,606	9.0	253,129	12.1
Sec. 2(d)	620,542	25.7	422,924	20.3
Sec. 2(e)	45,163	1.9	42,390	2.0
Sec. 2(f)	108,226	4.5	139,053	6.7
Total	2,414,181	100.0	2,086,390	100.0

Total programs costs, fiscal year 1963

Total funds available, appropriation 1963	\$11,472,500
Antimonopoly:	
F.T.C. Act, section 5	\$1,608,369
Clayton Act, section 2	2,177,493
Clayton Act, section 3	34,713
Clayton Act, section 7	1,353,807
Clayton Act, section 8	
Compliance, Attorney General	960,393
Fabrics Identification Act	370,272
	6,097,917
Deceptive practices:	
F.T.C. Act, section 5	2,568,762
F.T.C. Act, section 12	728,973
Insurance	
Wool Act	219,849
Fur Act	404,985
Flammable Fabrics Act	69,426
Trademarks	23,142
	4,362,267

Export Trade Act.....	\$11,571
Industry guidance.....	428,127
Economic and financial reports.....	671,118
Total program costs.....	11,571,000
Less: Unfunded operating costs.....	115,000
Net obligations incurred.....	11,456,000

SUMMARY OF PROGRAM COSTS—COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—			
	1963	1962	1961	1960
Antimonopoly:				
FTC Act, sec. 5.....	13.9	11.8	10.8	11.7
Clayton Act:				
Sec. 2.....	18.3	18.1	22.2	19.5
Sec. 3.....	.3	.7	1.1	1.3
Sec. 7.....	11.7	12.4	13.8	15.4
Sec. 8.....			.1	.2
Compliance—Attorney General.....	8.3	7.1		
Trademarks.....	.2	.4	.3	.2
Total, antimonopoly.....	52.7	50.5	48.3	48.3
Deceptive practices:				
FTC Act:				
Sec. 5.....	22.2	21.0	23.8	23.0
Sec. 12.....	6.3	6.5	4.5	4.2
Insurance.....			.1	
Wool Act.....	1.9	2.0	2.0	3.2
Fur Act.....	3.5	3.7	3.3	3.2
Flammable Fabrics Act.....	.6	.5	.3	.1
Fabrics Identification Act.....	3.2	3.4	2.9	2.1
Total, deceptive practices.....	37.7	37.1	36.9	35.8
Export Trade Act.....	.1	.2	.4	.6
Industry guidance.....	3.7	4.9	5.7	5.5
Economic and financial reports.....	5.8	7.3	8.7	9.8
Total.....	100.0	100.0	100.0	100.0
Total, program costs.....	\$11,571,000	\$9,963,000	\$8,003,124	\$6,839,532

DETAIL OF CLAYTON ACT, SEC. 2

	Amount	Percent to total, sec. 2
Sec. 2(a).....	\$1,228,894	58.9
Sec. 2(c).....	253,129	12.1
Sec. 2(d).....	422,924	20.3
Sec. 2(e).....	42,390	2.0
Sec. 2(f).....	139,053	6.7
Total.....	\$2,086,390	100.0

Summary of operating costs, fiscal year 1962

Antimonopoly:	
FTC Act, sec. 5.....	\$1,177,900
Clayton Act, sec. 2.....	1,802,400
Clayton Act, sec. 3.....	67,500
Clayton Act, sec. 7.....	1,231,700
Clayton Act, sec. 8.....	600
Compliance, Attorney General.....	706,300
Trademarks.....	41,200
	\$5,027,600

Deceptive practices:

FTC Act, sec. 5	\$2,096,800
FTC Act, sec. 12	647,500
Wool Act	201,800
Fur Act	368,600
Flammable Fabrics Act	48,100
Fabrics Identification Act	338,600
	<u>\$3,701,400</u>

Export Trade Act	24,200
Industry guidance	483,400
Economic and financial reports	726,400
	<u>9,963,000</u>

Total operating costs 9,963,000

SUMMARY OF OPERATING COSTS, FISCAL YEAR 1962, COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—		
	1962	1961	1960
Antimonopoly:			
FTC Act, sec. 5	11.8	10.8	11.7
Clayton Act:			
Sec. 2	18.1	22.2	19.5
Sec. 3	.7	1.1	1.3
Sec. 7	12.4	13.8	15.5
Sec. 8		.1	.2
Compliance—Attorney General	7.1		
Trademarks	.4	.3	.2
Total	<u>50.5</u>	<u>48.3</u>	<u>48.4</u>
Deceptive practices:			
FTC Act:			
Sec. 5	21.0	23.8	23.0
Sec. 12	6.5	4.5	4.2
Insurance		.1	
Wool Act	2.0	2.0	3.1
Fur Act	3.7	3.3	3.3
Flammable Fabrics Act	.5	.3	.1
Fabrics Identification Act	3.4	2.9	2.1
Total	<u>37.1</u>	<u>36.9</u>	<u>35.8</u>
Export Trade Act	.2	.4	.6
Industry guidance	4.9	5.7	5.5
Economic and Financial Reports	7.3	8.7	9.7
Total obligations incurred	<u>100.0</u>	<u>100.0</u>	<u>100.0</u>
Total, operating costs	<u>\$9,963,000</u>	<u>\$8,003,124</u>	<u>\$6,839,532</u>

Summary of operating costs, fiscal year 1961

Antimonopoly:

FTC Act, section 5	\$865,798
Clayton Act, section 2	1,780,133
Clayton Act, section 3	86,444
Clayton Act, section 7	1,105,208
Clayton Act, section 8	5,856
Trademarks	20,815
	<u>\$3,864,254</u>

Deceptive practices:

FTC Act, section 5	1,904,030
FTC Act, section 12	361,042
Insurance	5,650
Wool Act	161,220
Fur Act	266,041
Flammable Fabrics Act	24,328
Fabrics Identification Act	234,665
	<u>2,956,976</u>

Export trade act.....	\$32,542
Trade practice conferences.....	452,530
Economic and financial reports.....	696,822
Total obligations incurred.....	8,003,124

SUMMARY OF OPERATING COSTS, FISCAL YEAR 1961, COMPARISON WITH PRIOR YEARS BY PERCENT OF COST

	Fiscal year—		
	1961	1960	1959
Antimonopoly:			
FTC Act, sec. 5.....	10.8	11.7	11.3
Clayton Act:			
Sec. 2.....	22.2	19.5	18.6
Sec. 3.....	1.1	1.3	1.3
Sec. 7.....	13.8	15.5	16.9
Sec. 8.....	.1	.2	.2
Trademarks.....	.3	.2	.4
Total.....	48.3	48.4	48.7
Deceptive practices:			
FTC Act:			
Sec. 5.....	23.8	23.0	21.0
Sec. 12.....	4.5	4.2	4.1
Insurance.....	.1		.5
Wool Act.....	2.0	3.1	4.0
Fur Act.....	3.3	3.3	4.4
Flammable Fabrics Act.....	.3	.1	.1
Fabrics Identification Act.....	2.9	2.1	.8
Total.....	36.9	35.8	34.9
Export Trade Act.....	.4	.6	.6
Trade practice conferences.....	5.7	5.5	5.5
Economic and financial reports.....	8.7	9.7	10.3
Total obligations incurred.....	100.0	100.0	100.0
Total obligations in dollars.....	\$8,003,124	\$6,839,532	\$6,484,168

SUMMARY OF OPERATING COSTS—FISCAL YEARS 1959–60

	Fiscal Year—	
	1960	1959
Antimonopoly:		
FTC Act, sec. 5.....	\$802,627	\$736,154
Clayton Act:		
Sec. 2.....	1,333,899	1,204,853
Sec. 3.....	86,091	87,297
Sec. 7.....	1,055,526	1,094,021
Sec. 8.....	14,525	11,891
Trademarks.....	15,885	26,087
Total.....	3,308,553	3,160,303
Deceptive practices:		
F.T.C. Act:		
Sec. 5.....	1,574,027	1,362,203
Sec. 12.....	285,715	264,991
Insurance.....	884	32,265
Wool Act.....	216,274	257,699
Fur Act.....	224,230	284,859
Flammable Fabrics Act.....	4,963	6,242
Fabrics Identification Act.....	141,435	55,673
Total.....	2,447,528	2,263,932
Export Trade Act.....	40,932	39,298
Trade Practice Conferences.....	375,634	355,921
Economic and financial reports.....	666,885	664,714
Total obligations incurred.....	6,839,532	6,484,168

OBLIGATIONS BY ACTIVITY

	Fiscal Year—					
	1952	1953	1954	1955	1956	1957
Antimonopoly:						
Investigation and litigation.....	\$1,693,806	\$1,711,218	\$1,685,540	\$1,544,772	\$1,753,778	\$2,539,660
Economic and financial reports.....	229,511	267,851	234,210	275,210	314,736	514,650
Trade practice conference and small business.....					75,000	79,540
Total, antimonopoly.....	1,923,317	1,979,069	1,919,750	1,829,982	2,143,514	3,133,850
Antideceptive practices:						
Investigation and litigation.....	1,229,400	985,167	927,840	1,093,448	1,232,638	1,130,770
Trade practice conference and small business.....	217,696	313,406	335,540	245,334	155,272	159,080
Wool, Fur and Flammable Acts enforcement.....	308,104					
Wool, Fur and Flammable Acts enforcement.....		271,813	286,640	258,938	270,242	350,650
Lanham Act and insurance.....	23,691	30,705	15,000	57,928	86,081	103,220
Total, antideceptive practices.....	1,778,891	1,601,091	1,565,020	1,655,648	1,744,233	1,743,720
Executive direction and management.....	299,412	311,075	336,260	361,006	367,118	352,650
Administrative salaries.....	305,297	285,999	232,770	279,645	292,298	286,203
Total obligations incurred.....	4,306,917	4,177,234	4,053,800	4,126,281	4,547,163	5,516,423
						6,185,048

OBLIGATIONS BY ACTIVITY

	Fiscal year—				
	1947	1948	1949	1950	1951
Antimonopoly:					
Legal casework.....	\$796,700	\$941,091	\$1,389,515	\$1,400,000	\$1,298,713
Economic and financial reports.....	257,537	202,375	222,797	234,174	292,615
Export trade.....	76,760	56,524	54,928	52,432	53,062
Total, antimonopoly.....	1,130,997	1,199,990	1,667,240	1,686,606	1,644,390
Antideceptive practices:					
Legal casework.....	1,220,779	1,119,958	1,306,688	1,145,823	1,221,302
Trade practice conferences.....	169,720	243,793	257,384	211,497	236,600
Wool Act administration.....	311,994	301,551	326,522	311,165	309,372
Lanham Act and insurance.....		34,828	38,671	46,909	33,875
Total, antideceptive practices.....	1,702,493	1,700,130	1,929,265	1,715,394	1,801,139
Administrative salaries.....				320,792	326,439
Total obligations incurred.....	2,833,490	2,900,120	3,596,505	3,722,792	3,771,968

FEDERAL TRADE COMMISSION ITEM No. 1
COMPLAINTS AND ORDERS ¹ (1st 11 Months, Fiscal Year 1969)

	Complaints pending, July 1, 1968	Complaints docketed for litigation	Reopened	Complaints and consents of OCD's ² (C series)		Assurances of voluntary compliance		Docketed orders to cease and desist		Dismissed	Terminated	Withdrawn	Complaints pending May 31, 1969
						Consent	Contest						
FTC Act, sec. 5 (DP).....	20	9	1	42	1	2	8	2	3				14
FTC Act, sec. 5 (Insurance).....	2			1				1			1		
FTC Act, sec. 5 (DP) and 12.....	3			6					1		1		
FTC Act, sec. 5 (RT).....	5	1		6			1						1
FTC Act, 5 (RT)/Clayton, sec. 7.....	5	2		2			1				1		5
Clayton Act, sec. 7.....	6	4		4		1	3		1				5
FTC, 5 (RT)/Clayton, 2 a, c, f.....	1												1
Clayton Act:													
Sec. a.....				2									
Sec. c.....				4									
Sec. d.....		1											
Sec. f.....	2											1	
Sec. a, f.....	1												1
FTC Act, sec. 5 (DP) and—													
Wool.....				12									
Fur.....		1		51									1
Flammable Fabrics.....				10									
Textile.....		2		17			1	1					1
Wool, Fur, Textile.....	1			4									
Flammable Fabrics and Textile.....				3									
Wool and Textile.....				16									
Fur and Textile.....				3									
Wool and Fur.....				4									

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OCD—Order to cease and desist.

COMPLAINTS AND ORDERS¹ (FISCAL YEAR 1968)

Complaints pending, July 1, 1967	Complaints docketed for litigation	Complaints and consents (C series)	Docketed orders to cease and desist					Dismissed	Terminated	Closed	Complaints pending, June 30, 1968
			Reopened	Consent	Contest	Admssive answer	Default				
FTC Act, sec. 5 (DP).....	28	15		2	12	4	2	3			20
FTC Act, sec. 5, Insurance.....	1	1									2
FTC Act, Secs. 5 (DP) and 12.....	5				2						2
FTC Act, sec. 5 (DP) and (RT).....	1				1						3
FTC Act, sec. 5 (RT).....	7	2	1	1	4						5
FTC, sec. 5 (RT)/Clayton, sec. 7.....	4	1									5
Clayton Act, sec. 7.....	7	1	1		2					1	6
FTC, 5 (RT)/Clayton, sec. 2 a, c, f.....	1										1
Clayton Act:											
Sec. 2a.....		2	1	2				1			
Sec. 2c.....											
Sec. 2d.....	1				1						
Sec. 2f.....	3								1		2
Sec. 2 g, f.....	1										1
Sec. 2 a, d, e.....	1				1						
FTC Act, sec. 5 (DP) and—											
Wool.....	2								2		
Fur.....											
Flammable Fabrics.....											
Textile.....	1				1						
Flammable Fabrics and Textile.....		1									1
Wool and Textile.....											
Wool, Fur, and Textile.....											

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² DCD—Order to cease and desist.

COMPLAINTS AND ORDERS¹ (FISCAL YEAR 1967)

	Complaints pending, July 1, 1966	Complaints docketed for litigation	Complaints and consents OGD's ² (C series)	Assurances of voluntary compliance	Docketed orders to cease and desist				Complaints pending, June 30, 1967
					Consent	Contest	Admssive answer	Default	
FTC Act, sec. 5 (DP)	17	34	63	1	6	9	2	2	1
FTC Act, sec. 5, Insurance	1	1	1	1	1	1	1	1	1
FTC Act, sec. 5 (DP) and 12	7	5	3	1	1	5	1	1	5
FTC Act, sec. 5 (DP) and (RT)	1	1	1	1	1	1	1	1	1
FTC Act, sec. 5 (RT)	7	4	4	1	2	2	1	1	7
FTC, sec. 5 (RT)/Clayton, sec. 7	5	2	3	1	1	1	1	1	4
FTC, sec. 5 (RT)/Clayton, sec. 2a	8	1	1	1	1	1	1	1	7
Clayton Act, sec. 7	1	1	5	1	1	1	1	1	1
FTC, 5 (RT)/Clayton, 2a, c, f	3	2	2	1	1	3	1	1	1
Clayton Act:	3	3	1	1	1	2	1	1	1
Sec. 2a	3	3	1	1	1	2	1	1	1
Sec. 2d	3	3	1	1	1	2	1	1	1
Sec. 2c	3	3	1	1	1	2	1	1	1
Sec. 2f	3	3	1	1	1	2	1	1	1
Sec. 2 a, f	1	1	1	1	1	2	1	1	1
Sec. 2 a, d, e	2	1	1	1	1	2	1	1	1
Sec. 2 a, d	2	1	1	1	1	2	1	1	1
Sec. 2 d, e	3	3	1	1	1	2	1	1	1
FTC Act, sec. 5 (DP) and —	3	3	1	1	1	2	1	1	1
Wool	3	3	1	1	1	2	1	1	1
Fur	3	3	1	1	1	2	1	1	1
Flammable Fabrics	3	3	1	1	1	2	1	1	1
Textile	3	3	1	1	1	2	1	1	1
Flammable Fabrics and Textile	3	3	1	1	1	2	1	1	1
Wool and Fur	3	3	1	1	1	2	1	1	1
Wool and Textile	3	3	1	1	1	2	1	1	1
Wool, Fur, and Textile	3	3	1	1	1	2	1	1	1

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting, excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OCD—Order to cease and desist.

COMPLAINTS AND ORDERS¹ (FISCAL YEAR 1966)

	Complaints pending, July 1, 1965	Complaints docketed for litigation	Reopened	Complaints and consents OGD's ² (C series)		Docketed orders to cease and desist				Complaints pending June 30, 1966
				Consent	Contest	Admssive answer	Default	Dismissed	Closed	
FTC Act, sec. 5 (DP)	19	9	1	34	1	6	2	2	1	17
FTC Act, sec. 5 (DP)	12	1		4						1
FTC Act, sec. 5 (DP) and (RT)	1			1		4	1	1		7
FTC Act, sec. 5 (RT)	8	5		6	2	1		2	1	1
FTC Act, sec. (RT)/Clayton, sec. 7	4	3		3		2				7
FTC, sec. 5 (RT)/Clayton, sec. 2a	3			1		1		2		5
Clayton Act sec. 7	8	2	1	4	1	1		1		8
Clayton Act:										
Sec. 2a	6		1			4				3
Sec. 2d	4	1		63		2				3
Sec. 2f	2			2						3
Sec. 2a, f		1								1
Sec. 2a, d	3							1		2
Sec. 2a, d, e	1	1						1		1
FTC Act, sec. 5 (DP) and—										
Wool	1	2		10						3
Fur				16						
Flammable Fabrics				3						
Textile			3	10		2		3	1	
Wool, Flammable Fabrics, and Textile	1	1		1						
Fur and Textile				1						
Wool and Fur				2						
Wool, Fur, and Textile				2						
Wool and Textile				3						

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OCD—Order to cease and desist.
³ C series reopened and dismissed.

COMPLAINTS AND ORDERS¹ (FISCAL YEAR 1965)

	Complaints pending, July 1, 1964	Complaints docketed for litigation	Reopened	Complaints and consents (C series)		Docketed orders to cease and desist							Complaints pending, June 30, 1965	
				Consent	Contest	Admssive answer	Default	Dismissed	Withdrawn	Declaratory				
FTC Act, sec. 5 (DP)	35	10	1	41										19
FTC Act, sec. 5 (DP) and 12	12	9		7										12
FTC Act, sec. 5 (DP)/Clayton, 2a				1										
FTC Act, sec. 5 (RT) and (DP)														
FTC Act, sec. 5 (RT)	1			5	1			3		2	2			8
FTC Act, sec. 5 (RT) Clayton, 7	13	2	1	1	1			1						4
FTC Act, sec. 5 (RT) Clayton, 2a	6			1				1						3
FTC Act, sec. 5 (RT)/Clayton, 2a	8			1				1		4				3
Clayton Act, sec. 7	9	4		1	4			1						8
Clayton Act:														
Sec. 2a	9		1					1		3				6
Sec. 2c	1							1						
Sec. 2d	34	1	1	8	4			1		7		18		4
Sec. 2f	2	1								1		2		2
Sec. 2 a, d	5													3
Sec. 2 a, d, e	1									2				3
FTC Act, sec. 5 (DP) and—														1
Wool	1	1		22		1								
Fur				22										
Flammable Fabrics				2										
Textile	1	1		7			1							1
Fur and Textile				5										
Wool, Fur, Textile				4										
Wool and Textile				1										
Wool and Fur				3										

¹ Excludes orders partially disposing of cases; excludes orders modifying and correcting; excludes cases referred for supplemental work unless reopened by formally vacating previous order.

² OCD—Order to cease and desist.

Item No. 12

MEDIAN CASE TIME (ELAPSED TIME IN DAYS, COMPLAINT ISSUANCE TO ORDER ISSUANCE)

	Docketed orders issued	Median case	Case	
			Shortest	Longest
FISCAL YEAR 1969, FIRST 11 MONTHS				
Deceptive practices:				
FTC Act	22	597	152	4,209
FTC, Wool, Fur, Flammable Fabric and Textile Acts	1		173	
Restraint of trade:				
Clayton 2	1		1,464	
Clayton 7	5	1,390	711	1,725
FTC 5	1		2,561	
FTC 5 and Clayton 7	2		947	3,450
FISCAL YEAR 1968				
Deceptive practices:				
FTC Act	25	439	95	2,165
FTC, Wool, Fur, Flammable Fabric and Textile Acts	3	216	180	1,096
Restraint of Trade:				
Clayton 2	6	812	212	3,355
Clayton 7	3	1,576	1,408	2,319
FTC 5	6	666	280	3,301
FISCAL YEAR 1967				
Deceptive practices:				
FTC Act	33	334	44	2,412
FTC, Wool, Fur, Flammable Fabric and Textile Acts	2		160	400
Restraint of trade				
Clayton 2	9	2,372	779	5,161
Clayton 7	1		789	
FTC 5	5	1,691	387	3,087
FTC 5 and 7	3	326	322	2,453

Items Nos. 11 and 13 (Bureau of Deceptive Practices)

From: Berryman Davis, Legal Adviser for Screening & Planning.

To: Frank C. Hale, Director, Bureau of Deceptive Practices.

Re: Robert Pitofsky, Esquire, New York University: Request for data concerning Commission operations.

You have asked me to submit statements in response to Mr. Pitofsky's Questions 11 and 13, insofar as they relate to proceedings utilized in the Bureau of Deceptive Practices.

Question 11: A brief description of techniques used to detect violations in each substantive area within the jurisdiction of the FTC; e.g. textile and fur labeling, deceptive practices, mergers, price discrimination, etc.

Assuming that it is understood that our first awareness of developing unfair practices more often than not results from complaints communicated in person by consumers who are interviewed by staff members in the various field offices, and by letters received from consumers, businessmen, and other members of the public, we employ three techniques and are in the process of developing a fourth in attempting to detect deceptive practices.

1. *Examination of advertising.* Using law school students who work part-time, examination is undertaken, on a selective basis, of the advertisements published in about 170 magazines and 500 newspapers, and the printed scripts of commercial continuities broadcast by some 4,100 radio stations and 525 television stations. The advertising examiners also examine the commercial scripts which have been telecast by the three major television networks over the 24-hour periods comprising the first week of every month.

The purpose of the examination is two-fold. One, it is to be of service to attorneys who are investigating and/or litigating false advertising cases, who need to be current on shifting and changing emphases in advertising themes used in promoting the given commodity in which the attorney has particular interest. Two, as the examiners become knowledgeable in the areas of Bureau concern respecting particular commodities (e.g., analgesics) and particular themes (e.g., relief of depression) they are expected to be alert to and report the appearance of new products to the market the advertising of which appears to them to have deceptive content.

2. *There is a voluntary staff advertising monitoring program*, inaugurated in recent months by the Executive Director. Attachments A and B are fully explanatory.

3. *Records Search*. A single letter of complaint more often than not fails to give indication that there is national interest in undertaking a corrective action. If successive complaints come in, our Records Section builds onto reporting forms a résumé which, at a glance, discloses the receipt of prior complaints and guides the attorney to the previously closed files. Subsequent review thereof frequently discloses the existence of substantial public interest, files are merged, and investigation is initiated.

4. *Computerization*. We have underway a pilot program to computerize some of the same sort of data as that discussed under (3), above, but with many refinements. The plan is, as complaints are received and disposed of, to record (among other things) S.I.C. numbers identifying industries, keywords identifying commodities, zip codes which will locate both the complainant and the proposed respondent, and codes (the Code of Federal Regulations numbers) that classify types of prohibited deceptive trade practices. (See Attachment C)

As the memory bank grows, we shall be calling for printouts that, we are very hopeful, will enable us quickly to spot developing trends in geographical regions, or by industry members, or by type of violation, or by commodity or service, or any combination thereof.

Question 13: Instructions to the staff concerning governing criteria to open or close cases, and concerning selection of the appropriate enforcement procedure (e.g. formal proceeding, advisory opinion, etc.)—largely included in the Administrative Manual.

1. *Criteria for opening cases*. See Attachment D, "Factors to Consider (etc.)."

2. *Criteria for closing cases*. See Attachment E, (FTC Administrative Manual, Appendix 1, Par. 6-051.14C).

3. *Selection of appropriate enforcement procedures*. Assurance of Voluntary Compliance will be accepted if the public interest will be fully safeguarded. In determining that the public interest will be served, the Commission considers:

(a) Nature and gravity of alleged violation;

(b) Prior record and good faith of all parties involved;

(c) Other factors, including adequate assurance of voluntary compliance. (Rules of Practice, § 2.21).

Consent Orders and litigation: If a matter is not appropriate for AVC, a complaint is prepared. The party named may execute consent order, failing which the matter will be litigated.

Respectfully submitted,

BERRYMAN DAVIS,
Legal Adviser for Screening and Planning.

ITEM NO. 1 (TEXTILES AND FURS)

JUNE 17, 1969.

To: John A. Delaney, Director Office of Administration.

From: Henry D. Stringer, Director Bureau of Textiles and Furs.

Subject: The Investigation of the Commission's Practices and Procedures by the American Bar Association.

Reference is made to a letter dated June 9, 1969 from Robert Pitofsky of the New York University School of Law to the General Counsel requesting information as to the Commission's accomplishments and procedures. This office has been asked by you for comments on paragraph 11 of Mr. Pitofsky's letter, and the Bureau's reply is set forth below.

The Bureau of Textiles and Furs has a field staff of 43 investigators assigned to the Washington headquarters, each of the Commission's field offices, and nine field stations located throughout the country. These investigators by reason of their training and experience are experts on the laws administered by the Bureau, i.e., the Wool Products Labeling Act, Fur Products Labeling Act, Textile Fiber Products Identification Act and the Flammable Fabrics Act, and the products subject thereto.

The field staff, when not engaged in formal investigation work, make inspections of fiber suppliers, spinning mills, weaving mills, knitting mills, finishing mills, fabric wholesalers and jobbers, garment manufacturers and wholesalers, and retail distributors located within their assigned territory. These inspections

consist of checking the labeling, invoicing, and advertising practices of the inspected firms, together with the sufficiency of required fiber content and other records required to be maintained by them.

Reports of the inspections are submitted to Washington headquarters. Minor deficiencies are handled by verbal assurances to the investigator at the time of the inspection that corrections will be made or, in certain instances, the inspected firm is requested to put its assurance in writing and submit it to Washington with corrected sample labels or invoices. In those cases where there are serious deficiencies due possibly to intention or negligence, or in the case of deficiencies which have been called to the inspected firm's attention on several occasions without correction being made, it is the practice to request a formal investigation number looking forward to a Commission cease and desist order or an affidavit of voluntary compliance.

The Bureau of Textiles and Furs also has several examiners who scan newspaper and periodical advertising received from throughout the country noting advertisements which are in violation of the Textile, Fur or Federal Trade Commission Acts in regard to textile and fur products.

The efficacy of the Bureau's inspection work is demonstrated when we consider that during the first three quarters of fiscal 1969 of 189 formal investigations initiated 140 of these resulted from the inspection program.

HENRY D. STRINGER,
Director, Bureau of Textiles and Furs.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, N.Y. June 9, 1969.

JOHN BUFFINGTON, Esq.,
*Office of the General Counsel,
Federal Trade Commission,
Washington, D.C.*

DEAR MR. BUFFINGTON: First let me say that I appreciate very much the cordiality with which we were received on Friday, and the very cooperative way in which you and your colleagues went about making information available to us. I will try to set out briefly in this letter the categories of information that it was agreed could be made available to us without inordinate inconvenience to the staff of the Commission.

We request at this time that the following data be supplied:

1. A statistical breakdown of "formal" enforcement activities of the FTC by year for each of the last 10 years. Information furnished would include data with respect to complaints filed and pending, complaints dismissed prior to final action (by settlement or otherwise), cease and desist orders obtained, etc. It is understood that the information will be furnished in the finest categories possible; for example, it would be most helpful in the antimonopoly enforcement area to have separate data for section 7 enforcement, and for each relevant subsection of the Robinson-Patman Act (i.e. 2(a), 2(c), 2(d), 2(e), and 2(f)).

2. A statistical breakdown, similar to that described under Paragraph 1, of FTC "informal" compliance activities (e.g. advisory opinions, trade regulation rules, etc.) by year for each of the past 10 years.

3. Copies of the "Workload and Manpower Quarterly Report" for each quarter for each of the past 4 years.

4. To the extent available, an indication of dollars spent by year by each Bureau and Division of the FTC for the past 12 years.

5. A copy of the transcript of testimony of the FTC Consumer Protection hearings, held during November and December of 1968. It is understood that we will review this transcript and then discuss with you an arrangement whereby a member of our staff may have access to the accumulated written submissions and exhibits compiled during those hearings.

6. Copies of the 1948 agreement, and the subsequent exchange of letters in 1962 and 1963, summarizing coordination arrangements between the Antitrust Division of the Department of Justice and the FTC in areas of concurrent antitrust enforcement.

7. A compilation of data for the present year and the past two years showing the following information with respect to each applicant to the FTC who accepted an offer of employment on the legal staff, or received and declined an

offer: (a) home state (b) law school affiliation (c) rough estimate of class standing, and (d) law school aptitude score (when available).

8. To the extent available, similar information will be furnished for the current year and each of the past two years with respect to applicants who did not receive offers.

9. A copy of the standard rating form used by interviewers in summarizing relevant data on law school students applying for legal positions with the FTC.

10. An organizational chart for the FTC showing the number of people in each Bureau and Division.

11. A brief description of techniques used to detect violations in each substantive area within the jurisdiction of the FTC, e.g., textile and fur labeling, deceptive practices, mergers, price discrimination, etc.

12. Statistical analysis of the duration of formal enforcement proceedings in each substantive area within the jurisdiction of the FTC for a series of recent years (if possible, for cases filed since 1961).

13. Instructions to the staff concerning governing criteria to open or close cases, and concerning selection of the appropriate enforcement procedures (e.g. formal proceeding, advisory opinion, etc.)—largely included in the Administration Manual.

14. Any reports or evaluative materials showing the extent to which states have established or expanded consumer protection programs in the last 10 years.

Please send the data requested to Robert Skitol at the N.Y.U. Law Review office, N.Y.U. Law School, 249 Sullivan Street, New York, New York 10002. We would appreciate it if you would send information along as it becomes available rather than await compilation of all requested data.

In the future, when additional information is requested, we understand that Mr. Skitol is to communicate directly with John Delany.

Again, many thanks for your cooperation.

Very truly yours,

ROBERT PITOFSKY.

ITEM NO. 11 (RESTRAINT OF TRADE)

JUNE 30, 1969.

To: John A. Delaney, Director, Office of Administration.

From: Cecil G. Miles, Director, Bureau of Restraint of Trade.

Subject: Response to Paragraph Eleven of letter from Robert Pitofsky, Esq.—American Bar Association Study.

Attached herewith are brief descriptions of techniques used to detect violations in each of the Division's areas of responsibility, as requested by Robert Pitofsky, Esq. in Item 11 of his letter of June 9, 1969.

Respectfully submitted,

CECIL G. MILES,

Director, Bureau of Restraint of Trade.

SECTION 5 FEDERAL TRADE COMMISSION ACT (DIVISION OF GENERAL TRADE RESTRAINTS)

The Division of General Trade Restraints utilizes several methods in determining the existence of possible violations of Section 5 of the Federal Trade Commission Act.

First: This Division regularly receives letters of complaint from Congressmen, other government agencies, corporations and private businessmen and citizens concerning alleged illegalities. Division attorneys daily review these complaints to determine whether any violations of Section 5 of the FTC Act exist, and what if anything, can be done about such violations in view of prior commitment of money and manpower.

Second: Attorneys in this Division regularly scrutinize various trade publications such as the Kiplinger Letter; Oil Daily, Wall Street Journal; Journal of Commerce; Barron's; etc., as well as the New York Times and various other newspaper publications and some of the better known magazines such as Fortune. The Division also receives copies of magazines or periodicals published by trade associations and distributed primarily to their members. Also, the attorneys in this Division attend various seminars where information with respect to different industries is disseminated. In addition, we are in regular receipt of economic reports from various sources, including the Federal Government, on different industries.

As a result of the foregoing the Division develops a rather high degree in expertise in being able to become knowledgeable as to the possibility of violations of the statutes administered by the Federal Trade Commission.

ROBINSON-PATMAN ACT (DIVISION OF DISCRIMINATORY PRACTICES)

Most of the complaints charging acts or practices which may violate the Robinson-Patman Act are initially brought to the Commission's attention by those individuals and firms adversely affected by the pricing practice, i.e., injured business competitors and dealers or distributors of the party against whom the complaint was made. Other sources include members of Congress, other federal state or local government agencies, and trade associations. Such complaints are assigned to staff counsel for screening purposes and as an incident to this process, or during the course of a formal investigation, staff counsel may detect other violations of the Act.

In addition, we have our own program to detect and identify possible violations of the Act. Members of the staff regularly monitor trade journals, financial newspapers and magazines, and newspapers of general circulation as well as other publications for information indicating possible violations. Also those members of the staff who are specialists in specific industries maintain a constant surveillance over those industries.

The Commission also utilizes the formal procedures of investigational hearings and reports or answers furnished in compliance with Section 6(b) orders as investigational aids in determining the existence of possible law violations.

MERGERS AND ACQUISITIONS (DIVISION OF MERGERS)

There are two sources of information used by this Division for detecting violations of Section 7 of the Clayton Act—the public press, primarily The Wall Street Journal, and complaints from the public and competitors about particular mergers. More than 95 percent of our original information concerning mergers comes to our attention from reports in The Wall Street Journal, other newspapers and trade publications. Such publications are analyzed on a daily basis and certain planned or announced mergers are selected for investigation after checking through liaison arrangements with the Department of Justice that the matter will be handled by the Commission.

Once it has been decided that a merger is to be handled by the staff of the FTC, the usual procedure is to initiate an investigation and to send letters requesting comprehensive information from the acquiring and acquired corporations. In some few instances, compulsory process is used, instead of using letter requests for voluntary submission of information. Compulsory process consists of investigational subpoenas duces tecum, orders to file Section 6(b) Special Reports and on occasion investigational subpoenas ad testificandum, wherein witnesses testify at closed investigational hearings.

The information obtained from the merging corporations is analyzed and attorneys from this Division confer with competitors and any other persons in or outside the industry who may have pertinent knowledge concerning the industry and the impact of the merger therein. Universe market data is developed using any available Bureau of the Census information or other public or industry recognized survey data showing total industry sales from which market shares may be derived. All of the data obtained is carefully analyzed as the investigation develops in order to determine if Section 7 has, or has not, been violated. If the information indicates a violation, a draft of complaint with a supporting memorandum is submitted to the Commission for approval and issuance. If no violation is indicated, a memorandum is prepared recommending the Commission close the investigation. During the past three years, an average of nine major proposed mergers annually have been called off after the initiation of prompt investigations.

The staff of the Division of Mergers is unique within the operation of the Commission in that it does its own investigating of merger cases, in addition to handling the preparation of the complaint, negotiations of settlements and any ensuing litigation resulting from such investigations. The staff of the Division of Mergers rarely utilizes the Field Offices of the Commission for the purpose of investigating merger matters.

SECURING AND MAINTENANCE OF COMPLIANCE WITH ALL FINAL ORDERS (COMPLIANCE DIVISION, BUREAU OF RESTRAINT OF TRADE)

The Compliance Division of the Bureau of Restraint of Trade assumes responsibility for the procurement and maintenance of compliance with all final orders issued by the Commission affecting antimonopolistic and trade restraining practices having genesis in Section 5 of the Commission Act, and all sections of the Clayton Act, as amended over which the Commission has jurisdiction.

Keeping in mind that some techniques are more adaptable to particular types of order compliance than are others, the following are the most prevalent procedures which we utilize to detect order violations:

(a) Requiring a covered respondent to file a supplemental report of compliance responding in detail to specific areas of inquiry: e.g., all mergers entered into in a prior year, if applicable to a provision of an order prohibiting acquisitions without Commission approval (Section 7); all meetings attended with competitors during prior year (Section 5 price fixing order); names of customers granted maximum advertising allowances or discounts last year (Section 2(a) or (d) of Clayton Act, as amended).

(b) A variation of (a) above is utilized through correspondence if, for considered reasons, a supplemental report is not deemed necessary, as, for example, if a question of order coverage exists.

(c) Investigational hearings accompanied by compulsory process (several of our civil penalty cases were developed by personnel of this Division through utilization of this technique).

(d) Use of Section 6 questionnaires. We have found this device to be particularly adaptable to Section 7 and 2(d) type inquiries.

(e) Interviews in the field by Compliance Division personnel if the matter indicates the advisability of our getting quick information through this medium.

(f) Referral to Bureau of Field Operations of spot checks or protracted investigations involving interviews with a multiplicity of industry factors at various functional levels. An illustration of this type of referral would be an order prohibiting dealer coercion.

(g) An extensive use of correspondence to develop general inquiries or complaints which we receive on a periodic basis. A variation of this technique also involves our consistent use of the telephone to talk to informants or trade sources.

(h) At times, check of certain data in possession of other governmental agencies.

(i) At times, referrals from other governmental agencies, both State and Federal.

(j) Examination of trade periodicals, particularly with respect to merger activity which may involve a covered respondent.

(k) Referrals from other Divisions of the Commission which develop information which in their opinion bear upon compliance with an order.

(l) Complaints from competitors, members of Congress, and the public.

(m) The insertion of affirmative provisions in an order requiring respondent to maintain certain types of records or to assume a particular type of burden in the event that a particular course of action is pursued.

LETTER TO PROFESSOR ROBERT PITOFSKY FROM JOHN A. DELANEY,
DATED JULY 29, 1969, TRANSMITTING MATERIAL WITH RELATION TO
ADVISORY OPINIONS AND TRADE REGULATION RULES

JULY 29, 1969.

PROF. ROBERT PITOFSKY,
Vanderbilt Hall, New York University Law School,
New York, N.Y.

DEAR PROFESSOR PITOFSKY: The enclosed materials are being submitted to you in response to paragraph 2 of your letter of June 9, 1969.

As Mr. Yarley has mentioned in his memorandum to Mr. Day dated July 17, 1969, we are unable to fulfill the 10-year requirement in the furnishing of statistics in those areas since the first trade regulation rule was not adopted until FY 1964. Information is being submitted on trade practice rules only since FY 1962 (see Mr. Hall's memorandum dated July 14, 1969); the first advisory opinions were issued in that same fiscal year when the Division of Advisory Opinions was established.

Mr. Helm has also submitted a paper entitled "The Use of Advisory Opinions and Voluntary Compliance Procedures in Dealing with the Federal Trade Commission," which he submitted at the Proceedings of the Seventh Annual Corporate Counsel Institute, held at Northwestern University School of Law on October 10 and 11, 1968.

Sincerely yours,

JOHN A. DELANEY,
Director, Office of Administration.

JULY 17, 1969.

To:

Monroe F. Day,
Management Officer,
Office of Administration.

From:

Chalmers B. Yarley, Director,
Bureau of Industry Guidance.

Subject:

Letter dated June 9, 1969, from Robert Pitofsky.

The following information is submitted in response to item #2 of Mr. Pitofsky's letter of June 9, 1969, addressed to General Counsel Buffington.

We are unable to fulfill the 10 year requirement since the first trade regulation rule was not adopted until FY 1964. There are presently 13 trade regulation rules in effect, adopted as follows:

Fiscal year 1964

Advertising and Labeling Of Sleeping Bags As To Size
Deceptive Use Of "Leakproof," "Guaranteed Leakproof," Etc., As Descriptive Of Dry Cell Batteries
Deception As To Nonprismatic And Partially Prismatic Instruments Being Prismatic Binoculars
Misbranding And Deception As To Leather Content of Waist Belts

Fiscal year 1965

Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products
Deceptive Advertising and Labeling of Previously Used Lubricating Oil
Misuse of "Automatic" or Terms of Similar Import as Descriptive of Household Electric Sewing Machines

Fiscal year 1966

Deceptive advertising as to sizes of viewable pictures shown by television receiving sets.

Fiscal year 1968

Failure to disclose that skin irritation may result from washing or handling glass fiber curtains and draperies and glass fiber curtain and drapery fabrics.

Discriminatory practices in men's and boys' tailored clothing industry.

Deception as to transistor count of radio receiving sets including transceivers.

Fiscal year 1969

Deceptive advertising and labeling as to length of extension ladders.

Failure to disclose the lethal effects of inhaling quick-freeze aerosol spray products used for frosting cocktail glasses.

COMPLIANCE

There are approximately 1,587 manufacturers, importers and distributors subject to the provisions of the above rules. In the course of our compliance program we have received proof, based on data evaluated to date, showing that such parties subject to the rules, with the exception of 28, were in full compliance therewith. In those 28 instances, we received assurances of voluntary compliance as follows:

	<i>Number</i>
Fiscal year 1967-----	11
Fiscal year 1968-----	7
Fiscal year 1969-----	10
Total -----	28

We do not have data on a fiscal basis as to the time we contacted the industry members or the dates that we received proof of compliance from such members.

CHALMERS B. YARLEY,

Director, Bureau of Industry Guidance.

This memo also includes the assurances of discontinuances, which later became assurances of voluntary compliance in the industry guidance area.

JULY 14, 1969.

To: Monroe F. Day, Management Officer, Office of Administration.

From: E. M. Hall, Jr., Chief, Division of Industry Guides, Bureau of Industry Guidance.

Subject: Letter dated June 9, 1969, from Robert Pitofsky.

The following information is submitted in response to item #2 of Mr. Pitofsky's letter of June 9, 1969, addressed to General Counsel Buffington.

The information respecting this Division's Guide and rule making activities covers inclusively FY 1962 through the first 11 months of FY 1969:

In FY 1962 trade practice rules were promulgated for the Pleasure Boat, Residential Aluminum Siding, Stationers, Metallic Watch Band, and Rebuilt, Reconditioned & Other Used Automotive Parts Industries. During the same period advertising Guides were adopted for Fallout Shelters and for Shell Homes.

In FY 1963 trade practice rules were promulgated for the Kosher Food Products Industry and for the Wire Rope Industry. Guides were adopted for Advertising Radiation Monitoring Instruments and for Shoe Content Labeling and Advertising.

In FY 1964 trade practice rules were promulgated for the Household Furniture Industry and for the Braided Rug Industry. In addition, Guides Against Deceptive Pricing and Guides for the Mail Order Insurance Industry were adopted.

In FY 1965 trade practice rules were promulgated for the Fresh Fruit & Vegetable Industry and the following Guides were adopted: Guides Against Debt Collection Deception; and Guides for Avoiding Deceptive Use of Word "Mill" in the Textile Industry.

In FY 1966 Guides Against Deceptive Labeling & Advertising of Adhesive Compositions were promulgated and a Guide relating to Deceptive Pricing in the Tire Industry was adopted.

In FY 1967 Guides were adopted for the Tire Industry (except Guide 15).

In FY 1968 Guide Against Deceptive Use of the Word "Free" in Connection With the Sale of Photographic Film and Film Processing Service was adopted.

In FY 1969 Guides were adopted for the Watch Industry, for the Beauty &

Barber Equipment & Supplies Industry, for the Greeting Card Industry, for the Ladies' Handbag Industry, for the Dog & Cat Food Industry, and for Advertising Allowances and Other Merchandising Payments and Services.

During the period covered above a number of existing Guides and trade practice rules were revised, amended, or otherwise modified. Information on this subject is available if desired.

Attached are charts showing rule and Guide compliance activities and interpretative work of this Division during the period discussed.

E. M. HALL, Jr.,

Chief, Division of Industry Guides, Bureau of Industrial Guidance.

Approved.

CHALMERS B. YARLEY, *Director, Bureau of Industrial Guidance.*

BUREAU OF INDUSTRY GUIDANCE, DIVISION OF INDUSTRY GUIDES

	Compliance with trade practice rules and guides			Compliance with trade practice rules and guides	
	Rules	Guides		Rules	Guides
Fiscal year 1962:			Fiscal year 1967:		
On hand beginning fiscal year..	418	710	On hand beginning fiscal year..	218	171
Received.....	533	619	Received.....	254	372
Completed:			Completed:		
Assurance of			Assurance of voluntary		
discontinuance.....	303	204	compliance.....	133	107
Other disposition.....	417	800	Assurance of discontinu-		
On hand end fiscal year.....	231	325	ance.....	14	106
Fiscal year 1963:			Other disposition.....	77	107
On hand beginning fiscal year..	231	325	Total.....	248	223
Received.....	426	475			
Completed:			Fiscal year 1968:		
Assurance of			On hand beginning fiscal year..	241	223
discontinuance.....	229	123	Received.....	194	193
Other disposition.....	287	542	Completed:		
On hand end fiscal year.....	141	135	Assurance of voluntary		
Fiscal year 1964:			compliance.....	159	123
On hand beginning fiscal year..	141	135	Assurance of discontinu-		
Received.....	323	533	ance.....	23	28
Completed:			Other disposition.....	54	60
Assurance of			Total.....	206	205
discontinuance.....	203	150			
Other disposition.....	150	322	Fiscal year 1969:		
On hand end fiscal year.....	111	196	On hand beginning fiscal year..	206	205
Fiscal year 1965:			Received.....	159	185
On hand beginning fiscal year..	111	196	Completed:		
Received.....	222	389	Assurance of voluntary		
Completed:			compliance.....	118	109
Assurance of			Assurance of discontinu-		
discontinuance.....	143	140	ance.....	22	12
Other disposition.....	83	129	Other disposition.....	55	62
On hand end fiscal year.....	107	316	Total.....	171	207
Fiscal year 1966:					
On hand beginning fiscal year..	107	316			
Received.....	271	212			
Completed:					
Assurance of voluntary					
compliance.....	38	34			
Assurance of discontinu-					
ance.....	59	269			
Other disposition.....	63	54			
Total.....	218	171			

¹ Include 2 assurances accepted in 1 file.

BUREAU OF INDUSTRY GUIDANCE, DIVISION OF INDUSTRY GUIDES

	Interpretations of trade practice rules and guides			Interpretations of trade practice rules and guides	
	Rules	Guides		Rules	Guides
Fiscal year 1962:			Fiscal year 1966:		
On hand beginning fiscal year..	17	27	On hand beginning fiscal year..	2	9
Received.....	171	329	Received.....	152	324
Completed.....	177	310	Completed.....	153	327
On hand end fiscal year.....	11	46	On hand end fiscal year.....	1	6
Fiscal year 1963:			Fiscal year 1967:		
On hand beginning fiscal year..	11	46	On hand beginning fiscal year..	1	6
Received.....	275	523	Received.....	177	317
Completed.....	280	551	Completed.....	172	323
On hand end fiscal year.....	6	18	On hand end fiscal year.....	6	
Fiscal year 1964:			Fiscal year 1968:		
On hand beginning fiscal year..	6	18	On hand beginning fiscal year..	6	
Received.....	181	421	Received.....	204	334
Completed.....	182	431	Completed.....	204	332
On hand end fiscal year.....	5	8	On hand end fiscal year.....	6	2
Fiscal year 1965:			Fiscal year 1969:		
On hand beginning fiscal year..	5	8	On hand beginning fiscal year..	6	2
Received.....	141	265	Received.....	228	654
Completed.....	144	264	Completed.....	227	654
On hand end fiscal year.....	2	9	On hand end fiscal year.....	7	2

JULY 8, 1969.

To: John Delaney, Director of Personnel.

From: Hugh B. Helm, Chief, Division of Advisory Opinions, Bureau of Industry Guidance. Statistics Requested by Mr. Pitofsky's letter of June 9, 1969.

Forwarded herewith are statistic sheets requested in item 2 of Mr. Pitofsky's letter of June 9, 1969. We believe the sheets are self explanatory. They go back to 1962 when the Division was first placed in operation.

We also forward 2 copies of the two volumes of published Advisory Opinion Digests with index as to subjects and statutes involved. Sometime during July we expect to receive the first volume of Advisory Opinion Digests from Government Printing Office. The volume will contain 313 Advisory Opinion Digests through the calendar year 1968, with cross index as to subject matter and statute.

We enclose copy of our 1968-69 fiscal report which points up the fact that the work of the Division of Advisory Opinions is 75% consumer oriented.

Respectfully submitted,

HUGH B. HELM,

Chief, Division of Advisory Opinions, Bureau of Industry Guidance.

Total number of advisory opinions issued by Commission, 1962 through 1969

Fiscal year:	
1962	1
1963	40
1964	30
1965	58
1966	46
1967	83
1968	136
1969	126
Total	¹ 520

Total number submitted to Commission, 1962 through 1969

Fiscal year:

1962	21
1963	66
1964	41
1965	78
1966	68
1967	131
1968	173
1969	174
Total	¹ 732

¹ Difference is represented by "no opinion" after review and consideration by the Commission under Rule 1-1.

² For one month only.

By statute—total number of advisory opinions issued from 1962 through 1969

[Fiscal years]

Restraint of trade, section 5	109
Clayton Act, section 2(a)	38
section 2(c)	11
section 2(d)	64
section 2(e)	43
section 2(f)	12
section 6	1
section 7	35
Webb-Pomerene	2
Capper-Volstead	3
Deceptive Practices, section 5	226
section 12	19
section 15	1
Textile Act	11
Wool	2
Fair packaging and labeling	2
Truth in lending	1

Total number of advisory opinion digests published, 1962 through 1969

Fiscal year:

1962	0
1963	0
1964	0
1965	2
1966	59
1967	76
1968	123
1969	99
Total	359

FTC ADVISORY OPINIONS ISSUED, CLASSIFIED BY STATUTES, FISCAL YEARS 1962-69

	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of trade:								
F.T.C. Act.....	0	6	11	10	10	19	25	28
Clayton Act:								
Sec. 2(a).....	1	5	2	2	1	9	12	6
Sec. 2(c).....	0	2	1	2	2	1	1	2
Sec. 2(d).....	0	10	4	6	11	12	12	9
Sec. 2(e).....	0	8	4	4	5	8	4	10
Sec. 2(f).....	0	2	3	2	0	1	2	2
Sec. 6.....	0	0	0	0	0	0	0	1
Sec. 7.....	0	4	2	8	1	3	6	11
Webb-Pomerene Act.....	0	0	0	1	1	0	0	0
Capper-Volstead.....	0	0	0	0	0	1	0	2
Deceptive practices:								
F.T.C. Act:								
Sec. 5.....	0	10	7	24	19	26	76	64
Sec. 12.....	0	0	0	4	0	5	6	4
Sec. 15.....	0	0	0	0	0	0	0	1
Textile and furs:								
Wool Act.....	0	0	0	0	1	0	1	0
Textile Act.....	0	0	1	0	0	0	2	8
Fair Packaging and Labeling Act.....	0	0	0	0	0	0	1	1
Truth in Lending Act.....	0	0	0	0	0	0	0	1

DIVISION OF ADVISORY OPINIONS

The Division of Advisory Opinions prepares, for the Commission's consideration, proposed advisory opinions in response to requests of individuals, partnerships and corporations. These opinions discuss the legality of proposed courses of action and, when finally rendered, are binding upon the Commission. The Agency retains a right to rescind any opinion, however, should subsequent developments indicate a necessity for so doing. The advisory opinion procedure is offered to businessmen to assist them in avoiding use of practices which may be contrary to laws administered by the Commission.

Accomplishments—Fiscal 1968

While the total requests for advice remained about the same as the number received during the preceding year, 173 processed requests for advisory opinions were forwarded to the Commission. This number compares with the 131 requests forwarded during the preceding year. One hundred and thirty-six opinions were issued by the Commission during the year, representing a substantial increase over the eighty-three opinions issued during fiscal year 1967.

Incoming requests dealt with questions arising under practically all of the numerous statutes administered by the Commission. Most of them, however, came within the scope of the Federal Trade Commission Act and the amended Clayton Act and involved either actual or potential trade restraints or actual or potential deceptive practices.

The questions presented and the opinions rendered by the Commission involved many problems having a high degree of economic or social impact, and involving complex issues of law. In this regard, in the area of trade restraints, the Commission affirmatively granted opinion clearance to two requests concerning proposed mergers, while disapproving six other merger proposals.

One of the affirmative opinions granting merger clearance followed Commission policy to encourage the growth of regional dairies by permitting a small dairy to be acquired by a somewhat larger regional company. The other opinion approved a proposed combination of two moderately sized building materials corporations which were not in competition with each other since each served different customers in different geographical areas.

An opinion of considerable social and economic significance dealt with a problem faced by minority groups in ghetto areas. The problem in question involved one group of manufacturers who were contemplating an offer to extend credit terms to residents in ghetto areas to assist in establishing retail stores. The applicants were concerned, however, that such an offer might occasion violation of the Robinson-Patman Act's prohibition of price discriminations. Drawing upon its knowledge of competitive conditions within the industry in question, the Commission, through an advisory opinion, was able to open the way for manufacturers to help put minority people into new businesses of their own. As a result, approximately 20 million dollars will be allocated, on extended re-

payment terms, for some 500 new stores, owned and operated by those who dwell in the inner city in ghetto areas.

Other opinions rendered during the year ranged across such diverse subjects as drug advertising, disclosure of foreign origin of imported products, selective leasing of shopping center space, and computerized collection and dissemination of marketing information, among others.

During the year the Division vigorously implemented an earlier Commission decision to make public digests of its advisory opinions whenever possible. Many businessmen have advised that publication of these digests has been instrumental in persuading them not to embark upon a questionable course of business action which they might have otherwise pursued had not they been made aware of the fact that the Commission regarded the practice in question to be illegal.

Program for fiscal year 1970

While the workload of the Division of Advisory Opinions is primarily dependent upon requests for opinions from the business community, it is anticipated that approximately 200 requests will be processed during fiscal year 1969 and that this figure will be exceeded in FY 1970.

In addition, the Commission has recently taken action to require recipients of advisory opinions granting clearance to tri-partite promotional programs, to file compliance reports within six months. Considerable staff time will be invested in processing the forty reports to be rendered to the Commission in connection with currently outstanding advisory opinions. Further, this action will be followed in the future with new advisory opinions dealing with questions arising in connection with Sections 2(d) and 2(e) of the amended Clayton Act.

In this connection, proposed revised Guides for Advertising Allowances and Other Merchandise Payments and Services Compliance with Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act are being published and circulated to the public and business community for comment. These proposed Guides, as did the 1967 amendment, call attention to the availability of Commission's advisory opinion procedure and invite those contemplating implementation of tri-partite promotional plans to make use of the procedure. Because of the widespread publicity which the proposed Guides themselves will receive and because the development of three-party promotional plans is becoming increasingly common, it is anticipated that this area of the law will account for a considerable upswing in the division's workload, both in preparing opinions and processing compliance reports.

A portion of the Commission's available manpower will continue to be devoted to the preparation and indexing of the advisory opinion digests which have proved so valuable.

Increase requested—fiscal year 1970

To meet the anticipated increase in workload, especially that involving the aforementioned compliance reports, an additional \$14,000 is requested to provide one GS-13 attorney.

Consumer oriented opinions

Advice sought by businessmen in connection with proposed courses of action frequently resulted in the issuance of opinions so oriented as to accord considerable protection for consumers, regardless of whether negative or affirmative advice was given. The processing of opinions of this nature made up about 75% of the Division's workload and covered a melange of topics such as the previously mentioned problem faced by minority groups in ghetto areas. During the past year, the Division processed 38 opinions dealing with the questions of proper labeling of imported merchandise in order that the consuming public might be made aware of the foreign country of origin of various items from cutlery and fishing reels to medical devices and nails. Eight of these opinions were concerned with the impropriety of using the phrases "Made in U.S.A." or "U.S. Made" in the labeling of merchandise containing a substantial quantity of imported components.

Other consumer oriented opinions processed during the year concerned many industries and products. A practice examined in the jewelry industry was the proposed use of a term descriptive of precious stones in connection with the advertising of a synthetic stone. In the textile industry, three opinions concerned the use of symbols and names having fur-bearing animal connotations in connection with the labeling of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in the production of

fur products. An opinion given in the footwear industry advanced the view that the unqualified term "Hand Made" could not be used to describe a boot with a sealed sole. Of particular significance to consumers are two opinions dealing with guarantees and one dealing with wood fiber corsages. As to guarantee advertising the position was taken that there shall be a clear and conspicuous disclosure of the extent and nature of the guarantee, the manner in which the guarantor will perform, and the identity of the guarantor, while the corsage opinion held that an article made from wood fiber chips was wearing apparel subject to the provisions of the Flammable Fabrics Act.

Other consumer oriented opinions rendered during Fiscal Year 1968 dealt with advertising claims for a deodorant spray, a mink oil skin lotion and a toilet preparation containing French oils, the publication of a pricing manual for common use by service members of a trade association, certain advertising promoting the sale of information and a product represented as a cure or treatment for ailments, the substitution of merchandise similar to that ordered without prior authorization, the permissible period of time during which an advertiser may continue to describe a new product as being "new," the use of leather connoting terms in connection with the labeling of non-leather products even though the true composition is disclosed, and agreements among producers to sell milk at prices higher than those established by state regulation, to name but a few.

We repeat for emphasis that 75% of the work of the Division of Advisory Opinions is consumer oriented.

BUDGET PROJECTION AND JUSTIFICATION FOR FISCAL YEAR 1970 FOR DIVISION OF ADVISORY OPINIONS

Inasmuch as for the immediate past fiscal year, 173 requests for advisory opinions were prepared and submitted to the Commission and inasmuch as this was an increase over 131 requests prepared and submitted to the Commission for fiscal year 1967, and inasmuch as both of these figures are an increase over fiscal year 1966 in which 68 requests were prepared and sent to the Commission, it is apparent that when the productive work of this division has more than doubled and it all channels through the one secretary, that additional clerical-stenographic help is needed at once. It is contemplated that a GS-5 stenographer be added who can assist in the statistical and clerical duties now taking up all of the time of the secretary to the Chief. This added stenographer can also act as secretary to the Assistant Chief and be available for his dictation and typing and do whatever she can to help the whole division. The increased work of the division is absolutely too much for one secretary-clerk-stenographer-administrative assistant.

It also follows that there needs to be an increase in professional personnel. It is strongly urged that another Attorney-Adviser, GS-14 or GS-15, be added to the staff. We have the whole staff working at maximum output and must anticipate increasing our production to 200 requests for advisory opinions prepared for the Commission for fiscal year 1969. We will again be operating at maximum capacity with the increased personnel in fiscal year 1970 and may need to expand further then.

The need for more personnel both clerical and professional is also indicated by the Commission's recent action in requiring 6 months compliance reports on 40 Three-Party Promotional Type Advisory Opinions. This action by the Commission will have to be followed in future 2(d) and 2(e) Robinson-Patman Act Advisory Opinions.

PROCEEDINGS OF THE SEVENTH ANNUAL CORPORATE COUNSEL INSTITUTE, OCTOBER
10 AND 11, 1968

THE USE OF ADVISORY OPINIONS AND VOLUNTARY COMPLIANCE PROCEDURES IN DEALING
WITH THE FEDERAL TRADE COMMISSION

(By Hugh B. Helm,* Federal Trade Commission, Washington, D.C.)

A paper presented at the Seventh Annual Corporate Counsel Institute, October 10 and 11, 1968. Copyright © Northwestern University School of Law, December, 1968.

Mr. Chairman, Ladies and Gentlemen, it is a great pleasure for me to appear on the program of this highly regarded institute. Particularly, it is an honor for me to follow one of the leaders of the American Bar, Mr. Barton of White and Case.

This is a good time to remind you that the remarks I make today and the opinions on the law that I may enunciate are entirely my own and there may be or may not be someone at the Federal Trade Commission who agrees with me, probably not.

Nearly everybody knows that the Federal Trade Commission was established by Congress on request of President Woodrow Wilson by enactment in 1914 of the Federal Trade Commission Act. This Act gives the Commission jurisdiction over unfair methods of competition in commerce and unfair or deceptive acts in commerce. Of course there is much more than this to the Act but these powers under Section 5 are the main ones you are interested in. The Commission has exercised jurisdiction over nearly every kind of business in America under the Federal Trade Commission Act. This Act supplements the Sherman Act. Sherman Act violations are stopped in their incipiency as unfair methods of competition under this our basic act.

The mission of the Federal Trade Commission very simply put was and is to preserve competition in business. President Wilson said:

"The businessmen of the country desire something more than that the menace of legal process . . . be made explicit and intelligible. They desire the *advice*, the definite *guidance* and *information* which can be supplied by an administrative body, an interstate trade commission."

The general jurisdiction conferred on the Federal Trade Commission by the FTC Act, particularly Section 5 of the FTC Act, places in the Commission the duty to stop "unfair methods of competition in commerce, and unfair and deceptive acts or practices in commerce." Violations of the Sherman Act have been held to be unfair acts of competition under the FTC Act.

Now there is also a special jurisdiction conferred on the Federal Trade Commission by several special statutes passed by Congress since the FTC Act which I shall now list:

Clayton Act (15 U.S.C. 12), as amended by the Robinson-Patman Antidiscrimination Act (Public Law 692, 74th Congress);

Export Trade Act (15 U.S.C. 61);

Packers and Stockyards Act, 1921 (7 U.S.C. 181);

Wool Products Labeling Act of 1939 (15 U.S.C. 68);

Trade-Mark Act of 1946 (15 U.S.C. 1051);

Fur Products Labeling Act (15 U.S.C. 69);

Flammable Fabrics Act (15 U.S.C. 1191);

Textile Fiber Products Identification Act (15 U.S.C. 70);

Fair Packaging and Labeling Act (Public Law 89-755, 89th Congress); and other public laws (such as Administrative Procedure Act.)

Of these acts passed since the FTC Act, by far the most important has been the Robinson-Patman Act passed in 1936 to amend the Clayton Act. The main purpose of this act was to protect small business from big business and its "deep pocket" by prohibiting discriminatory acts and practices having a probable sub-

*Chief, Division of Advisory Opinions, Federal Trade Commission.

stantial effect on competition if they could not be cost justified or were not for the purpose of meeting competition. Certain other acts and practices were made illegal *per se* by the Robinson-Patman Act, all to the purpose that small business would have a fair chance against the big resources of big business.

For forty-six years, the lawyers of the Federal Trade Commission were kept busy directing investigations, drawing complaints and prosecuting violations of the FTC Act. In 1936 the same procedure was put into effect enforcing the Robinson-Patman amendment to the Clayton Act. Lawsuits under these two statutes were our main business. We did a good job at it, and won most of our cases including those appealed. Today these two statutes are still the two main statutes enforced by the Federal Trade Commission. Most of our cases have been and are brought under these two statutes. Most of our business is transacted under their jurisdiction. These and the others listed previously are the statutes that confer jurisdiction to act on the Federal Trade Commission. All our activity proceeds under them, including Advisory Opinions. We can give an advisory opinion under any of these Acts.

In 1961, Paul Rand Dixon became Chairman of the Federal Trade Commission. At that time he reorganized the staff completely and it has functioned quite well ever since. Today Mr. Dixon is still Chairman having been reappointed last year. He has now been Chairman longer than any other man in the history of the Federal Trade Commission.

The staff of the Federal Trade Commission is organized under the Executive Director. There are four special offices under him, Secretary, Program Review, General Counsel and Hearing Examiners. In addition there are six operating bureaus each under a Director. They are: Deceptive Practices, Economics, Field Operations, Industry Guidance, Restraint of Trade, Textiles and Furs. These bureaus are divided into divisions relevant to the mission of the bureau. An Organizational Chart is included at page 44 for your future convenience in dealing with the Federal Trade Commission.

One of the first things that Chairman Dixon changed after his first appointment was the emphasis and thrust at the Commission on litigation. This is somewhat strange, in a way, because Chairman Dixon had been one of the top trial lawyers at the Federal Trade Commission in his long career there. However, he changed the thrust from litigation and the emphasis from litigation—to consultation and advice on *future* courses of action and voluntary compliance on *present* courses of action where they violate statutes administered by the Federal Trade Commission.

The history of the Federal Trade Commission prior to Chairman Dixon can be read in one reported case after another. Some accepted the Commission's Order and went no further.

Others pursued their right of appeal to the Circuit Courts of the United States and even to the Supreme Court of the United States. The way was long, cumbersome and indeed expensive. One distinguished attorney at the Federal Trade Commission was 17 years in litigation on one case. Seventeen years to get the word "Liver" out of Carter's Little Liver Pills. This case of course was an exception, but it shows what a tough minded corporate litigant can do if they wish to tie up the Federal Trade Commission in expensive litigation. There comes to mind the Cement Institute case which was fought by some 40 law firms for the respondent members of the Cement Institute and its members for about eight years, with over 50,000 pages of oral testimony. The complete record with exhibits cost over \$500,000. The three years of trying the record before the Commission cost the industry 5 million dollars. Commissioner Everette MacIntyre was one of three FTC counsels in this case. He has just served one 7 year term and been reappointed for another seven years. Many, many others could be cited, although I would say the average litigated case could run the full course before the Commission and the Circuit Court on appeal and certiorari denied by the Supreme Court in about two years. Now think, not only how expensive this litigation is, but how disrupting to the business involved and how worrisome to the corporate executives who must manage and pursue this course of action. Think of what it can do to the corporate image with the public. More than this, think of the pitiful plight of the small businessman without vast corporate resources to wage this kind of battle.

As a trial attorney, Chairman Dixon experienced all of this and knew it well. And when he became Chairman, he did not forget it. Many people had said there ought to be an easier way to handle enforcement. There ought to be a

fairer way to do this for those involved. There ought to be a less costly way to do this for the little fellow.

Most businessmen big or small are honest and want to do the right thing. Nobody wants to get in trouble with the Federal Government—tax-wise, fraud-wise or business-wise. It is too expensive and it is too time consuming. It is not good publicity for the business or the executive who finds himself or his business so involved. Nevertheless, there is a hard core of hard cases which can be treated no other way and the Federal Trade Commission, no more than any other Government agency is not about to dispense with litigation entirely. There will be trial attorneys at the Federal Trade Commission after we are all dead and gone, but I venture to predict that there will never be as many trials or as many people engaged in litigation again as the history of the Commission reveals prior to the appointment of Chairman Dixon because he found another way to obtain compliance and enforce our statutes. To accomplish this, two major programs were set up for business to approach on an individual basis.

The advisory opinion procedure was set up in 1962 and about the same time the voluntary compliance procedures were set up as they appear in the rules today. Let us examine the voluntary compliance procedures first.

If your business is already engaged upon a course of action and becomes involved with the Federal Trade Commission voluntarily or involuntarily, the voluntary compliance procedure is open to you, provided you are not a hard core violator with a prior record against you and provided you act in good faith. What does good faith mean? It means you cooperate fully with the Commission's people. You give them the information they ask for whether it is records or oral testimony when you apply to file an assurance of voluntary compliance.

If you have been in and out of the Commission's investigatory sights, off and on for the past years, don't be surprised if the Commission's attorneys tell you it is not in the public interest to allow you to file an assurance of voluntary compliance. In such case you may have to take a consent order, which we will go into later.

The voluntary compliance procedure involves your contacting the Commission and asking whether or not your individual enterprise is now violating the law. If the appropriate operating division concludes you are violating one of our statutes, then you will want to file an assurance of voluntary compliance and receive a closing letter from the Commission. Authority to have issued such a letter by the Secretary for the Commission is given to the Director and Assistant Director of the following four operating bureaus if no Commissioner objects within five days:

1. Deceptive Practices
2. Restraint of Trade
3. Textiles and Furs
4. Industry Guidance

All four of these bureaus handle voluntary compliances. An assurance of voluntary compliance does *not* admit or deny you have violated any law; nor does it give immunity from Commission action in the future. As a practical matter a closing letter through one of the four bureaus signed by the Secretary for the Commission on an application for an assurance of voluntary compliance will ordinarily lay the matter to rest.

The file in a voluntary compliance matter is usually transmitted to the Office of Legal Records to be available for reading and copying by any member of the public interested in so doing. In unusual situations, the Commission may grant confidentiality to the applicant for good and sufficient reason presented to them on application.

The assurance of voluntary compliance should be the most often used procedure in the work of the Commission. It is simple and informal in method and practice. An applicant may apply to any of the divisions of the four operating bureaus as previously set forth. It is used where a recurrence of unlawful conduct appears unlikely and may be effectively prevented without a formal order to cease and desist. The sole test is whether "the public interest will be fully safeguarded" by informal nonadjudicatory disposition, and in every case information should be fully developed so as to permit a comprehensive application of this test to the acts or practices involved.

Another nonadjudicatory procedure available to business is the Trade Regulation Rule. This is a handling of an industry-wide violation *en masse* or can even be handling of a statutory violation on a nationwide basis. This procedure is particularly apt when the Commission on investigation of a complaint is told

by the respondent businessman that *everybody is doing it*. Not for an individual violation although an individual may be an applicant. A trade regulation rule will get it stopped by all at the same time. It can be likened in technique to a hearing on a show cause order, although it is not absolutely necessary to have a hearing. We have always found it important to have hearings. More teeth than Guides or old T.P.C. Rules. Due process must always be had and care taken to proceed according to the Commission's Rules and Statutes such as the Administrative Procedure Act.

The effect is not the same as an order, but violation of such a rule is an invitation to litigation. I'm afraid this procedure is not too well understood by business. If you are interested in a trade regulation rule or think the issuance of one should be explored for your industry, you should apply to the Division of Trade Regulation Rules, Bureau of Industry Guidance. They will be happy to work with you and advise you on your problem.

I will merely note in passing that there are also *special rules* which you will find set forth in the outline. They are:

- (1) Wool and Fur
- (2) Flammable Fabrics
- (3) Textile Fiber Products
- (4) Fair Packaging and Labeling Act.

The procedures are set out in the Rules of Practice and have been very effective in dealing with specialized matters. The Commission has also the power to issue Quantity Limit Rules under Section 1.13 as authorized by Section 2(a) of the Robinson-Patman Act. There is, and has been very little activity in this regard.

Another very important nonadjudicatory procedure is the issuance of *guides*. This is done by the Division of Industry Guides in the Bureau of Industry Guidance. As the rules say, the industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. A guide is in effect an advisory opinion on a present course of action issued to a whole industry or many, many businessmen dealing with the interpretation of a portion of the Commission's statute. The Commission has full power to investigate the desirability or the possible need for issuance of a guide. Further, the guide may be issued on the Commission's own motion, on being convinced of the need for it or on application of an industry or an industry individual. Some 500 individual interpretations are issued by the Division and Bureau each year.

So far, assurances of voluntary compliance, trade regulation rules, special rules and guides have all been short of an order—they are nonadjudicatory.

We come now to a type of voluntary compliance which goes beyond any of these and involves the issuance of a complaint and order. This is the *consent order procedure*. Where a business does not qualify because of its past record for an assurance of voluntary compliance, it can still take a consent order which is issued by the Commission following a consent order agreement entered into between the respondent business and the Commission's attorney. This procedure has the advantage of saving time and money of a trial and the publicity incident thereto. The Commission maintains a consent order staff in the form of a special division headed by an Assistant General Counsel. If they won't let you file an assurance of voluntary compliance, they will nearly always let you take a consent order.

If your business is about to embark upon a *proposed* or *new* course of action *not now in operation*, you may seek advice and approval from the Federal Trade Commission by filing a request with the Secretary for an advisory opinion. This is true even if you are already under an adjudicative order of the Commission.

If you are already under an order, you will file for an advisory opinion under 3.61(c) of the Rules. This application is filed with the Compliance Division, Bureau of Restraint of Trade or the Compliance Division, Bureau of Deceptive Practices, depending upon the nature of your previous violation. Otherwise, you will inquire about an advisory opinion from the Division of Advisory Opinions, Bureau of Industry Guidance. Applications for advisory opinions under 1.1 or 3.61(c) may be filed with the Secretary of the Commission.

Years ago, President Wilson in his own words had sounded the need for the advisory opinion procedure:

"It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety."

Now what is an advisory opinion? Rule 1.1 of the Commission Rules of Practice states:

"Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy to consider requests for such advice and, where practicable, to inform the requesting party of the Commission's views. A request ordinarily will be considered inappropriate for such advice: (a) Where the course of action is already being followed by the requesting party; (b) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (c) *where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.*" Rule 1.3 states:

"(a) On the basis of the facts submitted, as well as other information available to the Commission, and if practicable, the Commission will inform the requesting party of its views and may take such other action as may be appropriate.

"(b) Any advice given is *without prejudice* to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. *The Commission will not proceed against the requesting party*, with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

Thus we see that an advisory opinion is a written opinion voted by all five or a majority of the five Commissioners participating on a proposed or future course of action presented to them in writing by a requesting party not under investigation and not under order of the Commission or another governmental agency as to the proposed or similar course of action.

It is not an opinion by the staff.

It is by the Commission.

It is not on a *present* course of action, that is a matter for *voluntary compliance or consent order*.

It is not an opinion on a *past* course of action or a *future course of action covered by an order*. That is an advisory opinion to be obtained through the proper compliance section because it involves an outstanding order. This action is governed by Rule 3.61 of the Commission's Rules of Practice, as hitherto noted.

It is not a declaratory judgment although some lawyers confuse an advisory opinion with a declaratory judgment.

A distinguished former member of our Advisory Opinion staff, Mr. William Denny Dixon, has defined an advisory opinion in an excellent law review article on FTC Advisory Opinions in Vol. 18 of the Administrative Law Review quoting from Page 71:

"An advisory opinion is a binding ruling by the legal or administrative body having lawful jurisdiction of the subject matter on the legality of a proposed future course of action contemplated by the party requesting the opinion."

This brings us to the most important feature of the advisory opinion. *It is binding upon the Commission*. Just like a cease and desist order in a litigated case. An advisory opinion is binding on the Commission until rescinded or overruled. It is not a mere "railroad release" good as of the time of issue only. It is good until revoked or rescinded. I might say here, that I know of only two advisory opinions out of some 563 handled by the Commission that have been rescinded. This particular instance involved bad faith on the part of the requesting party.

Commissioner Elman is fond of quoting Mr. Justice Brandeis on legal advice and I am very fond of hearing it. It is the best advice to the businessman involved in the modern complexities of law and government, I know. It goes like this:

"Now, I do not believe * * * that the difficulty for the businessman is nearly as great as he imagines it to be. * * * If you ask me how *near* you can walk to the edge of a precipice without going over, I can't tell you, for you may walk *on* the edge, and all of a sudden you may step on a smooth stone, or strike against a little bit of a root sticking out, and you may go over that

precipice. But if you ask me, how *near* you can go to that precipice and *still* be safe. I can tell you, and I can guarantee that whatever mishap comes to you, you will not fall over that precipice. * * * You must not expect that you can go to the *verge of [the] law* without running any risks. Why should you? You do not in any other relation of life that I know of." When you request an advisory opinion through the Division of Advisory Opinions, we may not *precisely pinpoint* the legal edge of the problem but we will get you an opinion from the Commission telling you where it is safe to tread.

How do you get an advisory opinion? Rule 1.2 Procedures of the Commission and Rules of Practice states in part:

"The request for advice should be submitted in writing to the Secretary of the Commission and should include *full and complete information* regarding the proposed course of action. Conferences with members of the Commission's staff may be held before or after submittal of the request. Submittals of additional information may be required. The original submittal should *affirmatively show that the proposed course of action is not currently being followed by the requesting party* and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency."

The procedure is as simple as we can make it. There is no special form or format. The requesting party simply submits his request in writing, usually in the form of a letter either to the Division of Advisory Opinions or to the Secretary of the Commission. This written request should contain enough information to enable the staff to prepare a memo to the Commission intelligently stating the proposed course of action and its predictable effects and the question or questions about its legality for which answers are desired. If you don't give enough information, the staff attorney to whom it is assigned will either write or call you for what he needs. If the information is not available, the commission may *not be able* to give an opinion because of the necessity for an investigation, or the need for scientific tests.

However, the requesting party generally gets an opinion within 30 to 60 days. In the case of an involved pre-merger clearance request, requiring extensive economic analysis, the time may be extended. Recently, when the Commission was reviewing the whole foreign origin question, the elapsed time was much longer. But all requesting parties were advised of the problem and their requests in effect suspended until the Commission thrashed the matter out in the public interest.

When you get an advisory opinion from the Federal Trade Commission what do you get?

The requesting party receives a *letter signed by the Secretary of the Commission* by order of the Commission. This letter is rarely over two pages in length and quite often only one page. It is the opinion and is not released to anyone else in order to preserve the identity of the requester in confidence. However, the text or a digest of the text is usually issued as a press release for the guidance of others throughout the nation. This is all in accordance with Rule 1.4 of the Commission's Rules of Practice and announced policy.

We occasionally have requests to see the *memorandum of the staff* transmitting the request for advisory opinion to the Commission with the staff recommendation. That is *never* released to anyone as it is an *intra agency* communication and therefore *confidential*.

How has the advisory opinion worked?

Has it been worthwhile? The answers are quite clear by now. The procedure has worked well indeed. It has been very worthwhile.

We have handled and processed some 563 advisory opinions to date and published about 300. Not only this, but hundreds and hundreds of voluntary compliance affidavits have been placed before the Commission for action without litigation.

We have had a good many advisory opinion requests by trade associations dealing with the selling practices, compliance of labeling rules, dealings with customers, conditions of membership, exchange of information, guaranteed pricing, product standards, range of prices in advertising and uniform hours. We have had advisory opinion requests covering cooperatives and the Capper-Volstead Act and establishing of a common sales agency under the Capper-Volstead Act. We have had requests under the Clayton Act covering functional discounts, free merchandise, aggregate purchases and back-haul allowances, tripartite promotional plans. We have had advisory opinions under deceptive advertising and deceptive practices. We have had advisory opinions on the following *products*:

Aluminum siding
 Apparel
 Automotive and equipment
 Badminton sets
 Bags
 Books
 Brush, shaving
 Building materials
 Chamois
 Chemicals, concrete blocks
 Corsages
 Cutlery
 Deodorant
 Diamonds
 Drugs and pharmaceuticals
 Electrical machinery and equipment
 Electronics
 General merchandise
 Grocery industry and allied
 Home improvements industry and allied
 House furnishings
 Iron and products
 Jewelry industry
 Leather and products
 Machinery and equipment
 Magazines
 Materials handling equipment
 Maternity products
 Medications
 Milk
 Mobile homes
 Newspapers
 Office equipment

Oxygen administering device
 Paper stock
 Pen sets
 Photoengraving
 Plastics and products
 Prefabricated building
 Produce
 Projection equipment and allied
 publications
 Radio and allied
 Real estate
 Recipes and allied
 Records and record player
 Servomotors
 Sewing machines
 Shingles
 Ship supplies
 Shopping carts
 Shopping center
 Silverware
 Skip-tracing material
 Sports equipment
 Textiles
 Thimbles
 Tile cement
 Time clocks
 Toiletries
 Toys
 Trading stamps
 Trailers
 Typewriters
 X-ray film

We have had advisory opinions involving the *meaning and use of the following words*:

Back-haul
 Chamois
 Embossing
 Free
 Full-cover
 Golden
 Gold filled
 Government
 Greenland
 Karat
 Leather
 Like
 Like grade and quality
 Lifetime guarantee
 List price
 Made in U.S.A.
 Man-made
 Manufacturing
 Medically prescribed

Mink oil
 Missing heirs
 Most warranted
 National
 New
 Pure, clear color
 Rebuilt
 Reconstructed
 Remanufactured
 Reward
 Rolled gold plate
 Safe and effective
 Satisfaction guaranteed
 Suede
 Solid gold
 Type
 U.S. made
 Velvet
 14-K

The Commission has given advisory opinions to very little people, such as the man who wrote in and said he had advertised that for a \$1.00 sent through the mail, he would by return mail advise his party about a cheap, safe deodorant. For the \$1.00 he would send the purchaser the recipe to mix baking soda and water and apply to the person. This was found to be all right, scientifically and legally, and the man got a favorable opinion. The Commission has given advisory opinions to an association of some of the largest corporations in the United States who applied for a *code of ethics* to regulate the conduct of their door to door salesmen.

The advisory opinions are widely quoted and increasingly sought. When it is remembered that a single trial attorney cannot handle more than four litigated cases during a year and an attorney-adviser on the Advisory Opinion staff can handle 30 to 50 advisory opinions in a year, the saving in time and money is quite obvious.

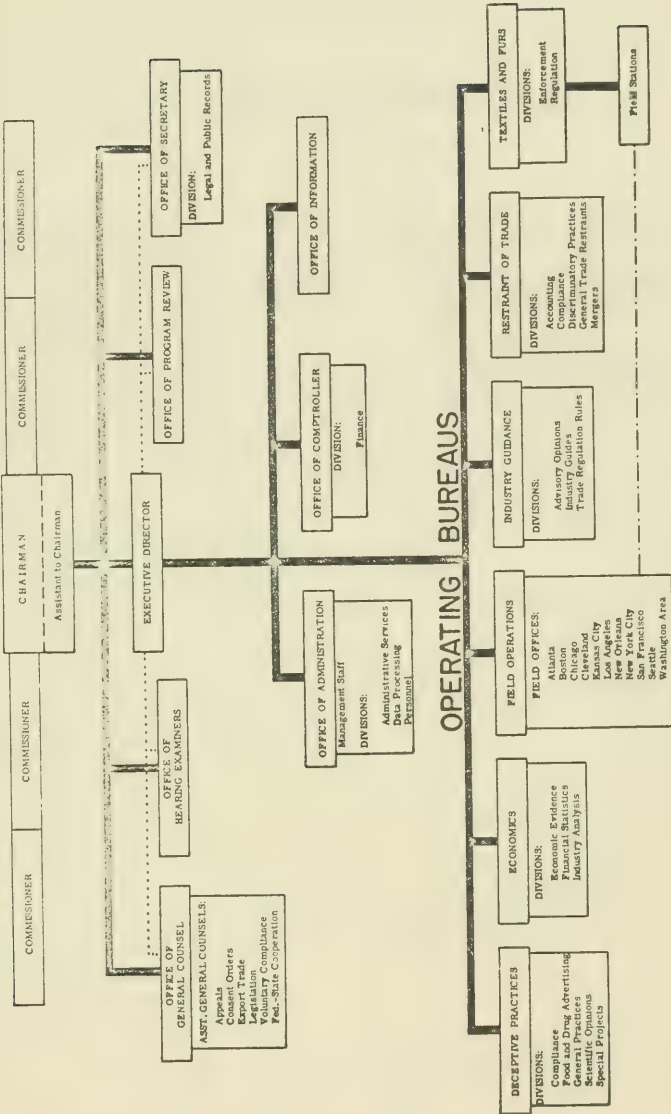
We don't want you to get into trouble. We don't want you to violate any of our acts. The Federal Trade Commission will keep you *out* of trouble if you will ask simply *ask* us for advice on matters under the laws we administer.

The voluntary compliance procedure is open to you at all times if you haven't been in trouble with us before. If you have been in trouble with us and have an order against you the compliance divisions will give you advice if you will apply to them. They can process an advisory opinion for you as to whether or not your proposed course of action complies with the order outstanding against you.

Any business planning or contemplation of a new or changed course of action for the future can be passed on by the Commission through the advisory opinion procedure. We will tell *whether or not* it probably violates any of our statutes. The Commission will be bound by its opinion. This service is *quick* and it is *free* to all who *comply with our rules on the subject*. And I submit the price is right. Be safe; save your worry; save your time and save your money. Ask us in advance.

FEDERAL TRADE COMMISSION

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Approved: *Paul R. Dixon*
Chairman

May 1968

Management Staff

..... ADMINISTRATION ONLY.
- - - - - ADMINISTRATIVE SERVICES AND
FORMAL INVESTIGATIVE MATTERS.

RESPONSE TO QUESTION 5

CONTENTS¹

Memorandum from Division of Mergers, to Commission, dated June 18, 1969, May 27, 1969, transmitting a set of memoranda she prepared with respect to the budget plan submitted by bureau.

Memorandum from Chief, Division of Discriminatory Practices to Director, Bureau of Restraint of Trade, dated June 18, 1969, responding to Commissioner Jones' memo of May 27, 1969.

Memorandum from Division of General Trade Restraints, to Commission, dated June 18, 1969, dealing with Budget Plan and Program for Fiscal 1971—Response to Commissioner Jones' Memorandum of May 27, 1969.

Memorandum from Division of Mergers, Bureau of Restraint of Trade, to Commission, dated June 5, 1969, responding to Commissioner Jones' Memorandum, Budget Plans of Division of Mergers, Fiscal 1971.

Memorandum from Division of Mergers to Commission, dated June 20, 1969, on Budget Plans of Division of Mergers—Supplementary Report for Fiscal 1971.

Memorandum from Division of Scientific Opinions, to Commission, dated June 4, 1969, responding to Commissioner Jones' request for more detailed information on that Division's plans for Fiscal year 1971 budget.

Memorandum to Commission from Commissioner James M. Nicholson, dated June 10, 1969, dealing with Budget Plans for the Bureau of Restraint of Trade For Fiscal 1971.

Commissioner Nicholson's Request For Data Re FY 1971 Budget Justification of New Investigations by the Bureaus—Comments by Dufresne.

Memorandum from Division of Mergers, to Commission dated June 18, 1969, responding to Commissioner Nicholson's Memo of June 10, 1969. The subject of this Memo is Budget Plans for Fiscal 1971.

Memo from Chief, Division of Discriminatory Practices to Director, Bureau of Restraint of Trade, dated June 18, 1969, responding to Commissioner Nicholson on Budget Plans.

Memorandum from Chief, Division of General Trade Restraints to Director, Bureau of Restraint of Trade, dated June 18, 1969, dealing with Fiscal 1971 Budget—Commissioner Nicholson's Memorandum of June 10, 1969.

Memorandum from Bureau of Restraint of Trade, to Commission, dated June 20, 1969, responding to Commissioner Nicholson's Memorandum of June 10, 1969, "Budget Plans of the Bureau of Restraint of Trade For Fiscal 1971."

Proposed Budget Request to the Bureau of the Budget—Fiscal Year 1971 And Final Commission Action.

Commission Minute dated June 21, 1969—Special Matter: Proposed Budget Requests for Fiscal Year 1971.

FTC Budget Justification to the Bureau of the Budget—Fiscal Year 1971.

Summary of Budget Requests And Appropriations—Fiscal Year 1959 to Date.

Memorandum from John J. Hurley, Economist, to Charles A. Sweeney, Program Review Officer, dated October 3, 1968, on the subject of Efficiency and control of bureau operations at the Commission.

Memorandum from Director, Bureau of Deceptive Practices to Commission, dated October 24, 1968, dealing with the Criteria for Opening Deceptive Practice Investigations; Preliminary Contact of Possible Proposed Respondents.

Memorandum from John J. Hurley, Economist, to Charles A. Sweeney, Program Review Officer, dated November 6, 1968, dealing with the need and basis for the bureaus to plan by specific objectives along industry and product lines.

Memorandum from Bureau of Restraint of Trade to Commission, dated December 24, 1968, dealing with Recommendation for Approval of Proposed Planning and Priorities Program for the Bureau of Restraint of Trade.

¹ See contents, p. VIII.

Memorandum from John J. Hurley, Economist, Office of Program Review to Executive Director, dated January 3, 1969, on the Economic means to plan more effectively the initiation of new investigations by the bureaus.

Memorandum from Chief, Division of Special Projects to Executive Director, dated January 16, 1969, on Economic Means to Plan More Effectively the Initiation of New Investigations by the Bureaus-Comments by Dufresne.

Memorandum from Bureau of Restraint of Trade to Executive Director, dated February 4, 1969, dealing with Comments on Hurley Memorandum of January 7, 1969.

Memorandum from James M. Nicholson to Commission, dated February 17, 1969, on the Policy Planning Program—First Interim Report.

Memorandum from Chief, Division of Mergers, Bureau of Restraint of Trade to Commission, dated June 17, 1969, on Fiscal Year 1970 Budget Estimates, Revised June 16, 1969.

Memorandum for Division of Scientific Opinion to Commission dated June 4, 1969, dealing with Plans For Fiscal 1971 Budget.

Memorandum from Bureau of Deceptive Practices to Commission, dated June 20, 1969, dealing with Preliminary 1971 Budget, Commission Minute, June 4, 1969, instructed the staff to submit comments and recommendations.

Memorandum from Acting Director, Bureau of Field Operations to Commission, dated July 2, 1969, on Supplemental Statement of BFO Budget Estimates For Fiscal 1971 submitted to Executive Director under date of June 20, 1969.

1971 Budget Estimate For the Bureau of Field Operations and Review of its 1970 Request.

Memorandum from General Counsel to Commission, dated June 20, 1969, dealing with Review of Allocations of Funds For Fiscal 1970 and Basic Plans For Fiscal 1971.

Memorandum from Director, Bureau of Industry Guidance to Commission, dated June 20, 1969, dealing with Appropriations Request for Fiscal Year 1971.

Memorandum from Director, Bureau of Textiles and Furs to Commission, dated June 20, 1969, dealing with Budget Plans For Fiscal 1971.

Memorandum from Chief, Division of Regulation to Director, Bureau of Textiles and Furs, dated June 19, 1969, dealing with Budget Plans for Fiscal 1971.

Memorandum from Chief, Division of Enforcement to Director, Bureau of Textiles and Furs, dated June 18, 1969, dealing with Fiscal Year 1971 Budget Justification.

Memorandum from Chief, Division of General Practices to Director, Bureau of Deceptive Practices, dated June 4, 1969, dealing with Fiscal Year 1971 Budget.

Memorandum from Director, Bureau of Economics to Comptroller, dated June 20, 1969, on Budget Justification of the Bureau of Economics for Fiscal 1971.

Memorandum from Paul Rand Dixon, Chairman to Commission, dated May 19, 1969, dealing with Appropriations Request For Fiscal Year 1971 In re: Preliminary Ideas and Plans of the Bureaus and Offices.

Memorandum from Executive Director to Chairman, dated April 30, 1969, on Ideas and Plans of the Bureaus and Offices for Fiscal 1971.

Memorandum from Office of Program Review to Executive Director, dated April 30, 1969, on Program Evaluation of Plans and Projects Proposed by the Bureaus and Offices for Fiscal 1971.

Memorandum from Executive Director to Chairman, dated April 25, 1969, dealing with Ideas and Basic Plans For Fiscal 1971 Budget.

Memorandum from Chief, Division of Accounting, to Assistant to the Director, Bureau of Restraint of Trade, dated April 15, 1969, on Budget-Fiscal Year 1970.

Memorandum from Chief, Division of Discriminatory Practices to Director, Bureau of Restraint of Trade, dated April 15, 1969, on Plans for Fiscal 1972 Budget.

Memorandum from Chief, Compliance Division, Bureau of Restraint of Trade, to Director, Bureau of Restraint of Trade, dated April 15, 1969, dealing with Plans for Fiscal 1971 Budget.

Memorandum from Director, Bureau of Deceptive Practices to Paul Rand Dixon, Chairman, dated April 25, 1969, on Proposals for Assessment Preliminary to Preparation of the FY 1972 Budget.

Memorandum from Director, Bureau of Textiles and Furs to Paul Rand Dixon, Chairman, Via John W. Wheelock, Executive Director, dated April 25, 1969, on Ideas and Basic Plans For the Fiscal Year 1971 Budget for the Bureau of Textiles and Furs.

Program Memorandum from Bureau of Industry Guidance on Fiscal Year 1971.

Memorandum from Director, Bureau of Economics to Chairman Dixon Via Executive Director, dated April 29, 1969, dealing with Programs and Special Projects of the Bureau of Economics for Fiscal 1971 Budget.

Memorandum from Executive Director, Office of Program Review, dated May 27, 1969, on Proposed Budget Request of the Office of Program Review for Fiscal 1971.

Conference Minute, dated June 4, 1969, in re Appropriations Request for Fiscal Year 1971; Preliminary Ideas and Plans of the Bureaus and Offices.

Memorandum from Sheldon Feldman, Attorney in Charge, Truth in Lending Section to Director, Bureau of Deceptive Practices, dated June 12, 1969, on Revised Fiscal 1970 Budget Justification for Truth in Lending.

Budget Justification to the Bureau of the Budget Fiscal Year 1970.

MEMORANDA

MAY 27, 1969.

Subject: Budget plans.
To: The Commission.
From: Mary Gardiner Jones.

I am attaching a set of memoranda which I have prepared with respect to the budget plan submitted by each Bureau. Each Bureau has received a complete set, even though not all are of concern to each Bureau.

I expect the Bureaus to respond in writing before the Commissions' scheduled budget meeting.

Subject: Budget plans submitted by the acting general counsel.
To: The Commission.
From: Mary Gardiner Jones.

I would like to know what this office has done in connection with its stated function of "preparing and prosecuting when advisable trade-mark cancellation proceedings." If this is a statutory obligation of the Commission, who is responsible for discharging this function and what exactly is done.

I would also like to know what action has been taken with respect to "voluntary industry agreement sponsored by other agencies in carrying out the Defense Production Act."

I have trouble understanding why the Division of Consent Orders exists. It seems to me its functions are better handled by the trial attorneys familiar with the case.

I also see no reason why this Division has to review complaints. Certainly the trial staff is competent to do this. I would like the trial staff and General Counsel's staff to comment on these two points.

The Division of Export Trade should state precisely what its objectives and specific goals are with respect to its administration of the Webb Act and the specific steps it plans for fiscal 1971 to carry out these objectives.

What is involved in its liaison activities, what is the objective of such liaison work and how precisely is it discharged?

I believe the Assistant General Counsel for Federal-State Cooperation is grossly understaffed. I am not sure he should not in fact be in the Deceptive Practice Bureau. I would like the Deceptive Practices and General Counsel staffs' comments on the latter observation.

I think the Federal-State Cooperation functions as they are envisaged should be more explicitly set down in terms of the 1971 specific goals and techniques to be used in performing each of the listed functions. In other words is it contemplated for 1971 to try to get each of the 50 state officials to go forward on each of the listed functions. Or is it contemplated that certain of these functions will be pushed for states with adequate laws and others will be pushed with respect to other states. If results are to be hoped for all of these functions cannot possibly be effectively performed with each state. A properly planned program for 1971 would encompass some specific, defined targets for each or all or some states for each of these functions. If these were stated, the Commission would be in a position in a real sense of being able to review with this office its contemplated programs. We would also be able to document factually the need of this office for manpower.

The Assistant General Counsel should advise us as to whether he thinks in 1971 it best for him to concentrate entirely on promoting legislation; or should he concentrate on aiding state officials in their preventive work, etc. For each of these functions he should tell us exactly what is involved, personal visits, correspondence or what. I wonder if Item 7 is necessary since I understand CCH does this now.

Subject: Budget Plans of Division of Mergers.
To: The Commission.
From: Mary Gardiner Jones.

I would like the Divisions of Mergers to elaborate how it reached its conclusions to make each of the projects listed in Items 1-10 priority projects and why those listed in non-priority status were selected and so classified. What are the reasons in terms of size of industry sales, size of industry members, growing concentration, number of industry members, etc. for each listed project.

Does the existence of guidelines automatically make these a priority item or can we assume that with the guidelines, we can turn our priority attention elsewhere.

The Division should specify the exact goal to be reached in fiscal 1971 with respect to each listed project and how it is to be reached. In other words, are we shooting for restructuring, are we simply preparing to respond to mergers in these fields as opposed to mergers in other fields, or do we have some affirmative program of our own in mind and if so what is it and how do we expect to implement and achieve its goals?

The Division should tell us whether and why our enforcement effort will be more effective by spreading the Division's resources over all the listed projects even though in several of these projects, staff tells us we have insufficient manpower to do the whole job. Will this mean we will do several of these inadequately?

Subject: Budget Plans of the Division of General Trade Restraints.

To: The Commission.

From: Mary Gardiner Jones.

The Division indicates that if it had sufficient manpower it could plan its work in advance and lessen its reliance on the mailbag in formulating its programs. I believe the Division should indicate to us exactly what a limited pilot planning effort such as it refers to on page 2 would entail, how it would proceed, what industries it would select and what it would look for. Also it should document exactly what types of studies it envisions and what would be involved. I do not believe planning should be the victim of the limitations on our manpower which will always be with us. I am convinced that if we try a limited pilot program, we can evaluate results and then document to the BOB why we need more personnel.

Starting with the Division's listing of projects on page 3, the Division should state for each of these projects exactly what their goals are and which ones it expects to achieve in fiscal 1971 and by what means. If greater or lesser effort is contemplated depending on manpower, the lesser and greater goals which might be accomplished in 1971 should be stated precisely.

The Division should also indicate for each project, why it was selected, what other projects must be put to one side because of manpower problems and why these were selected over those pushed to one side.

Subject: Budget Plans for Divisions of Discriminatory Practices.

To: The Commission.

From: Mary Gardiner Jones.

The Division has stated its overall objective and also its sub-objectives and has given us an informative, concise statement of how it proceeds to organize its work.

I think it would be helpful to the Commission and to the Division if it would take the next step and try and estimate for us just what its short range goals are in each of their industry projects for 1971. I doubt the Division anticipates elimination of all problems in each of the listed projects by the end of fiscal 1971. If not, what realistically does it hope to do in 1971 and what then will be left for 1972, etc. The Division should also tell us alternative ways of reaching its 1971 sub-goals with indication of manpower requirements for each alternative.

Subject: Budget Plan of Compliance Division, Bureau of Restraint of Trade.

To: The Commission.

From: Mary Gardiner Jones.

I would like the Compliance Division to furnish the Commission with more information elaborating on its proposals. I do not believe that the Division has been responsive to the Chairman's suggestion that it plan compliance investigation of significant orders in important product lines and I would like to know how the Division believes this could be done and pros and cons of doing it.

With respect to its listed products, I would like to know how and why the industries and orders covered by Project Nos. 1 and 2 were selected; what precisely is involved in each industry order selected for scrutiny and why other industry orders were not included even in the "etc."

How does this Division's program relate to the objectives of the Bureau as stated in its memorandum and to what extent does the Division's compliance program jive with the operational programs of the other Divisions?

For each compliance project listed, the Division should point out the extent to which the project carries out the Bureau's objectives and coordinates with a comparable program engaged in by the operating bureau. Compliance should also tell us whether it has outstanding orders which bear on any of the criteria or projects proposed by the operating bureaus and the reasons pro and con for compliance to pursue these orders.

Compliance should tell us exactly what manhours and time are involved in investigational hearings as compared with field investigations, whether the two procedures are wholly interchangeable, whether investigational hearings could be conducted by the field.

What is involved in checking compliance with vertical price fixing orders, could it be done by subpoenaing documents and processing them on the computer? Could this be contracted out on some other government computer, or could it be requested in tape form or punch cards from the companies which undoubtedly keep their pricing data this way?

How would compliance carry out a study of the "economic" effect of orders in selected industries as a guide to future planning? What would a pilot project entail in manpower?

What is contemplated would be involved in making "on site interviews and inspections" in Sec. 7 matters? What types of information would be solicited in such interviews, what type of pilot project could be mounted to develop hard facts on exact time and manpower which would be required by this technique as compared with present techniques, the quality of the information developed and an evaluation of the contribution to our analysis of the merger made by the development or checking of such hard data.

Subject: Budget Plans of Bureau of Deceptive Practices for Fiscal 1971.

To: The Commission.

From: Mary Gardiner Jones.

I have the following inquiries about the Bureau's plans which I would like to have answered in writing prior to the Commission meeting scheduled to discuss these proposals.

Part I of the Bureau's submission I found extremely creative and imaginative. I am a little disturbed at the implication of Part I, however, that the Commission has just discovered the consumer. Frank Hale writes that the Bureau has a need to reorient its thinking "in the direction of consumer affairs" and the author of Part I writes at page 7 that the change of the Bureau's name would constitute "a highly visible action that . . . would be widely interpreted as *pretending (sic) new roles* for the Bureau . . ." (emphasis added).

I would like the description of what the overall objectives of the Bureau should be. I do not understand why they would involve "an increased allocation of supergrades" nor do I find in the statement any explanation of the duties of the new staff which it is stated will represent a 100 percent increase. Staff should tell us precisely what new staff it envisages and what duties will be assigned to them.

I cannot find any relationship between Parts I and II of the Bureau's memorandum. If Part I establishes the overall functions of the Bureau, Part II should illustrate the manner in which it is contemplated these objectives will be carried out in fiscal 1971.

Part II simply lists a variety of projects in which the bureau is engaged. It gives us no indication of how or why these projects were selected and what other projects were considered and not selected and why. Most important, we are not told what the Bureau's objectives are for each of these projects in 1971. In item 1, for example, what is contemplated to be done by the end of fiscal 1971. How many are there? Is it contemplated that $\frac{1}{4}$ or $\frac{1}{2}$ or $\frac{3}{4}$ of these drug evaluations will be screened and action taken. Or is it contemplated that all com-

panies involved will at least be contacted once (whatever that entails) with no action contemplated until fiscal 1972. In other words, the Bureau should not simply list the project. It should tell us what it intends to do in pursuing the project so that the Commission can approve, modify, raise or lower the sights and know how alternative manpower (up or down) will affect progress.

The same series of questions must be asked of Item 2. How many TV networks, programs, etc. is it contemplated will be monitored, by how many people for what purposes. We should know the likely coverage we can obtain by one, two or more persons, we should know how quickly we can proceed with ads which are determined to be questionable with one, two or more persons so that when we determine manpower needs and cost we know the reasons behind the request.

Staff should outline specifically and precisely for each item, what it expects to cover and do in fiscal 1971 and what the outer and inner limits are on manpower and time of accomplishment.

In Part II B, New Programs, staff should state to us precisely the basis for selecting these projects, what alternative projects did it reject, the objective to be sought in each, and exactly what it contemplates *doing* in each of these projects and alternative minimum and maximum courses of action which are available to staff in carrying out these projects (i.e., education, suits, guides, etc.)

In Part II C staff lists several other projects "in which there is considerable public interest". Staff should state to us precisely the source of its information as to the existence of public interest and what other projects it considered and rejected in reaching the conclusion to list these.

Each of the Bureau's operating Divisions (Food & Drug, General Practices, Scientific Opinions and Special Projects) should furnish us this information with respect to each project item listed. I do not feel that I can vote for a budget allocation unless this type of information is furnished.

Compliance states it does not have a formal program for ascertaining compliance. In the event of a budget increase for the Bureau, it recommends "a program for selecting existing orders to cease and desist". Compliance should state precisely what type program it has in mind. It should also state precisely with or without a budget increase, the advantages and disadvantages, time, cost, manpower and efficiency, of a program of compliance as compared with its present practice of no programs.

In addition to the questions listed above to be answered by Special Projects for each of its listed project items, staff should advise why it lists Items 2, 7 and 11 which I would have assumed will be completed by the end of Fiscal 1970. Staff should state in detail why Item 8 is included. I do not understand what determines whether or not a project is "special". I do not understand Item 5. Why are Items 1 and 2 under B considered under this Bureau. I would have thought these were BIG responsibilities.

I do not understand why Special Projects contemplates doing Items 3 and 4 in B. Why is it contemplated to maintain a bibliography. Who else maintains one and is FTC the best agency to do this. What is the expertise which will back up the stated intention to disseminate consumer education materials on "wise buying".

Doesn't agriculture do this to some extent? To what extent is the communication of consumer materials involving local, state and federal levels, before the Courts, and before the state and Federal agencies, already performed by CCH, HEW, OEO, etc. Will this function overlap with the Assistant General Counsel for Federal-State Cooperation. To what extent should he also perform Item B 4.

Truth-in-Lending unit must state precisely the objective of its contemplated "creditor education" program and how it expects to achieve whatever the stated objective is. The objective should be broken down into definable realistic goals so that we can evaluate the manpower needs to reach each. For example, if one goal in fiscal 1971 is to build a universe of creditors that should be stated and the means contemplated to reach the goal. If it also encompasses the goal of making certain that each one of these creditors has heard of the CCPA and the FTC that should be stated together with the means contemplated. If the goals contemplate other matters they should each be stated. Staff should also state what portion of these goals it contemplates will be done by its own staff, what by field staff, etc.

I had thought that the staff was now "planning work on consumer education" and that by fiscal 1971 the project would be well into its implementation. Staff should give us its precise goals separately stated together with the means by which each will be reached.

Under New Projects, staff must elaborate precisely how it contemplates achieving this "continuing involvement" and exactly what goals and means to reach them it contemplates under its "increased emphasis upon enforcement techniques."

Subject: Budget Plans for Bureau of Industry Guidance.

To: The Commission.

From: Mary Gardiner Jones.

The Bureau's memorandum reflects a broad concept of the Bureau's functions which I found stimulating and thought provoking. The Bureau has in every case given us the goals of its projects and the means it contemplates using to achieve these goals. I have one problem with the presentation and that is that the goals and strategy could perhaps be broken down so that the Commission and the Bureau could know exactly what part of the overall goal the Bureau believes it will be able to achieve in 1971 and exactly what steps BIG will take in 1971 to achieve that goal and how much will still remain. Alternative methods to achieve that goal (in terms of scope of companies connected or what have you) should also be stated.

BIG's work has one major difficulty in it in that it overlaps with Deceptive Practices (price advertising) Economics (See Item 2 as to whether Economics states it can't move now), Restraint of Trade (franchising).

It seems to me that the Program Review Officer's function should be to spot overlaps in the Bureau's thinking and projects and work them out so that Economics hasn't put to one side a project which would support a BIG ongoing project or vice versa. Perhaps BIG should wait for Economics and turn its attention to supporting a consumer protection effort being pushed by Deceptive Practices.

This problem of overlap and need for coordination and interreaction of projects between the bureaus is particularly apparent when one reads BIG's memorandum after having read the memos of the other Bureaus.

The Program Review Office should bring the appropriate staff together to go over these projects to see if the various Bureaus' projects should be coordinated or postponed or accelerated in the light of the plans of the other Bureaus.

Subject: Budget plans of the Bureau of Economics.

To: The Commission.

From: Mary Gardiner Jones.

I think the Bureau's plans which are all definable studies are important but I am wondering whether they should not be carefully coordinated with the work of the other Bureaus. Obviously in most cases, the Bureau's studies should precede the work of the operational divisions.

The Program Review Office should work on this problem with all of the Bureaus.

Subject: Budget plans of the Bureau of Textiles and Furs.

To: The Commission.

From: Mary Gardiner Jones.

I think the Bureau should tell us exactly what its enforcement goals for fiscal 1971 are, i.e., how many and what types of inspections, etc. it plans to make, etc. What is the "greater" emphasis on its inspection program which the Bureau would engage in if an increase in manpower is available. The Bureau should document precisely what extra enforcement will result, i.e., number of inspections or what.

I think the Bureau should also give thought to alternative enforcement techniques other than inspection. I am wondering whether inspections are the only technique considered by the Bureau.

The Bureau should tell us exactly what their contemplated drive on women's fur coats will be and what their "hope" is based on that this can be started in fiscal 1971.

What type of "concentration" is projected by the Bureau with respect to foreign mink coats?

MEMORANDUM

JUNE 18, 1969.

Subject: Response to Commissioner Jones on Budget Plans.

To: Director, Bureau of Restraint of Trade.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices.

Commissioner Jones has requested that the Division of Discriminatory Practices set forth:

1. Estimate of short range goals for each industry project;
2. List what we realistically hope to do by the end of FY 1971; and
3. Alternative ways of reaching sub-goals with an indication of manpower requirements for each alternative.

Attached hereto is a summary of our sub-goals, expected achievements and alternative methods of reaching sub-goals. The desirable alternative in reaching goals is avoidance of undue delay and lengthy, time consuming litigation. Uniform industry compliance should be accomplished through consent agreements and voluntary assurances where appropriate. Avoidance of undue delay and lengthy trials should bring the project to an expeditious conclusion thus avoiding use of the project manpower for a number of years.

MAJOR PROJECTS

Chain Grocers—Food Distribution

It is anticipated that some time prior to FY 1971, that several pending matters will result in recommendations for complaint. The litigations involved would extend well into FY 1971 and, quite possibly, into FY 1972.

In *Olterman Foods, Inc.*, File No. 671 0222, the proposed charges involve receiving unlawful discriminatory promotional allowances in violation of Sec. 5 of the FTC Act. The conduct of this firm is notorious and since the firm indicates an unwillingness to modify their conduct, consent order settlement appears to be an unlikely alternative.

Likewise, a similar Sec. 5 proceeding appears likely against *Kroger*, File No. 691 0014. This matter is now under expedite investigation with special Commission authority. Because of the nature and magnitude of the practice, we feel that *Kroger* should be under order. Accordingly, we have declined a voluntary compliance suggestion.

The project team handling this industry contemplate other litigation that will carry into FY 1971 or commence in that period.

(a) *United Fruit Company, et al.*, File No. 671 0187. This matter involves a joint seller and customer proceeding under Sec. 2(a) and 2(f) with several monopoly charges against the customer. A recommendation is pending with the Commission to accept a consent order from United and also to issue a complaint against the customer, Harbor Banana Distributors. If recommendation is adopted, part 3 complaint will issue in the next fiscal year.

(b) *Purex Corporation Ltd.*, 671 0114. This matter involves discrimination in price in the sale of private label bleach. We consider this a significant case which will show adverse effects of private labeling at the primary line of competition. Purex is using raw market power to drive locals out of business in an attempt to gain monopoly power in the sale of this product.

(c) *Super Value Stores*, File No. 691 0027 involves an unauthorized deduction by a power buyer of discounts from invoices from suppliers.

In our plans for FY 71 Budget, we projected six (6) attorneys for this project. In addition to the above-mentioned probable litigation, routine scrutiny of the industry will require their efforts on a continuing basis.

Apparel Industry

All compliance reports still extant are expected to be forwarded to the Commission before the end of FY 1970. This will leave only civil penalty investigations and a few initial investigations undisposed of by the end of FY 1970. The two initial investigations which we have in the field should be returned early in FY 1970 and will be disposed of by the end of that year. If they result in litigation, that will run into FY 1971, but should terminate during that year. There will probably be some civil penalty investigations active in FY 1971 and beyond; this is a necessarily continuing activity. FY 1971 will mark five years since the Commission made its Orders to Cease and Desist final in this industry. Although we have not submitted any plan for such a follow-up, it appears to me that FY 1971 would be a good time for at least spot-checking compliance by Section 6(b) Orders to File Special Reports.

There are two matters still pending from the Commission's inquiry into this industry in 1962. They are: Korell Corporation, D-8777 and Evan-Picone, Inc., File 671 0162.

In Korell, the complaint has been issued and pre-trial stipulations etc. are being drafted. It is anticipated that this matter will be concluded in FY 1971.

In Evan-Picone, the files were returned from the field just last month. A preliminary review indicates a violation of Section 2(d). Accordingly, work has commenced looking towards the issuance of a complaint. It is anticipated that Evan-Picone will be substantially completed in FY 1971. We have projected two (2) attorneys for this project.

Dairy Industry

It is anticipated that some time prior to FY 1971, that at least two or three of the presently pending seven digit matters involving the dairy industry will result in recommendations for complaint. The litigations involved would undoubtedly extend well into FY 1971 and, quite possibly, into FY 1972.

The matters nearest the complaint stage are File Nos. 661 0093, Prairie Farms Dairy, Inc. and 681 0030, The Borden Company. In the Prairie Farms case a recommendation for complaint has been received from the attorney-examiner. There appear to be several violations of Section 2(a) of the amended Clayton Act by Prairie Farms. However, the documentary evidence requisite to prove such charges is woefully lacking. It is estimated that it will take from three to four months to complete this file. At that time a recommendation for complaint will most likely be filed.

In the Borden case, a supplementary investigation by this Division is nearing completion. A recommendation for complaint may be forwarded within the next three months.

There are six other investigations pending in the field which offer distinct possibilities of complaint. Since the estimated completion dates in these investigations seem to be quite fluid it is difficult to predict when they will be received from the field offices. However, it is very possible that one or more of these may result in recommendations for complaint prior to or during FY 1971.

At the same time continued scrutiny will be required of the dairy industry, especially in the areas of private label contracts between the major dairies and the major chains and inducements of discriminatory prices by chain stores. Such investigations are becoming more and more dependent upon compulsory process and investigational hearings (See File Nos. 661 0172, 671 0149, 681 0030 and 681 0137).

In addition to the probability that litigation in two or more cases will extend into FY 1972, it is apparent that our routine scrutiny of the dairy industry, plus future investigations and matters going to complaint will continue to require the efforts of from three to five attorneys during FY 1972. We have requested three (3) attorneys for FY 1971.

As for alternatives for our sub-goals, industry scrutiny and investigation of private label contracts and chain store pressures on the dairy industry, it would appear that the principal alternative approach would be that of the rule-making procedure. However, this would not appear to be a workable solution to dairy industry problems. Regulations set up at the state and local levels appear to have had a less than salutary effect. They tend to preserve the inefficient and, in the long run, only encourage backward integration by the chain stores.

Fresh Fruits and Vegetables

Notice of issuance of intention to issue complaints have been served charging five retail food chains and six "ground" or "field" brokers with violations of Section 2(c) of the Amended Clayton Act. It appears unlikely from negotiations that respondents will settle this matter. Accordingly, these cases should be in litigation in FY 1971. Six (6) attorneys have been requested to handle this litigation in FY 1971.

Tri-Partite Arrangements

This project was undertaken pursuant to Commission direction. Two (2) investigations [involving at least 10 top chain grocers] are in progress. In *Store Cast Corporation of America*, File No. 671 0067, the New York office advises that this investigation is almost complete. This case will probably involve litigation because respondent is involved in discriminatory activity and a consent order would put it out of business. [Pursuant to these programs the participating suppliers, directly or indirectly, grant preferential advertising allowances or serv-

ices to the participating retail grocery chain. The programs make no provision for granting allowances or furnishing services on a proportionate basis to competing retailers.] Litigation of this matter will carry into FY 1971. Two attorneys have been requested.

Publishing Industry [Prestige paperback and hardback publishers]

In a recent status report to the Commission this Division recommended that Section 6(b) reports be secured from a representative number (we have in mind about 50) of publishers in this industry—the reports to cover the heavy sales period in the fall of 1969.

If the Commission authorizes such action the reports should be processed and analyzed by spring of 1970. We will then be in a position to determine whether substantial conformance to the Commission's Guides has been achieved.

If such conformance is not indicated then further investigation and the issuance of formal complaints will be required. I further anticipate that certain members of this industry may take this opportunity to oppose the 6(b) reports and contest the Guides. Two (2) attorneys requested for FY 1971.

OTHER PROJECTS

Automotive Parts

An investigation was recently initiated under Section 2(a) and 2(f) of the amended Clayton Act against a major oil company (subject to one of the "TBA" orders) and two of its suppliers. One of the two suppliers also has a nationwide network of warehouses. The investigation, initially, is limited to the two suppliers, with the possibility of expansion to others. The warehouse of one of the suppliers is reportedly a major factor in the distribution of "private label" items sold through the gasoline station of the major oil company. The two suppliers, although selling a "private label" item to the oil company, are also large national factors in the sale of "branded" products. The reason we initiated this investigation is to get some understanding of the new "purchase and resale" program of the oil company. Also, the applicant's attorney indicated the practices of this oil company present a "test case." In other words, if the Commission does not proceed against this oil company, the other majors probably would follow their program of selling "private label" products in competition with the "independent" wholesalers and thus take away from the "independents" all of the gasoline station business. This matter is in its initial stages. 156 hours have been spent on it so far. The practice is reportedly nationwide. This matter will undoubtedly carry through the next fiscal year because of the complexities of dealing with a major distributor of "TBA" items, and also the problems inherent in prosecuting a "private label" matter. It might also lead into investigation of other oil companies engaging in the same type of practices.

Another serious problem that appears to be prevalent in the automotive replacement parts industry, based on a substantial number of complaints we have received, is the so-called "chicken wire warehouse." This involves the joint ownership of a warehouse and one or more jobber outlets. A warehouse price is granted on all purchases. This is affecting the competition of the legitimate warehouses and jobbers. But the problem is also directly related to the Commission's treatment of "buying groups". Of even greater significance is the investigation ordered by the Commission to discern the effects of the Advisory Opinion in the *Matter of General Motors Corporation* (Docket No. 5620), which deals directly with joint ownership. The outcome of the General Motors matter, and the directions thus emanating from the Commission should serve as a policy guideline in all such joint ownership matters.

We presently have three (3) related matters in the field for Section 2(a)—price discrimination investigations. They all involve "volume rebates." One (in the Kansas City Office) is reportedly completed or nearly completed. Man hours on that one are 427. The other two are in the initial stages of investigation. Man hours so far are 39 and 97. There has been an indication in the Kansas City Office investigation that a closing recommendation will probably be forthcoming on the basis of "meeting competition." The time necessary for full investigation of the other two matters should not exceed the time required for the Kansas City investigation. The reason these three matters were investigated is because "volume rebates" were the subject of some of the Commission's very early automotive parts matters. Such pricing systems were consistently held to be unlawful. It was my recommendation when I recommended these investigations that if the facts disclosed 2(a) violations, complaints issue without the

opportunity of Voluntary Compliance, because of the long history of "volume rebate" matters at the Commission. Another factor I wanted determined was why, after so many years of litigation in the industry, "volume rebates" still exist.

Substantial manpower will be required to evaluate these investigations in FY 1971. Our budget request covers only two (2) attorneys for FY 1971.

Drug Industry

Our investigations in this industry involve the following problems:

1. Institutional and Professional purchase and resale to potential derogation of private markets.
2. Diversion by exempt or non-competitive sources into regular commercial channels, with attendant dislocation.
3. Arbitrary offering and pricing of bulk and non-standard package sizes.
4. Straight price and discriminatory concessions.
5. Dual distribution.

We have six (6) investigations in the field involving drug problems. The investigations should be completed and evaluated in FY 1971. The investigations have not progressed to the point where an accurate prognosis can be made as to whether complaints will issue. It is hoped that the problems in this industry can be solved without costly litigation. Two (2) attorneys requested for FY 1971.

Department Store Industry

At the present time there are active matters involving Montgomery Ward & Company, Inc., File No. 651 0096 and R. H. Macy, File No. 681 0126.

In connection with the former the charge will be violation of Section 5 of the Federal Trade Commission Act for inducing services which appear to be in violation of Section 2(e). At the present time the files are being reviewed for preparation of formal complaint.

With respect to R. H. Macy, the matter is currently being investigated by the New York Office for possible violation of Section 5 of the Federal Trade Commission Act for inducing violations of Sections 2(d) and (e) on the part of its vendors.

In addition to the foregoing, the Bureau has recommended to the Commission by memorandum dated May 29, 1969, that Federated Department Stores, Allied Stores Corporation, May Department Stores, Associated Dry Goods Corporation and R. H. Macy be investigated to determine whether these large complexes are receiving special prices and/or promotional allowances from suppliers which may be in violation of Section 2(f) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act. The Commission directed that this industry be studied by the Bureau of Economics.

Since the Montgomery Ward and Macy investigations do not include pricing practices, they should probably be also forwarded to the Bureau of Economics to assure uniform industry-wide treatment. We cannot anticipate whether the Bureau of Economic's recommendation will require manpower expenditure in FY 1971.

Baking Industry

The Commission continues to receive a large number of complaints from independent bakers because of discriminatory and below cost selling of bread by large national and regional bakeries. Private label is the most serious problem in the industry. Vertical integration by grocery chains has cut into the market share of the independents. The five (5) investigations in progress should be completed and evaluated by the end of FY 1971. Two (2) attorneys requested for FY 1971.

Drapery Hardware Industry

We intend to recommend that the five cases in this industry be closed. If this recommendation is accepted the Division will no longer be involved in this industry. If rejected, we would estimate that complaints would be recommended in at least three of the cases. Except for the Kirsch Co., File No. 671 0235, none of the investigations were extended to cover evidence of injury. Consequently, supplemental investigation would be needed in the other files. Hopefully this and the recommendations of this Division would be completed by the end of fiscal 1971. If this schedule were realized we could anticipate that fiscal 1972 would be spent in preparation for hearings, pre-trial, and perhaps hearings in

one of the cases. At least one other attorney and an accountant would be needed to litigate these cases. The *Graber* case at times required the full time efforts of three attorneys and one accountant.

MISCELLANEOUS BUYING GROUPS OF INSTITUTIONAL DISTRIBUTORS

These cases involve purchases of dry (canned and/or frozen) grocery products by various groups of institutional food distributors who resell their merchandise to large food organizations such as restaurants, hospitals and schools. Five investigational files have been opened and are in various stages of progress toward eventual complaint and trial. The cases involve:

Nugget Distributors, Inc., File No. 671 0184
 Stewart Tucker, Inc., File No. 681 0077
 Continental Organization of Distributor Enterprises, File No. 691 0001
 Frozen Food Forum, Inc., File No. 671 0102
 National Institutional Food Distributor Associates, Inc., File No. 671 0103
 United Institutional Distributor Corp., File No. 651 0168

Each of these cases resulted from complaints by food brokers either as individuals or through the National Food Brokers Association. It is charged that these proposed respondents are enterprises formed by institutional food distributors to purchase grocery products on their behalf at reduced prices made possible by elimination of brokerage fees which would normally have been paid to "independent" brokers by suppliers of these distributors. Two of these cases will be shortly forwarded to the Commission with recommendations that complaints issue.

Snack Foods Industry

An investigation of Frito-Lay in the Chicago market area has been recently completed. (File 661 0036) Frito-Lay is the snack foods industry's largest producer. The Field Office has recommended complaint on the basis of violation of Sections 2(a) and 2(d) of the Clayton Act. We feel that the Section 2(d) charge against Frito-Lay in this matter may not have much merit, but a Section 2(a) complaint may possibly issue on the basis of discriminatory discount allowances. It is anticipated that Frito-Lay would not accept a consent order and litigation would probably last until at least 1970.

Frito-Lay in the meantime has petitioned us to take action on an industry-wide basis in the snack foods industry with regard to alleged industry-wide discriminatory practices. We are presently considering the feasibility of such an industry-wide approach but, at this time, we are not sufficiently far along in our study of this matter to state that this would be our recommendation. Industry-wide action would take considerable time and probably would extend into FY 1971.

E. I. du Pont de Nemours, et al. File No. 621 0266

Industry—Cellophane sheets used in wrapping meat

Violation—Section 2(a) price discrimination; Section 5

Status: Field investigation completed; Pending determination as to disposition

This investigation centers around the pricing practices of the three domestic producers of cellophane used in wrapping fresh meat. In addition to price discrimination, the investigation has borne out incidents of vertical as well as horizontal price conspiracies, resulting in injury to secondary as well as tertiary line competition.

The case involves novel questions of law involving particularly the meeting competition defense and the indirect purchaser doctrine. The short range goal, since it is apparent that the product itself, cellophane, has been largely supplanted by another product, is not directly related to the cellophane industry but rather to the systematic pricing plan of E. I. du Pont Co. Inc., in its practice of assisting its customers to meet a lower price extended by its customers competitors. A determination of the illegality of such practice and a recognition of its inherent anticompetitive effects should deter similar violations by other producers in other industries.

In the event that the Division should recommend complaint and that the Commission issue same, it is estimated that litigation may ensue which could conceivably extend to 1971 and possibly 1972.

Coca-Cola, Inc. File No. 681 0015

Industry—Coffee

Violation—Section 2(a) price discrimination; Section 3, Clayton Act
Status: In field

The substance of this investigation revolves around the activities of two coffee divisions of the Coca-Cola Company: Tenco, Inc. and Duncan Foods, both of which were recently acquired by Coca-Cola. The investigation is directed to the anticompetitive effects of allegedly below cost prices on sales by Coca-Cola. The market is apparently characterized by a growing concentration as allegedly seven coffee companies in the relevant market have either gone out of business or trying to liquidate their ventures in order to do so.

The short range goal is to determine if there is a causal link between the primary line injury and growing concentration and the below cost sales.

Another aspect of the case may also have played a significant part in the apparent reduction of competitors. It was alleged that Duncan Foods, through its division Huggins-Young, is involved, in its institutional sales of roasted coffee, in a tying arrangement with Coca-Cola in the sales of its syrup.

The long range goal in this investigation is to protect the viability of the efficient competitor and halt the trend toward increasing competition, resulting from anticompetitive pricing practices. However as a budgetary consideration, it is difficult to forecast any specific estimates as such must necessarily depend upon the results of the field's investigation.

Argus, Inc. File No. 681 0042

Industry—Photographic Equipment and Supplies

Violation—Section 2(a) price discrimination; secondary line
Status: In field

This investigation centers around those engaged in the mail order resale of photographic equipment and supplies purchased from Argus. In addition to the complainant there are six to twelve other such mail order wholesalers. It was alleged that Argus was favoring another category of customer (wholesaler) who are in direct competition with the mail order firms, in that they serve the same customer accounts.

The investigation was initiated to determine if the pricing practices as alleged (price discriminations) had an anticompetitive effect on the mail order wholesalers and to determine if the ability of this class of customer to compete was impaired.

Preliminary reports from the field indicate that there may be a violation of Section 2(d) and (e) regarding promotional allowances and/or services.

It is impossible at this time to estimate any long range goals with relation to this investigation, however. This necessarily is dependent upon the outcome of the field investigation.

Outdoor metal sheds

Arrow Metal Products, File No. 671 0258 is presently being forwarded from the Washington Field Office to the Bureau with a recommendation for complaint.

The charges will be violation of Sections 2(a) and 2(d) of the amended Clayton Act in the sale of outdoor metal sheds.

The proposed respondent has been in business for about 5 years, during which time it has captured 40% of this particular market.

Indications are that this has been accomplished through enticing price advantages being offered to large volume buyers such as Penney's, Giants, AMC and others.

This complaint will also be forwarded to the Commission with recommendation in early FY 1970 and is expected to carry into FY 1971.

MEMORANDUM

JUNE 18, 1969.

Subject: Budget Plan and Program for Fiscal 1971—Response to Commissioner Jones' Memorandum of May 27, 1969.

To: Commission.

From: Division of General Trade Restraints.

Commissioner Jones' memorandum of May 27, 1969, directs this Division to set forth the plans and programs it would undertake if not restrained by the resources barrier mentioned in our budget presentation of April 15, 1969.

The overall objective of this Division, along with that of the Commission's other operating units, is of course to assure the vitality of meaningful competition and thus to minimize the amount and the effect of monopoly in the nation's economy. In general, monopoly (and oligopoly) tend to have three major effects, namely, (1) prices that exceed the level that would have prevailed had competition been effective; (2) lower levels of output than would have prevailed if competition had been effective; and (3) lower levels of technological innovation than would have prevailed if competition had been effective. Economists specializing in the field of antitrust (industrial organization) have estimated that the cost of monopoly and oligopoly to the economy as a whole, measured in terms of lost output (GNP), is now something on the order of \$20 billion to \$45 billion or more per year and is probably rising. (See, e.g., Dr. David R. Kamerschen, *An Estimate of the 'Welfare Losses' from Monopoly in the American Economy* (Michigan State University, 1964) (doctoral dissertation), and Dr. William G. Shepherd, "Conglomerate Mergers in Perspective," 2 *Antitrust Law & Economics Review* 15, 20 (Fall 1968).)

The bulk of these losses are said to be concentrated in the manufacturing sector of the economy and, within that sector, in a number of particularly concentrated or essentially noncompetitive industries. In general, approximately 25% of the total output of American manufacturing comes from these highly concentrated industries, the so-called "tight-knit oligopolies" with concentration in the range of 50% or more held by the "4 largest" or, what is roughly the same thing, 70% or more held by the "8 largest." In numbers, most industrial organization points to about 50 manufacturing industries (out of a total of 417) as constituting the heart of the country's monopoly/oligopoly problem. Restoration of effective competition in these industries would be expected to result in a regaining of a substantial part of that \$20 billion to \$45 billion or more monopoly/oligopoly cost figure. (Appendix A is a list of the approximately 50 industries tentatively identified recently by a group of antitrust economists as "priority industries," i.e., those especially in need of antitrust attention. "Priorities in Antitrust": Some Communications," 1 *Antitrust Law & Economics Review* 11 et seq. (Spring 1968). A somewhat similar list of industries, 35 in number, is set out in the recent *Studies by the Staff of the Cabinet Committee on Price Stability* (January 1969), page 93.)

The enforcement problem thus has two major aspects to it, namely, (a) *preventing any further growth* in the size of the oligopolized or noncompetitive sector of the economy, i.e., preventing those industries that are now relatively unconcentrated (e.g., 4-firm concentration ratios of 40% or less) from crossing the threshold into the "tight-knit" range (e.g., 4-firm ratios of 50% or more), and thus raising that aggregate annual loss to the consuming public still higher, and (b) *reducing the current size* of that already-existing oligopolized sector, i.e., lowering the concentration ratios in, and the entry barriers around, some of the already-concentrated industries and thus giving the consuming public some relief from the higher-than-competitive prices and other costs that are currently being imposed on them by those noncompetitive industries.

The responsibility for preventing further increases in concentration and the accompanying social and economic ills associated with it are shared by all of the operating Divisions of this Bureau. The Merger Division and the Division of Discriminatory Practices, by preventing acquisitions and other concentration-increasing acts and practices, are obviously addressing their resources to this *preventive* aspect of the problem. The Division of General Trade Restraints shares this responsibility also, under its duty to stop a variety of competitive devices that have an "incipient" potential ratio. It alone, however, carries the Commission's burden of attempting to provide the public with relief from the costs associated with *already-existing* monopolies and oligopolies in the economy.

of attempting to bring about some much-needed deconcentration and lowering of entry barriers in some of these noncompetitive industries.

Litigation must necessarily play a more significant role here than in some of the other aspects of the Commission's work. The most important single reason, of course, is that, whereas the prospect of a confrontation with the Commission is sometimes enough to persuade a proposed respondent to voluntarily give up a scheme that holds out only the *hope* of higher-than-competitive prices and profits in the *future*, there appears to be little evidence that anyone has ever "consented" to give up a genuine monopoly or oligopoly position yielding, as is often the case, long-range profits that are sometimes as much as two or three times (or even more) the norm in competitively-structured industries. Only a litigated order, one suspects, can really be expected to cause a significant drop in the price level maintained by one of these noncompetitive industries. To ask a firm or an industry to "voluntarily" consent to give up an annual harvest of monopoly profits it has enjoyed for decades is to place an undue strain, we feel, on human nature and to make an assumption that has no particularly sound basis in economic analysis.

Secondly, a vigorous program aimed at improving the structure and performance of some of these industries should have some beneficial side-effects on the *other half* of the Commission's enforcement work, the *prevention* of further increases in concentration in the as-yet unconcentrated sectors. Whereas a policy of indecision toward existing monopoly and oligopoly obviously acts as a powerful incentive for those firms and industries still exposed to the rigors of competition to attempt to better their condition through mergers and the like, thus further fueling the current merger movement, a show of real resolution against the already-concentrated industries should significantly reduce that incentive: the knowledge that there is no "sanctuary" on the other side of the oligopoly fence—that *all* significant positions of real monopoly power are ultimately going to be challenged—could well cast quite a chill on the urge to convert unconcentrated industries and loose oligopolies into tight-knit, noncompetitive ones.

Thirdly, a policy that does not include a program that probes deep into the already-concentrated industries misses an opportunity to develop the kind of knowledge and understanding on the part of the Commission and the staff that is vital in *all* areas of our work, including, for example, our anti-merger work. In all of the "incipiency" cases, for example, the analysis is necessarily theoretical rather than immediately empirical; one has to accept the premise, without actual proof, that if a given act is allowed to occur (e.g., a merger), monopoly and oligopoly will eventually result and that this, in turn, will have undesirable consequences for consumers. In a monopoly or oligopoly (shared monopoly) case itself, however, the actual proof of these matters can be explored, i.e., the situation can be examined in actual quantitative terms to determine *how much more* the consumer has really been required to pay as a result of the monopoly/oligopoly in question, how it was all accomplished, the real market relationships involved, and the like. A program that includes cases of this character is necessarily, it seems to us, a richer one than would otherwise have been possible.

The most difficult part of any rational enforcement program is, of course, the *case-selection process itself*. (See my memorandum to the Executive Director of March 25, 1969, on Planning New Investigations, and my memorandum to the Commission of June 4, 1969, Request for Authorization of Investigation of Breakfast Cereal Industry, attached hereto as Appendix D.) The appropriate procedure is to look out over the economy as a whole, identify those of our 417 manufacturing industries that are noncompetitive in character, and then select, from that noncompetitive group those in which the return on our investigative resources would be the highest. To select the wrong ones is to fail the "opportunity cost" test; bringing a case that return \$2 (in terms of lower consumer prices and the like) for every \$1 spent when there is available another case on which the return is not \$2 but \$10 is, by definition, to misallocate our resources and to give the consuming public less for its total number of enforcement dollars than we could have given it.

The basic method for estimating the amount of public interest in a given Commission case is to determine:

- (a) The total *sales volume* of the industry;
- (b). The *monopoly price* currently being charged for the product (or, if it is the threat of *future* monopoly that is involved, the price that is reasonably to be expected if it should in fact become monopolized); and

(c) The *competitive price* that would reasonably be expected to prevail if the industry should be made effectively competitive.

Subtracting the competitive price, (c), from the monopoly price, (b), gives the amount of the monopoly "overcharge" (actual or potential, as the case may be) in percentage terms. Multiplying this percentage figure times the dollar sales volume of the industry, (a), gives the *total dollar amount* of the actual or potential monopoly overcharge¹ and thus at least some kind of rough approximation of the actual or potential public interest in a proceeding aimed at restoring effective competition in that industry. (While there are of course other values associated with competitive markets, including optimum output rates, innovative progress, free entry, maximum opportunity for small business and the like, we consider *price* a reasonably good "proxy" or index figure for the entire aggregate of competitive values, since, other things being equal), improvements in any of these other areas (e.g., new entry, growth of the smaller firms in the market, new innovations, etc.) should be *reflected* in a drop in the price level.)

There are of course many difficulties in attempting to make estimates of the potential benefits to the public from an antitrust action, particularly at the preliminary or pre-investigation stage. In litigated cases, it can be done through the testimony of experts witnesses, basing the estimates of the "competitive" price on such benchmarks as (a) the Census Bureau's nationwide "averages," (b) the price level in *some other area* that is known to be particularly competitive, (c) the price level in the market in question itself *prior* to the monopolization complained of, (d) the price level in that market *after* the collusion or monopoly was eliminated, (e) the price being charged for physically identical products sold under different "brands" (e.g., the lesser known brands of the smaller firms in the industry in question, the "private brands" of the integrated retailers, and the "secondary" labels of the major manufacturers themselves), (f) the *known costs of production and distribution* of the product in question, including a competitive rate of profit on the capital employed, by plants and firms of reasonably efficient size (as established by prior litigated cases, industry studies published by university scholars, etc.), and, in some cases, (g) the *known heights of the entry barriers* around some of the concentrated industries (a 10% entry barrier around a highly concentrated industry implies, other things being equal, that a price 10% above the competitive level can be charged without inducing new entry and a beating of the price back to the competitive level).

The more of this kind of data one has at the pre-investigation stage, the more confident one can be of the preliminary estimate of the potential gains to the public from an action aimed at restoring effective competition in the industry in question. We have therefore recently recommended that a systematic program of data collection be instituted at the Commission, one designed to create, in time, a fairly complete "economic dossier" on each of our 417 manufacturing industries, particularly the 50 or so most highly concentrated ones. (See my memorandum of June 10, 1969, Proposed Upgrading of ADP Systems, attached hereto as Appendix B.)

Assuming that one has estimated with reasonable accuracy the annual cost, in dollars, of a particular monopoly/oligopoly situation in an industry, and thus the *potential* benefits to the public from a restoration of effective competition in it, there still remains the always difficult problem of devising an appropriate *remedy*, one that will in fact realize *all* of that potential rather than giving the public only half-a-loaf (or less). In order to perform this task adequately, one must know, of course, the precise market relationships involved; if the diagnosis is unsound, the certainty of the cure is obviously reduced. Unless one knows

¹ A figure somewhat comparable to this can be developed in the deceptive-practices area as well. Deception implies, by definition, that the consumer has been persuaded (a) to buy a product he would not have bought at all if he had known the truth about it, or (b) to pay *more* for a product than he would have paid if he had known the truth about it. (In more technical terms, deception creates a form of "product differentiation," a variety of monopolization discussed below and in Appendix D.) In the first case, the one where the product is worthless to the consumer, the loss is total, i.e., the "overcharge" is 100% of the price paid for the product. In the second situation, where the consumer was deceived into paying more than he would have knowingly paid for the product, the real loss is the *difference* between (i) the price paid, and (ii) the fair market value of the item in question, e.g., what comparable products are selling for in reputable establishments in the community. Multiplying that difference (say, 30%) times the dollar volume of a respondent's sales gives the total cost of the scheme to the public and, by the same token, the potential value to the consuming public of a Commission action aimed at eliminating the deception in question.

rather precisely *how* prices are being maintained at a noncompetitive level, for example, the chances of devising an order that will cause them to fall by more than a token amount are clearly impaired.

A great deal of knowledge about market relationships in monopoly and oligopoly situations have already been collected by the antitrust economists in the country, particularly the approximately 800 members of the Industrial Organization (Antitrust) section of the American Economic Association. In general, the overwhelming bulk of the annual monopoly/oligopoly cost figure mentioned above is ultimately attributable to distortions in the *structures* of these noncompetitive industries, i.e., to their (a) high concentration ratios, (b) high degrees of product differentiation, and (c) high barriers to entry. Price fixing, for example, is so closely associated with a certain kind of industry structure that it is possible for a skilled analyst to go down the list of our 417 manufacturing industries and pick out with considerable confidence those in which collusion is virtually inevitable. (See Appendix B.) Price discrimination is similarly a creature of industry structure, particularly of high entry barriers (the "high" price varies according to the height of the entry barriers sealing the disadvantaged buyers off from access to competitive-priced sellers). Resale price maintenance depends for its existence on "product differentiation," (*Cabinet Committee on Price Stability, supra*, 88) as do most of the various vertical restraints antitrust is concerned with, particularly exclusive dealing and territorial restrictions. It follows, of course, that a Commission order, if it is to be genuinely effective in restoring competition in an industry characterized by these anticompetitive symptoms, must deal with those underlying structural features of those industries. Again, the most meaningful compliance report, at least to the consuming public, is a decrease in market shares and, what is generally the same thing, a decrease in the price level in the industry in question.

It is against this general background that the Division of General Trade Restraints is currently attempting to develop an improved system of case priorities, one aimed at maximizing its effectiveness in those areas of most concern to the consuming public, particularly in the concentrated industries. Specifically, we have (a) reevaluated our current, pending cases, (b) recommended a number of new investigations to the Commission that would involve a direct challenge to the market power of some of the country's most important oligopolies on charges of oligopolization or shared-monopoly, (c) begun a limited program of developing the kind of data necessary to a more comprehensive case-selection process along these lines, and (d) recommended a number of other programs that we consider essential to the Division's maximum effectiveness.

The programs we would undertake if not constrained by resource barriers are as follows:

I. ECONOMIC CONSULTANTS

A basic part of our overall program would be one of consultation with economic experts (generally industrial organization economists from the universities) in the various sectors of the aggregate monopoly/oligopoly problem and the development of a systematic program designed to maximize the Division's impact on the price level in those industries that are currently believed to be imposing the most significant losses on the consuming public. We would especially want to consult with, and have our enforcement program designed in part by, experts we would select in the areas of (a) price fixing, (b) oligopoly in the producer goods industries, (c) product differentiation, and (d) vertically restricted distribution systems (resale price fixing, exclusive dealing, and territorial restrictions). My staff has already had some preliminary conferences with an economic expert specializing in one of these areas, as discussed below. Preliminary estimates are that, overall, we would need the equivalent of two (2) consultants for a year, although the tenure of any one of them probably would not exceed three (3) months. One attorney would be needed to coordinate the program here, plus several of the others described below.

II. DATA COLLECTION

In order to make the kind of analysis that would permit the Division to systematically array its cases according to their significance to the consuming public, it is necessary, as discussed above, to have a certain minimum amount of data on the structure-conduct-performance characteristics of each of the industries in question. The kind of data needed is described in some detail in Appendix C.

a memo of May 15, 1969, to the staff of this Division; our recommendations for a Commission-wide collection, storage, and retrieval program here are set out in Appendix B.

III. TRAINING

As I have pointed out at some length in response to the urgings of the Commission's Program Review Officer that we unilaterally abandon our alleged "mail bag" approach to law enforcement and direct our attention, instead, to the more sophisticated forms of monopolization in the highly concentrated industries, our attorney-staff simply does not have at the present time the kind of technical *economic* skills needed if we are to select, from our 417 4-digit manufacturing industries, those where the per-dollar return on our resources would be the highest. (See my memorandum to the Executive Director of March 25, 1969.) We need help from the Commission itself. We have been running a course in the Economics of Antitrust for nearly a year now, but it has been handicapped by the fact that it has been conducted in the evening hours, a time when the family responsibilities of most of the staff preclude them from attending. From our experience with these courses, we now have some fairly accurate estimates as to the *minimum* number of hours required to equip the Commission attorney to handle the concepts and data essential to a program of this type, namely, about 150 classroom hours. (The subject matter, unfortunately, does not lend itself to the so-called "on-the-job" training techniques; only a decently equipped classroom, with textbooks and blackboards, can do the job.) Considering that it is said to take 1500 hours to produce a jet pilot and even 300 hours to train a competent bartender, this does not seem to be an excessive amount of time to invest in an antitrust trial lawyer. One attorney in the Division, with the help of the consultants mentioned above, would be sufficient to handle this program. Classroom sessions of 1-hour each, three (3) days per week, are believed to be the most effective in a technical area such as this.

IV. PRICE FIXING PROGRAM

As noted above, my staff has already held some preliminary conferences with an economic expert specializing in price fixing conspiracies, Dr. John Kuhlman of the University of Missouri (currently consulting with the Commission's Bureau of Economics on the conglomerate merger study), and has outlined in Appendix B, below, a proposed pilot program in this area. We are advised that, given a reasonable amount of effort in this direction, by the mid-1970's the Commission's computers could be made into almost as formidable a hazard for the would-be price fixer as those of Internal Revenue Service are already said to be for the income tax artist. In Dr. Kuhlman's view, there is no activity the Commission could engage in, not even its anti-merger work, that could promise a larger return on the enforcement dollar. The estimated cost of this program for the first year is four (4) people: an economist, a programmer, a statistical clerk, and a typist. (See Appendix B.)

V. CONCENTRATED INDUSTRIES—PRODUCER GOODS

The Division has under way, in cooperation with the Bureau of Economics, a pilot program centering on a Plan of Study of Important, Highly Concentrated Industries. (See our memorandum to the Commission of April 30, 1969.) Six (6) industries are to be studied here, beginning with the *steel* industry (five others—*automobiles, drugs, electrical machinery, energy industries, and chemicals*—are also on the priority list). This aspect of our enforcement effort is aimed at the important, noncompetitive industries in the undifferentiated sector of the economy, the *producer* goods industries, i.e., the general problem of the noncompetitive, oligopolized industry characterized by high concentration ratios, high entry barriers, and poor performance in terms of higher-than-competitive prices, excessively high costs, and the like. (These industries are distinguished from the *consumer* goods industries by the general absence of advertising and product differentiation, characteristics that introduce special problems in themselves as discussed below.) 2 men.

VI. OLIGOPOLY IN THE CONSUMER GOODS INDUSTRIES (PRODUCT DIFFERENTIATION)

The heart of the monopoly/oligopoly problem in America, according to most industrial organization economists today, centers around the phenomenon of "product differentiation," the distinguishing of similar products from each other by persuasive (noninformational) advertising and other forms of sales promo-

tion. The monopoly power involved here in a particular industry is measured in terms of the *price differential* between the advertised and the unadvertised brands of *comparable quality*. If unbranded gasolines of 100 octane rating sell in a particular area for 34¢, for example, while the major branded gasolines of the same 100 octane rating are selling for 39¢ there, in economic terms we are confronted with a 5¢ monopoly "overcharge," an exaction of about 15% over and above the competitive price, the one that would have prevailed had the consuming public *known* that the two gasolines were in fact of comparable quality. (It need hardly be added that consumers could *not* be persuaded to pay 15% extra for a particular firm's product *if* they were informed that it was in fact of no better quality than the lower-priced brands. The *sine que non* of the consumer's "willingness" to pay the higher price is the *gap in his knowledge*, i.e., his ignorance of the single critical fact that lies behind his payment of the higher price, the fact that the two products are not significantly different in quality; a removal of that ignorance would cause the 39¢ price to promptly drop back to meet the lower 35¢ price.)

It is *this* kind of monopoly that accounts for the overwhelming bulk of the \$20 billion to \$45 billion or more "cost-of-monopoly" figure mentioned above. As the Director of the Commission's Bureau of Economics, Dr. Willard F. Mueller, has put it, "product differentiation poses the greatest single threat to effective competition in our economy." In fact, recent empirical studies have indicated that, whereas concentration is in general *falling* in most "producer goods" industries (that is, in heavy manufacturing, where there is little or no advertising), it is rising in the "consumer goods" industries, particularly in those where there is a high degree of product differentiation (and thus a high volume of advertising, particularly television advertising). See *Cabinet Committee Report, supra*, at 60-62; Charles E. Mueller, "Sources of Monopoly Power: A Phenomena Called 'Product Differentiation,'" *American University Law Review* 1 (December 1968). A vigorous program here, one that would of course focus particularly on, say, the few dozen firms that have built some of the country's most concentrated industry structures with very high volumes of advertising, would obviously offer some rather phenomenally high returns for the consuming public. The matters summarized below, for example, while not chosen with the kind of precision that would be possible under the kind of overall, systematic case-selection process we are recommending here, at least indicate generally the kind of cases we would recommend and develop to their full potential if the necessary resources were available (2 attorneys, plus approximately 20% of the time of an economist and an accountant, would be required by each of these matters):

Breakfast Cereals.—We have recently submitted to the Commission a request for authorization of an investigation of the nearly \$1 billion breakfast cereal industry. (Appendix D.) The three (3) largest firms there have 83% of the industry's total sales: Kellogg, 43%; General Mills, 22% General Foods, 18%. (The next three largest have 15% and some 50 other companies scramble for the remaining 2%.) Some 20% of the sales dollar of these firms is spent on advertising, primarily television advertising and, because the products of the competing sellers are not significantly different in physical properties, this is a non-functional addition to cost—and price—that could not survive if competition was effective in the industry. Kellogg, the leading firm in the industry, has maintained one of the highest long-term profit rates in American manufacturing, a 10-year average of more than 20% after taxes on stockholders' equity, some three times the long-range competitive norm. There are no significant scale economies in the industry (a plant of optimum efficiency would supply roughly 5% or less of the total industry sales volume), and hence there are no technical barriers to a competitive industry structure here.

There are thus *potential gains to the consumer* here from a restoration of effective competition in this industry of perhaps as much as 20% to 25% in lower cereal prices, a savings of some \$150 to \$250 million. And, as discussed in our memorandum recommending this investigation (Appendix D), the very lowest income groups would be the principal beneficiaries since a disproportionately large portion of their total income is spent on food (up to 50%, versus some 20% for the average income family), particularly on the basic grain products.

Gasoline.—We are advised that the differential between the major "branded" gasolines and the "unbranded" gasolines of the independent sector of the industry has now widened in some areas to 3¢ per gallon. Elimination of this "premium" on the approximately 64 billion gallons sold annually by the majors (85% of the 75 billion gallons sold by the entire industry) would yield a *potential gain*

to the consuming public of \$1.92 billion per year. We are currently working on a number of matters in this industry and, given the necessary resources, we would like to probe the product differentiation barrier involved here directly and the noncompetitive price level it is apparently supporting for the major refiners.

Retail Food Industry.—This Division is currently investigating, on the recommendation of the Director of the Bureau of Economics, the alleged monopolization of the Washington, D.C., retail food industry by the three major chains in the area, Safeway, Giant, and A&P. It is alleged that they acted in unison to force prices below cost in the immediate area of a new entrant's three (3) stores here (thus forcing it to withdraw), for the purpose of preserving their monopolistic price structure in the City and its environs. The new entrant, a 27-store chain from New Jersey, specializes in "private brands," "discount" prices, and stores that, individually, are generally three or four times the size of the bulk of the chain stores here. A transplanting of that new entrant's lower New Jersey price structure to this area (via the dozen or more stores it had planned to open in the Washington metropolitan area), a price structure that is alleged to be some 4% below the price level prevailing here (one of the highest in the nation), would have meant a *gain to the consuming public* of some \$40,000,000 per year (annual sales in the area are approximately \$1 billion) in immediate returns; a case of this kind, in demonstrating the Commission's willingness to promote the deconcentration of oligopolized markets (part of the relief to be requested here will be divestiture of some of the stores of the dominant firms responsible for that high price pattern), would also obviously have some significant effects in the other major metropolitan areas where equally high concentration ratios and noncompetitive prices prevail in the \$90 billion retail food industry.

Office Copying Industry.—A request is being made by this Division for authorization to investigate the approximately \$1.2 billion office copying industry. A single firm, Xerox, dominates the industry (65% to 70%) and has enjoyed a profit rate averaging 28% after taxes on invested capital over the period 1962–1967, a rate that is some four (4) times the long-term competitive norm. The creation of a competitive industry structure here would probably yield *well over \$100 million* in savings to the consuming public.

Electric Office Typewriter Industry.—A request is being made for authorization to investigate the \$310 million electric office typewriter industry, one in which the four largest firms hold 92% of the industry's total sales. (This is also one of the industries mentioned by the *Report of the Cabinet Committee on Price Stability, supra*, as an appropriate subject for Commission attention.) IBM, with approximately 60% of the market, is said to sell its typewriters at a "premium" of \$25 to \$100 over the price of comparable competitive machines. Based on its 1967 sales of \$186 million, the potential gain to the consuming public from the development of a competitive industry structure here could be as high as \$37 million per year.

Soft Drink Industry.—This Division has recommended that the Commission consider issuance of a trade regulation rule prohibiting certain forms of territorial restrictions in the soft drink industry. Its total sales, at wholesale, amounted to \$4 billion in 1968, and the four (4) largest firms in the industry account for 67% of the total. (The two largest, Coca Cola and Pepsi, have 31% and 20%, respectively.) Cola products of comparable quality (and presumably cost) sell under "private labels" for approximately 30% less than these "advertised" brands, thus suggesting a potential gain to the consumer of *perhaps \$1 billion or more* from a really significant improvement in the structure of the industry, one that might well emerge if the protective system of territorial restrictions on bottlers could be removed. The three largest firms here spent approximately \$190 million on advertising in 1965 and two of them, Coca Cola and Pepsi, enjoyed after-tax returns on their investments of 21.3% and 18.8%, respectively, over the period 1964–1968, some three times the competitive norm.

Auto Parts Industry.—This Division has a number of matters pending in the automobile replacement parts industry. Preliminary evidence indicates that the present distribution system in this \$7 billion industry, one distorted by product differentiation advantages of the major auto makers and maintained by resale price maintenance, territorial restrictions and the like, probably imposes a minimum overcharge of 20% or more, or at least *\$1.4 billion* more than the

consuming public would have to pay if this industry could be made more competitive in structure. (As an example of the magnitude of the potential savings involved here, a "breakdown" in the resale price maintenance on *spark plugs* in the Washington, D.C., area caused the price to fall from \$1.09 to 49¢ to 79¢, a per-plug savings of 28% to 55%; industrywide, this would mean a savings of \$100 million to \$300 million on spark plugs alone.)

Razor Blade Industry.—The Division has underway a proceeding involving the \$150 million razor blade industry. Gillette, the dominant firm, has more than 50% of the market and earned after-tax profits on its investment of 30% to 40% in the period 1962–68. It spends some 20% of its sales dollar on advertising, thus creating a product differentiation barrier that permits it to maintain these noncompetitive profit and price levels. (Wilkinson, the stainless-steel blade innovator, has some 5% of the market). Effective competition in this industry would offer a potential gain to the consumer of perhaps \$25 million or more per year.

Television Network Industry.—This Division is currently working on a matter involving the "discount" practices of the television network industry. Three firms control 100% of the market: CBS, 35% to 40%; NBC, 35% to 40%; ABC, 20% to 30%. The "buying side" of this market is similarly concentrated. While some 300 firms use national network television advertising, the top 60 of them accounted for more than 75% of total billings in 1968. Current billings are approximately \$1 billion per year.

While we have estimates that the expansion of the industry from 3 firms to as many as 8 or 10 would probably reduce advertising rates by as much as 50% (even the entry of *one* new network is estimated to have the potential of causing a 10% to 15% decrease in rates), that potential saving of \$500 million is a fairly small part of what is actually involved here. Television advertising, as mentioned above, is the primary source of the product differentiation barriers that prevent the development of effective competition in the important list of *product* markets or industries that use the services of these three networks. Moreover, the problems associated with product differentiation are expected by most economists to get significantly worse in the coming months if, as many expect, *cigarettes* leave the television airwaves. The time vacated by the cigarette companies, a quite sizeable block, will presumably be taken up by Procter & Gamble, General Foods, etc., thus accelerating still further the drive toward oligopolization of our consumer goods industries. Thus the elimination of any discriminatory advantages enjoyed by those dominant firms in their respective industries, and any improvement in the access of the smaller firms to economical ways of offsetting the product differentiation advantages of those larger advertisers, would obviously have some quite widespread effects in large segments of the economy as a whole.

VII. RESTRICTIVE DISTRIBUTION SYSTEMS

As mentioned above, most of the vertical restraints of trade—resale price maintenance, exclusive dealing, and territorial restrictions—are creatures of the structural phenomenon, product differentiation. That is to say, these practices are found primarily in those industries whose product is inherently "differentiable," i.e., capable of being made to appear "different" in the eyes of consumers from products that are in fact of comparable quality. This differentiation is not always accomplished by advertising, however, as such; in a number of industries, including *automobiles*, *gasoline*, *tires*, and *shoes*, the differentiation is accomplished primarily through an elaborate network of retail dealers, generally one tied "exclusively" to the manufacturer by a series of agreements and understandings that prevent any significant form of competition between retailers selling the same brand. And of course this elimination of all "intra-brand" competition leaves only "inter-brand" competition for the consumer's protection, a slender reed indeed when there is high concentration at the manufacturer's own level. In this group of industries, then, the principal barrier to entry, and thus the principal cause of the high concentration and its undesirable consequences, is the restrictive distribution system it uses so effectively to deny potential competitors equal access to the market. Bain, *Barriers to New Competition* 123–124 (1956).

This Division has underway a number of matters involving highly differentiated products and the usual accompanying practices of resale price maintenance, exclusive dealing, restricted dealer territories, and the like. In some of them,

it might be possible to devise a "conduct" order that would correct the distortions that have been developed in the industry over the years. In most of them, however, structural relief is probably the only kind that can be expected to yield a genuinely lasting solution to the overpricing and other unhealthy aspects of a noncompetitive market structure. (Bain suggests, for example, that exclusive dealing, tying arrangements, and the like become presumptively harmful to competition at the point where the firm practicing them has 10% or more of the market; with a lesser share, injury to competition is presumptively unlikely. This implies, of course, that the appropriate remedy in the typical exclusive dealing case, for example, one where the manufacturer in question has a very large market share, is to reduce that concentration level.) Given the necessary resources, we would like to have the help of the appropriate experts in developing a viable economic analysis in this area, one that would let us get to the root of these questions rather than responding, year after year, to complaints about these restraints in such industries as automobiles, gasoline, and the like. With appropriate structural guidelines in hand, we could then proceed to secure the kind of structural relief we need in those industries, relief that, by the estimates of most commentators, would probably yield some truly enormous returns to the consuming public in terms of lower automobile and gasoline prices. Two attorneys and an economist would be required initially.

VIII. CONGRESSIONAL AND SMALL BUSINESS MATTERS

The routine work of responding to inquiries and complaints from members of Congress, small businessmen, and the general public would of course be carried on here as before, the general objective in this area being simply to use the most economical techniques available and thereby conserve a maximum of resources for use on matters of greater significance to the consuming public as a whole. Our Small Business Procedure is of course particularly well suited for these smaller matters, one that permits us to resolve a fairly large number of restraint of trade problems with a relatively small drain on our manpower.

Absent some additional resources, however, any really significant effort to implement an enforcement program along the lines described here would undoubtedly mean some retrenchment on a number of other, pending matters of lesser public significance.

IX. CONCLUSION

The estimates given here for the potential savings to the consuming public from this small group of pending or proposed cases are by their nature crude and conjectural but they are nonetheless suggestive of what could be done in this area if we are willing to make some modest investments in skilled manpower and future training of our attorney staff (in our recent *Cyanamid (Tetracycline)* case, for example, prices fell some 75% after the order was entered, for a consumer saving of about \$60 million per year) :

Industry	Sales volume	Case potential (savings)
Breakfast cereals.....	\$1,000,000,000	\$150,000,000
Gasoline.....	18,000,000,000	1,920,000,000
Retail food industry (District of Columbia).....	1,000,000,000	40,000,000
Office copying industry.....	1,200,000,000	100,000,000
Electric office typewriters.....	310,000,000	37,000,000
Soft drinks.....	4,000,000,000	1,000,000,000
Auto parts.....	7,000,000,000	1,400,000,000
Razor blades.....	150,000,000	25,000,000
Television networks.....	1,000,000,000	500,000,000
Total.....	33,660,000,000	5,172,000,000

In other words, the evidence is fairly persuasive that the bulk of that \$20 billion to \$40 billion or more annual cost-of-monopoly figure mentioned above is indeed "concentrated" in a relative handful of industries and that a fairly small number of cases, if properly prepared and presented, could probably make quite gratifying progress in lifting much of that burden from the American public.

APPENDIX A

"PRIORITY" INDUSTRIES (LISTED ALPHABETICALLY)

1. Agricultural Cooperatives
2. Airlines
3. Aluminum
4. Automobiles
5. Baseball & Football
6. Beer
7. Biscuits & Crackers
8. Bread
9. Cement
10. Cereals
11. Chemicals
12. Chewing Gum
13. Cigarettes
14. Coal Mining
15. Copper
16. Drugs
17. Electric Power
18. Electrical & Electronic Equipment
19. Electrical Machinery
20. Flat Glass
21. Flour
22. Food Processing
23. Gas Utilities
24. Glass Containers
25. Gypsum Products
26. Insurance
27. Liquor
28. Newspapers
29. Nickel
30. Petroleum Refining
31. Pottery
32. Railroads
33. Razor Blades
34. Shipping
35. Shoe Machinery
36. Soap & Detergents
37. Soft Drinks
38. Steel
39. Sulphur
40. Telephone System (AT&T)
41. Television Networks
42. Tin Cans
43. Tires & Tubes
44. Trucking

Source: "Priorities in Antitrust: Some Communications," 1 *Antitrust Law & Economics Review* 11 et seq. (Spring 1968).

APPENDIX B

MEMORANDUM

Date: _____

Subject: Proposed Upgrading of ADP System.

To: The Commission.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

By directive of May 20, 1969, the Commission directed the Division Chiefs and others to consult with their staffs and prepare a list of uses to which they believe our ADP system should be addressed, the types of data needed, and any other suggestions they might have in this area. We have two suggestions, one somewhat general, the other fairly specific:

1. The Commission should establish a systematic program of collecting—and making available in computerized form—all of the basic structure-conduct-

performance data on each of our 417 manufacturing industries (discussed below) that are necessary (a) to determine whether the industry is effectively competitive or non-competitive in character, and (b) to determine whether, given the structure of the industry in question, a given form of "conduct" (price discrimination, exclusive dealing, etc.) is likely to have the proscribed statutory effects (lessen competition or tend to create a monopoly);

2. The Commission should establish an experimental pilot program (described below) aimed at the detection, via a specially-designed computer program, of price-fixing conspiracies in certain conspiracy-prone industries, particularly in the \$7½ billion roadbuilding industry (knowledgeable sources believe that all or substantially all of these products are sold at collusive prices). If successful here, this program could be readily adapted to other conspiracy-prone industries.

Certain underlying concepts are basic to both of these suggestions, the most important of which is the fact that, as we understand it, a considerable amount of study in recent years has been directed to the task of identifying the various "structural" characteristics that make possible, or are at least conducive to, the traditional antitrust offenses themselves, e.g., price fixing, price discrimination, exclusive dealing, and the like. That is to say, it is possible to look out over the 417 manufacturing industries and, by examining the principal structural features of each of them (concentration ratios, degree of product differentiation present, and nature and height of entry barriers), make a list of those industries that should at least be *prone* to price fixing, price discrimination, etc. For example, a 1965 doctoral dissertation (Dr. Walter B. Erickson, *Price Fixing Under the Sherman Act: Case Studies in Conspiracy* (Michigan State University, 1965)), suggests that, given a certain industry structure, *price fixing* is virtually "inevitable." Id., p. 345. (This study identifies some half dozen factors that predispose an industry toward price fixing, the most important being (a) high concentration,¹ (b) an inelastic demand for the industry's product,² and (c) barriers to new entry, (d) a homogeneous product, and (e) the absence of alternative techniques for achieving effective price "co-ordination," that is, the foreclosure, for one reason or another, of such alternative ways of achieving super-competitive prices as merger, price leadership, punitive pricing to bring price-cutters into line, and the like.³)

The point here, of course, is that, once we know the particular structural characteristics that are associated with the various practices the Commission is concerned with, we should be able to devise a much more comprehensive program of law enforcement in those areas. A "profile" or "dossier" could be developed for each of our 417 manufacturing industries, one that would tell the

¹ "Two types of industrial structure seem to be prone to conspiracy: one, an industry having a very small number of firms: the other, an industry having a somewhat larger number but with one or two firms predominant." Id., p. 284. The larger the number of firms, the more difficult it becomes, of course, to hold the conspiracy together. And the more nearly equal in size the group members are, the more difficult it becomes for the largest to impose an "agreement" on the others.

² If a product is of such a character that a relatively small increase in its price will cause consumers to abandon it in large numbers—that is, if a small price increase results in a proportionately greater loss in volume—then price-fixing is simply unprofitable and hence won't occur. If, on the other hand, consumers are relatively insensitive to the price of a product—if a relatively large price increase causes a proportionately smaller drop in volume—then price-fixing can be enormously profitable and will thus present the members of the industry with what for many can be a somewhat overpowering temptation to agree on prices. (In general, of course, whether a given item falls into the one or the other of these classes depends primarily upon whether or not there are any "close substitute" products available from other industries, that is, upon whether there are other products consumers can and will readily turn to when the price of this one starts to rise.) In the Justice Department's price-fixing case of a few years back against the various manufacturers of folding-seats (bleachers) for public schools, a document was found in which the connection between price and profit in an industry with inelastic demand was made unmistakably clear: "Normal projected sales of the next 5 years is 60 million dollars. Under price war [competitive] conditions normal projected sales shrink to 42 to 45 million dollars, an industry loss of 15 to 18 million dollars . . ." In other words, vigorous price competition is especially unlikely when the industry's members know that there will be little or no gain in *volume* to offset the effects of the lower prices.

³ In the bleacher case mentioned above, for example, a document was found in which one of the conspirators had estimated that it would take at least 5 years of what it called "ruinous price war" to get rid of even one or two of the half dozen major competitors it faced and that even then it wouldn't be permanently rid of them: the expectation, according to this memo, was that they would be back as soon as the market had been made "stable" again. The problem in that industry was simply that, while one of the firms there was in fact a quite large conglomerate, one whose bleacher sales accounted for less than 1% of its company-wide sales, most of the others were also fairly substantial firms, organizations that were simply too strong to be bankrupted by sales below cost without inflicting an unacceptable level of injury on the aggressor firm itself. Id., at 285.

experienced analyst at a glance whether that industry was (a) likely to be performing in an effectively competitive manner, on the one hand, or whether it was likely to be characterized by the various symptoms of noncompetition, including higher-than-competitive prices, reduced rates of output, and reduced rates of technological innovation, and whether, (b) given the structure of that industry, a given type of conduct or behavior (e.g., price discrimination) was likely to be anticompetitive or competitively neutral. While one need not go so far as to envision the day when the Commission can substitute an IBM "print-out" of the relevant structural characteristics of an industry for the skilled human analyst, it would obviously save a great deal of repetitive search-time by our attorneys and economists if we could get the basic, essential "structural" characteristics of our industries recorded on computer tapes and thus readily available to the staff.

As an illustration of the kind of data we have in mind here, I am attaching a memorandum to the staff of this Division of May 15, 1960, with an attachment that outlines, in skeleton form, the material that is particularly basic to most "lessening of competition" cases, i.e., the material that bears most directly on the question of how well the public interest is being served by a particular industry's competitive performance. Virtually all of this data can be expressed in quantitative terms and should therefore lend itself quite readily to a good ADP program.⁴

Our second—and more specific—suggestion relates to the potential use of the computer in the detection and prosecution of price-fixing conspiracies. We are indebted here to Dr. John M. Kuhlman of the University of Missouri (currently a consultant with the Commission's Bureau of Economics, working on the conglomerate merger study), a specialist in price-fixing cases, for the substance of this proposal. Dr. Kuhlman advises my staff substantially as follows:

Price fixing is probably a great deal more prevalent than is commonly believed. Many of our basic industries have all of the structural characteristics that make an industry "conspiracy-prone"—e.g., a homogeneous product, high entry barriers, relatively high concentration (or, alternatively, a strong "policing" organization, generally a trade association), a mature or stagnant technology (innovation tends to disrupt collusive arrangements), inelastic demand, etc.—and, in many of them, these predictions of economic analysis have been more than adequately borne out by a host of price-fixing convictions over the years. These industries can of course be picked out in advance and, if desired, made the subject of special investigations to determine whether or not collusion is in fact present.

Two highly useful generalizations can be made about price-fixing conspiracies. First, they tend, in Dr. Kuhlman's experience (he has been a witness in a number of cases and has studied the records and the economic literature surrounding many others), *to inflate prices by roughly 25% or more* above the noncollusive or competitive level. Secondly, they tend to *inflate costs* as well—though not, of course, as much as they inflate prices. (Erickson, cited above, found that, while prices had increased by approximately 32% in the bleacher case, 23 percentage points of that total had been dissipated in higher costs, leaving the conspirators with monopoly *profits* of only 9 percentage points. Other scholars have made similar findings, thus leading to the conclusion that profit figures *alone* tend to grossly *understate* the incidence and severity of collusion and monopoly in the economy.) Application of this 25% "rule-of-thumb" to the sales volumes of those industries that are known to be "conspiracy-prone" would of course yield an enormous figure, one that would suggest a very strong need for an imaginative program to protect the consumer from this kind of "transfer" of funds to price-fixers. Data of this kind also has some rather obvious relevance to the overall problem of inflation in the economy as a whole.

Considering the comparative advantage of the Justice Department in the so-called "garden variety" price fixing case (particularly its access to the services of the FBI and the machinery of the grand jury), the Commission's role here should probably be a very selective one, preferably one that would allow it to capitalize on one of its fairly unique resources, a particularly strong capacity for sophisticated economic analysis. In brief, the Commission should probably confine its activities in the price-fixing area to relatively path-breaking

⁴The initial collection of this kind of data (as contrasted with its storage and retrieval) is obviously a more complex matter, one that goes to the heart of the Commission's overall operation. Much of it is available from published sources; other items (e.g., entry barrier heights in most industries) must be developed by our attorney-staff on a case-by-case basis, as is currently being done in this Division.

cases, particularly those in which it alone has the economic sophistication to (a) *detect* the presence of particularly well concealed collusion, and (b) *establish legally* the fact of that collusion through economic techniques not readily available to other agencies or parties.

With the help of a good computer program, collusion can, as discussed below, be both detected and established without the aid of either the traditional "hot document" or "eye witness."

Dr. Kuhlman has recommended to us an experimental "pilot program" that centers around the collection and analysis of bid data received by governmental purchasing offices. His selection of this particular project is based, in part, on the following factors. First, he believes that the bidding mechanism is extremely important in price fixing, that perhaps as much as 50% or more of the total volume of price fixing that goes on in the American economy occurs in industries that sell their product, either in whole or in part, in a "bid" market. (The bid-opening procedures employed by virtually all governmental purchasers inform all bidders of the *identity* and *price* bid by the successful bidder, thus giving the conspirators a cost-free mechanism for "policing" their would-be price-cutters. This policing function, in the absence of a bid market, is said to be extremely expensive, so much so that a conspiracy is often made unprofitable without access to bid data.) Secondly, the kind of products that are purchased by government purchasing agents on a bid basis tend to satisfy most of the structural characteristics mentioned above that are conducive to price fixing, that is, they tend to be homogeneous products, to have an inelastic demand, and the like. Thirdly, the dollar volumes involved are extremely large. (As noted, purchases of our various governmental road authorities totalled some \$7½ billion in 1968.) Fourthly, price fixing cases in this area would be especially likely to have a so-called "multiplier effect" via the private treble damage actions now being brought by state and local officials on behalf of the consumers in their respective jurisdictions. (Maximization of the Commission's enforcement dollar requires that it take explicit account of such "multiplier" effects, i.e., that it select precisely those industries in which a single case, properly presented, would be expected to set the stage for a host of other interested parties, particularly state and local officials, to come in and do the relatively less sophisticated work of rooting out the remnants of the conspiracy and gaining redress for the injured consumers, while the Commission turns its attention to setting these corrective mechanisms in motion in still other industries.)

The essentials of this pilot program suggested by Dr. Kuhlman are as follows:

I.

The basic approach would be for the Commission to contact a number of government agencies that do an extensive amount of purchasing on a bid basis, including such agencies as the Bureau of Public Roads, the Veterans' Administration, HEW, and the like. In time, it might also want to contact various state and local purchasing agents themselves. At the outset, however, the program could be limited to perhaps only a single agency (e.g., the Bureau of Public Roads) and, within that agency, to only a few of the products it buys. For example, one might begin by collecting prices paid for *concrete* in, say, *three states* (e.g., Missouri, Iowa, and Illinois). In asphalt, one might collect prices for the southeastern part of the country. Or the VA's purchases of a certain drug might be studied.

II.

The core of the project would be centered around the development of a number of computer "programs" for processing the data and detecting, where present, collusive bidding. (The latter term, collusive bidding, is of course to be distinguished from "identical" bidding; the whole point here is to detect more sophisticated forms of collusion, e.g., bid "rotation" and the like.) The following are some of the programs that might be particularly useful here:

A. Market Share Conspiracies

1. Identification of rings that allocate a specific portion of the total available sales volume to each member (bidder) by analyzing "award" patterns.
2. Identification of rings that allocate markets on a geographic basis (as where sellers in Kansas City, *Missouri*, refuse to sell to purchasers in Kansas City, *Kansas*, or where, as in one actual case, the price of concrete was twice as high on one side of the Mississippi River in the St.

Louis area as on the other, i.e., where the behavior pattern is plainly inconsistent with reasonable economic behavior.)

3. Identification of instances in which the selling firms observe market boundaries that do not vary in accordance with variations in observable market conditions (as in the examples mentioned under 2, above).

B. Bid Rotation Programs

1. Identification of bidding arrangements in which there is a peculiar systematic relationship between the various bids, e.g., where the "next-to-low" bid is always 105% of the "low" bid itself.
2. Identification of any other systematic "rotation" of the "winning" bid among the bidders, e.g., the "phase-of-the-moon" pattern followed in the electrical industry cases.

C. "Distance-Shopped" Programs

1. Identification of bids in terms of the destination of the goods in question, i.e., whether there is a basing point system in operation, and whether there were unsuccessful bidders that were in fact closer to the destination than the winning bidder.

These are of course only illustrations of the kinds of programs that could be developed; others would undoubtedly be developed as the data from the cooperating agency was processed and analyzed.

III.

Over time, an effort would be made to expand the program to other purchasing agencies, eventually reaching, for example, all 50 State Highway Commissions and getting their bid data in a form that would minimize the processing and analytical work involved.

IV.

In terms of resources required, the program envisioned here would ultimately require some quite extensive computer facilities, say by the middle of the 1970's. For the immediate future, however, it could be undertaken with rented computer resources and with any increased, unused computer capacity that might be acquired by the Commission itself. In any event, of course, the program would require some kind of terminal facilities tied into a fairly large computer.

A quite small staff—e.g., programmer, an economist, a statistical clerk and a secretary-typist—would suffice to see the program through the first year.

APPENDIX C

MEMORANDUM

MAY 15, 1969.

Subject: Investigations and Reports.

To: The Staff, Division of General Trade Restraints.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

This Division is being called upon to demonstrate both within the Commission itself and in its presentation of its budget requests outside the Commission not only that (a) each of its cases *are in fact* in the public interest but (b) *how much* public interest is involved in each of them. In order to make any kind of reasonable estimates along these lines, we must begin to gather, and to include in our reports, some additional kinds of data, over and beyond what we have been emphasizing in the past.

In general, the basic method for estimating the amount of public interest in a given Commission case is to determine:

- (a) The total sales volume of the industry in question;
- (b) The price that is *currently* being charged for the product (or, if it is the threat of *future* monopoly that is involved, the price that is reasonably to be expected if it should in fact become monopolized); and
- (c) The price that would reasonably be expected to prevail *if* the industry was in fact effectively *competitive* now.

Subtracting the competitive price (c), from the monopoly price (b), gives the amount of the monopoly "overcharge" (actual or potential, as the case may be) in percentage terms. Multiplying this percentage figure times the dollar sales volume of the industry (a) gives the *total dollar amount* of the actual or potential monopoly overcharge and thus at least some kind of rough approximation of the actual or potential public interest in a proceeding aimed at restoring effective competition in that industry.

In our *Bakers of Washington* case, for example, the price of bread in Seattle had been kept some 20% above the competitive level for a period of about 10 years, a monopoly overcharge to the consumers in that City of 3¢ to 4¢ per 1-lb. loaf. Americans eat, on the average, 53 pounds of bread per person, per year, and Seattle has a population of roughly 1.5 million. The cost of the price-fixing conspiracy involved in that case thus cost the consuming public in Seattle approximately \$3.5 million per year, or \$35 million over the 10-year period of the conspiracy in question. Immediately after the entry of the Commission's cease-and-desist order in December 1964, the price of bread in that City dropped quickly back to the national average (a rough approximation of the competitive price, presumably) and has remained at or below that average figure over the four (4) years since. Our work in that case has thus already saved consumers in that area \$14 million (4 times \$3.5 million), a figure that will continue to grow in cumulative fashion, with another \$3.5 million in savings being added each year. (In 20 years, the total will be \$70 million, i.e., 20 times \$3.5 million.)

In one of our pending cases, an expert witness, an economist, testified at the hearing that, as a result of the monopoly in question (98% of the local market), consumers in Seattle were having to pay some 4¢ per lb., or about \$800,000 per year, *more* for macaroni than they would have had to pay if the monopolization of that market had not occurred and effective competition had been allowed to continue. Over the five-year period involved, 1964 to date, the cost of this monopoly to the consuming public in Seattle has thus been an estimated \$4 million. The value of this case, like the *Bakers of Washington* case mentioned above, will similarly increase from year to year (assuming effective relief is granted and competition is in fact restored there.)

As a final example, the Division has recently recommended to the Commission that we be authorized to conduct an investigation of the breakfast cereal industry. Four highly significant facts are known about this industry from published economic studies and reports. (a) It has annual sales of just under \$1 billion; (b) it is dominated by three (3) firms that together account for 83% of its sales and that earn well over 20% after taxes on their stockholders' equity (roughly three times the competitive norm); (c) it spends roughly 20% or more of its sales dollar on advertising, when in fact virtually all cereal products are substantially identical in quality (homogeneous); and (d) the smaller firms sell a substantially similar product—and apparently make a satisfactory profit doing so—at a price that is 25% or more *below* the price charged by the three dominant firms for their highly differentiated brands. The reasonable inference, of course, is that the *competitive* price for breakfast cereals, the price that would reasonably be expected to prevail if the industry was competitively structured, is perhaps 25% or more below the currently prevailing price. Multiplying this percentage figure by the industry's total sales volume, just under \$1 billion, gives a *potential gain to the consuming public* here, in terms of lower prices alone, of perhaps as much as \$250 million.

Insofar as possible, figures of this kind should be made an integral part of all current and future investigations in this Division.

Attached hereto is a suggested format for the organization of our investigations and the writings of our reports and memoranda. Not all of the questions listed there can be answered in every investigation, of course, but they are all important and should be kept in mind in reviewing investigative files and making factual analyses. Not all of the sub-headings will be applicable in every case. In general, however, we should report, in at least a brief summary form, as much as we know about the following major characteristics of any market in which the gravamen of the case is a "lessening of competition":

I. The Market

- (a) Geographic Market
- (b) Product Market
- (c) Sales Volume

II. Structure

- (a) Concentration
- (b) Product Differentiation
- (c) Barriers to Entry

III. Conduct

- (a) Collusion (if present)
- (b) Price Leadership (if present)
- (c) Predatory or Exclusionary Practices (if present), including product differentiation, price discrimination, sales below cost, exclusive dealing, etc.
- (d) Mergers

IV. Performance

- (a) Monopoly Pricing (estimates of how much the current price exceeds the competitive price)
- (b) Profits (after tax, as a percent of stockholders' equity for at least five years, preferably 10)
- (c) Advertising/Sales Ratio (advertising expenditures as a percent of the company's sales)
- (d) Suppression of New Technology (if present)

The purpose of this kind of data, of course, is to permit this Office and the reviewing offices in the Commission to evaluate at a glance (data of this kind on an industry can generally be summarized in no more than 15 to 25 pages) the public interest in our various cases and *assign priorities* to them. In view of the increasing number of investigations in which the potential returns to the public are extremely high (e.g., the cereal investigation mentioned above and a pending investigation of the steel industry), it may ultimately be necessary to shift a considerable amount of our total manpower off some current matters and onto still more significant ones.

I. THE MARKET

A. Geographic Market

(a) National Market

1. Sales volume of the industry as a whole during each of the past 10 years. _____

(b) Regional Market

2. If there is a meaningful regional (e.g., more than one state) sub-market—if there are entry barriers handicapping *non-regional* firms—give sales volume in that *region* for each of the past 10 years. _____

(c) Local Market

3. If there is a meaningful local market—if there are entry barriers handicapping *non-local* firms in the city, county, etc. in question—give sales volume in that local area for each of the past 10 years. _____

B. Product Market

(a) Cross-Elasticity

4. Is there reason to believe, or is it alleged, that some other product might be competitive with the one in question? _____
5. If so, would a substantial (say, 10%) *increase or decrease* in the *price* of the product have a noticeable effect on the sales *volume* of the *other* product, i.e., would a change in the price of the one shift volume to or from the other? _____ How much? _____
6. Have changes in the prices of the two products over the years been accompanied by corresponding changes in the volume of the other? _____

II. STRUCTURE

A. Concentration

(a) Selling Side

7. Number of firms in the industry? _____
8. Share of industry sales held by each of the eight (8) largest: _____

Firm	Yearly sales	Share of total (percent)	Firm	Yearly sales	Share of total (percent)
No. 1 _____	\$ _____	_____	No. 5 _____	\$ _____	_____
No. 2 _____	_____	_____	No. 6 _____	_____	_____
No. 3 _____	_____	_____	No. 7 _____	_____	_____
No. 4 _____	_____	_____	No. 8 _____	_____	_____
Big-four total _____			2d-four total _____		

(b) Buying Side

9. Approximate number of buyers of the product? _____
10. Share bought by four (4) largest buyers in the market? _____

B. Product Differentiation

11. Is product differentiation a significant factor in the industry?
12. If so, what is the current price *differential* between the best-known and three lesser-known "brands"? (5%?, 15%?, etc.) _____
Between the advertised manufacturer brands and the unadvertised "private label" brands? _____

C. Barriers to Entry**(a) Scale Economy Barriers**

13. How large does a plant in the industry have to be (in terms of annual output) in order to realize the lowest per-unit (per lb., per gal., etc.) cost of production and distribution? _____
14. What percentage of the market would a firm of that size have? _____
15. What is the unit cost (per lb., per gal., etc.) of producing and selling by a firm of that efficient size? _____
16. How much would that cost figure rise if the plant was only one-half that efficient size? _____ One-fourth? _____

(b) Absolute Barriers

17. Are patents needed to enter the industry? _____ How much royalty would a new entrant have to pay? _____
18. Do existing firms control the only available sources of some essential raw material (e.g., iron ore deposits)? _____
19. How much capital would a new entrant need to enter by building a new plant of the efficient size mentioned above? _____
20. Are the existing distribution outlets (wholesalers and retailers) tied to existing sellers by exclusive contracts? _____

(c) Product Differentiation Barriers

21. Do the *smaller firms* in the industry have to accept a *lower price* than the better-known "brands," even when the quality is the same? _____ How much lower? _____
22. Do the larger firms sell a "private brand" label? _____ How much lower a price do they charge for it? _____ Is it sold profitably or at a loss? _____
23. How many buyers of the product have *integrated* backwards into its manufacture? _____

III. CONDUCT**A. Price Policies****(a) Collusion**

24. Is there evidence of actual collusion in the industry? _____
25. What activities does the industry trade association **engage** in? _____

(b) Interdependence

26. Is there evidence of price leadership? _____

(c) Independence

27. Is there evidence of real independence in pricing by **any of the** industry's members, i.e., of ignoring the prices of the other members (price-cutting, etc.)? _____

B. Exclusionary Practices

28. Predatory pricing? _____
Below-cost selling? _____
29. Exclusive dealing? _____
30. Reciprocity? _____
31. Mergers? _____

IV. PERFORMANCE**A. Monopoly Pricing****(a) Price-Cost Margin**

32. Is the price being charged higher than the price that would be expected to prevail if the industry was competitively structured? _____ How much higher? _____

(b) *Profits*

33. Are the profits being earned by any of the four largest firms higher than those that would be expected to prevail if the industry was competitively structured? _____ How much higher?
34. Give the profits of each of the four (4) largest, in terms of return on stockholders' equity, for each of the last 10 years. _____

Firm	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968
No. 1 _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
No. 2 _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
No. 3 _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
No. 4 _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____

(c) *Selling Costs*

35. What percentage of its total sales does each of the four (4) devote to sales expenses? _____
36. To advertising expenditures? _____
37. To other forms of sales promotion? _____

(d) *Efficiency*

38. What percentage, if any, of the industry's total sales volume is produced in plants that are too small to be efficient (smaller than the most efficient size mentioned above)? _____ How much is that in terms of higher-than-necessary costs (in dollars) to the industry? _____
39. How much of the industry's total plant capacity, if any, is generally idle, i.e., how much excess capacity has there been over, say, the past (5) years? _____

(e) *Invention and Innovation*

40. Have there been any inventions or innovations in the industry in the past 25 years or so that have significantly affected the cost of producing and distributing the product? _____ Its sales volume? _____
41. Has there been any evidence of collusive suppression of new inventions or innovations? _____

APPENDIX D

MEMORANDUM

Date: _____

Subject: Request for Authorization of Investigation of Breakfast Cereal Industry.

To: Commission.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

The Office of Program Review has been recommending for some time that the operating Divisions of this Bureau shift the focus of their activities away from the traditional forms of so-called anticompetitive "conduct" and address themselves, instead, to the underlying "structural" characteristics that make such conduct possible in the first place. In a Memorandum on the Planning of New Investigations of January 3, 1969, for example, Mr. Hurley of that office suggested that, with the possible exception of the Merger Division, "the operating bureaus show few signs of planning on a rational basis the investment of their manpower in significant new investigations," i.e., that there is an "apparent hang-up in the practice of planning at the bureau level," one that stems from an alleged overemphasis on the contents of the daily "mail-bag" or letters of complaint. It is recommended:

1. That the bureaus "instruct their divisions that proposals to start new investigations should be accompanied by reasoned alternatives," i.e., that each new investigation be evaluated in the light of all other alternative uses to which the resources involved could be put (the "opportunity cost" of the proposed investigation);

2. That the bureaus "be requested to supply quarterly planning reports to [the Commission] on the most significant investigations they plan to launch in the quarter ahead"; and

3. That the bureaus be required "to prepare and submit a planning report, possibly within the next 30 days, that would cover these points: *the five most promising areas of non-competition to investigate*, specifying the ones not identified through outside complaints; the steps taken by the bureaus during the past year to come up with new investigations derived from sources other than complaint letters, and the results of these efforts; and the new directions in which the bureaus think the Commission should move in the year ahead." (Emphasis added.)

As we indicated in our response of March 25, 1969, to Mr. Hurley's memo, we have no difficulty with either the general idea of planning nor with the "opportunity cost" concept. Indeed, our only problem with his recommendations is that, in our view, they are addressed generally to the wrong party; they should be made to the Bureau of Economics or to the Commission for the establishment of a unit with the kind of resources that would be required to do what Mr. Hurley has in mind.

It should be understood at the outset precisely what is involved in a recommendation that this Division (or the Bureau of Restraint of Trade, for that matter) "come up with new investigations derived from sources other than complaint letters" and that it direct its efforts toward "the five most promising areas of non-competition to investigate."

In brief, this is a recommendation that this Division look out over the economy, identify those of our 417 manufacturing industries that are "non-competitive," and then select, from that non-competitive group, those in which the return on our investigative resources would be the highest. (If we make a mistake and select the wrong ones, we will have failed the "opportunity cost" test.)

Now, there is of course no mystery, at least in general terms, as to which of our manufacturing industries are so highly concentrated, and are protected by entry barriers so high, that they are either (a) essentially non-competitive, or (b) display only certain *forms* of competition that are demonstrably contrary to the public interest, i.e., forms that tend to produce (i) prices that significantly exceed the level that would have prevailed if the industry had been competitively structured, (ii) costs that significantly exceed the level that would be expected to prevail if the industry was competitively structured, and (iii) rates of technological progress or product improvement that are significantly below the level that would be expected if the industry was competitively structured. In general, approximately 25% of the total output of American manufacturing comes from highly concentrated industries, the so-called "tight-knit oligopolies" with concentration in the range of 50% or more held by the "4 largest" or, what is roughly the same thing, 70% or more held by the "8 largest." In numbers, most industrial organization economists point to *about 50* manufacturing industries (out of a total of 417) as constituting the heart of the country's monopoly/oligopoly problem.

NOTE: See *Report of the President's Cabinet Committee on Price Stability, Studies by the Staff* (January 1969), p. 93; "Priorities in Antitrust: Some Communications," 1 *Antitrust Law & Economic Review* (Spring 1968), p. 11 et seq.; *Concentration Ratios in Manufacturing Industry, 1963*, Subcommittee on Antitrust and Monopoly, 89th Cong., 2d Sess. (1966), Pt. I.

Merely being able to come up with a list of 50 or so "non-competitive" industries, however, does not equip this Division to "plan on a rational basis the investment of [its] manpower in significant, new investigations" or even to select from those 50 "the five most promising areas . . ." By "most promising," Mr. Hurley undoubtedly means those in which an antitrust action within the capabilities of this Division would yield the general public the largest number of dollars (in terms of lower prices, lower costs, and the like) of return for each dollar spent. It has long been known, however, that there are not one but *three* structural features of industrial markets that determine their performance (e.g., the amount by which their prices exceed the competitive level), namely, (1) concentration, (2) product differentiation, and (3) barriers to entry.

In other words, it would not be enough for us to simply select the 50 most highly concentrated industries, rank them in the order of their concentration ratios, and start suing from the top down. In order for us to really array them in their "most promising" order, we would have to know at least something about the heights of their respective entry barriers. Thus, even if Industry X and Industry Y were equally concentrated (e.g., 4 largest firms hold 80%), and had equal sales volumes (say, \$10 billion annually), the amount of the "public interest" in a proceeding against them would not necessarily be the same; the entry barrier surrounding Industry Y might be only 5% (thus permitting its members to charge a price that exceeds the competitive level by 5% without inducing new entry), whereas the one around Industry X might be 10%, with the result that the potential consumer "overcharge" in the latter industry would be *twice* as much as in the former, i.e., \$1 billion (10% of \$10 billion) versus \$500 million (5% of \$10 billion).

To be sure, the attorneys in this Division could be taught how to locate some of the industry studies that describe not only the concentration ratios in some of these most important of our highly concentrated industries, but provide estimates of the heights of their respective entry barriers as well. (See, e.g., Bain, *Barriers to New Competition* (1956), giving such estimates for 20 major manufacturing industries.) It should be fairly clear, however, that what is involved here is a task involving a great deal of quite *technical* economic skill, one that could more appropriately be performed by professional economists working with, perhaps, a group of specially trained Commission attorneys.

There is a second matter that should be mentioned here. While this Division is in complete sympathy with the approach suggested by Mr. Hurley, namely, a focusing of the Commission's major efforts on highly concentrated industries that are in reality "non-competitive" in character, I would be hard-pressed to cite a case, whether by this Commission or by a court, in which it has been held a violation of any law administered by this agency for an industry to be "non-competitive." So far as I know, no decision has ever been handed down declaring that the members of any industry have a *legal duty to "compete"* or, put it another way, that consumers have a legal "*right to buy at competitive prices*." The law has simply not been focused on these "performance" characteristics—high prices, high costs, retarded innovation records, etc.—but on various "conduct" or behavior patterns considered particularly offensive for one reason or another.

To be sure, there may well be a few instances in which it could be proved that a highly concentrated, entry-barricaded industry had *gotten that way* by a series of acts and practices that, individually or collectively, constituted either restraints of trade within the meaning of Section 1 of the Sherman Act or unfair methods of competition under Section 5 of the Federal Trade Commission Act. In all probability, however, those predatory or exclusionary acts have long since ceased in the industry and a current investigation would probably reveal nothing more exciting than a set of very high concentration ratios, high entry barriers, and the various unsatisfactory performance characteristics mentioned above (high prices, etc.), i.e., nothing that would fit squarely within the four corners of any precedent available to us today. For example, one of the industries that is near the top of virtually every industrial organization economist's list of "10 most-in-need-of-action" industries is the *breakfast cereal* industry. The 3 largest firms there have 83% of the industry's total sales: Kellogg, 43%; General Mills, 22%; General Foods, 18%. (The 3 next largest have 15% and some 50 other companies scramble for the remaining 2%.) See *Fortune*, December 1967, p. 128. Kellogg, though not as large in absolute size as General Mills and General Foods, enjoys such a strong "product differentiation" advantage (brand preference) that it has nonetheless been able to hold this great market share and earn one of the highest long-term profit rates in the history of American manufacturing, a 10-year average of more than 20% after taxes on stockholders' equity. This "product differentiation" advantage is of course not only the principal barrier to the expansion of the existing firms, but the principal barrier to the entry of new firms as well. R. C. Meinke, *Barriers to Entry: A Case Study of the Breakfast Cereal Industry* (University of Nebraska, July 1965) (Master's Thesis).

In short, the breakfast cereal industry is an excellent example of a "non-competitive" industry. With a 3-firm market share of 83%, with entry virtually barricaded by those 3 firms' "product differentiation" advantages, and with

costs and *prices* to the public clearly at supercompetitive levels (some 20% of the sales dollar is apparently spent on advertising and, because the products of the competing sellers are not significantly different in physical properties, this is presumably a non-functional addition to cost—and price—that could not survive if competition was effective in the industry), it could be suggested that this is a prime target for the kind of lawsuit Mr. Hurley has in mind.

The point is, however, that we would expect to find no "predatory" or otherwise inherently unlawful forms of "conduct" going on in this industry. Kellogg and the other two members of the controlling oligopoly here presumably don't *need* to engage in such crudities as these. The only kind of "conduct" needed to maintain this non-competitive industry structure and the supercompetitive price and cost levels it generates is a very large "ad" budget, one that bombards millions of children daily with TV commercials extolling the (largely imaginary, we're told) superiority of their cereals over those of their smaller competitors. The *moving cause* of the high concentration (and thus of the high costs and prices) is simply the "product differentiation" advantage (brand preference) created and maintained by the advertising itself.

Nor is this an isolated example. In fact, recent empirical studies indicate that, whereas concentration is in general *falling* in most "producer goods" industries (heavy manufacturing, where there is little or no advertising), it is *rising* in "consumer goods" industries (light manufacturing), and particularly in those consumer goods industries in which there is a high degree of product differentiation (and thus a high volume of advertising). See *Cabinet Committee Report*, *supra*, at 60-62; Charles E. Mueller, "Sources of Monopoly Power: A Phenomena Called 'Product Differentiation,'" *American University Law Review* 1 (December 1968). Put another way, one can say that, of all the factors responsible for the high degree of concentration or oligopolization in the United States at the present time, product differentiation is the most important by a considerable margin.

It should be understood here that the distinction between "noncompetition," on the one hand, and "anticompetitive" practices, on the other, is considerably greater than has been commonly supposed. The most significant difference in law at least, is said to lie in the fact that they describe an industry at different periods of *time*. In traditional legal analysis, they have been viewed as tied to each other in a cause-effect relationship, with the anticompetitive practices *causing* the demise of competition, and thus constituting the moving force that ushers in a state of nonrivalry or "noncompetition," one in which that absence of competitive activity is accompanied by inflated costs, supercompetitive prices, and a reduced rate of technological innovation. The policy conclusion that followed from this traditional legal analysis was of course the straightforward one of concentrating one's antitrust fire on the particular "conduct" patterns—the so-called "anticompetitive" practices—that were believed to be *responsible* for the subsequent period of "noncompetition" and all of its attendant economic and social ills.

Current research is making it increasingly clear, however, that the "practices" antitrust has historically concerned itself with are *not*, in fact, the major cause of the monopoly/oligopoly problem in America. Current estimates suggest that the cost to the public from monopoly and oligopoly pricing, measured in terms of lost output of goods and services (GNP), is now something on the order of \$20 billion to \$45 billion or more per year and is probably rising. (Dr. David R. Kamerschen, *An Estimate of the "Welfare Losses" from Monopoly in the American Economy* (Michigan State University, 1964) (doctoral dissertation); Dr. William G. Shepherd, "Conglomerate Mergers in Perspective," *2 Antitrust Law & Economics Review* 15, 20 (Fall 1968).) A vigorous attack on certain forms of business conduct, particularly price fixing in industries that are not yet sufficiently concentrated to permit noncompetitive pricing without actual collusion, might well make *some* perceptible reduction in this overall monopoly cost figure. But there is every reason to believe that even the most strenuous efforts to prevent the various other types of "anticompetitive" practices would have little or no serious effect here unless they were coupled with some fairly significant *structural* reforms in the industries involved.

Put another way, there seems to be no particular reason for believing that a larger *number* of cases of the traditional type, or even a larger number of such cases against *larger firms* and larger industries, would make a great deal of difference in the size and cost of this country's monopoly/oligopoly problem. What is needed is not more of the same, but something entirely different in

kind. Viewed in this perspective, proposals aimed at improved "efficiency" at the Commission—i.e., at organizational and other changes aimed at the production of more "cases" per dollar spent—would seem to be something less than the ultimate solution. The real problem lies not in the *speed* with which cases, as such, are processed, but in the *kinds* of cases selected in the first place and the quality of the analysis brought to them in the end.

An example will illustrate the kind of problems we are trying to avoid, one that has to do with the milk industry in the State of Minnesota, as described in a recent doctoral dissertation (Dr. Ronald D. Knutson, *Price and Trade Practice Regulation in the Minnesota Fluid Milk Industry* (University of Minnesota, St. Paul, 1967)).

A local statute, the Minnesota Dairy Industry Unfair Trade Practices Act of 1957, makes it unlawful for milk processors to engage in some seventeen (17) "unfair" or "anticompetitive" practices when either their purpose or effect is to injure competition or competitors. The economic study in question found, however, a rather peculiar relationship between the incidence of the 17 so-called "unfair" practices and the real intensity of competition in the various Minnesota milk markets studied.

Five (5) separate markets were studied altogether, one of which was considered effectively "competitive," one of which was judged to be essentially "noncompetitive" or monopolistic in character, and three of which were found to have significant elements of both competition and monopoly. Only the first two are of interest here, the competitive market (Minneapolis/St. Paul) and the noncompetitive market (Duluth/Superior).

Some of the more critical facts about each of these five (5) markets are summarized in the table below. Thus, in the competitive market—Minneapolis/St. Paul—the essential facts are these: First, there is a relatively large number of firms (processors) in the market, 19. Secondly, the concentration ratio is relatively low, with the four largest firms holding only 38% of the total milk sales in the area. Thirdly, the wholesale (to the retailer) price is relatively low, 33.8¢ per ½ gallon. Fourth, the average price paid by the processor to the producer is an unexceptional 20.9¢. Fifth, the minimum processing cost, or cost that would be incurred by a firm of reasonable efficiency, is 11.8¢. And, sixth, the net margin of the processor is quite low, 1.1¢.

Now contrast these figures with those prevailing in the noncompetitive Duluth/Superior market. There are only eight (8) firms in the market, with the four largest holding 95.3% of all milk sales in the area. And the price here is 45.0¢ per ½ gallon at wholesale, or 11.2¢ (some 30%) more than the price being charged in Minneapolis/St. Paul. And after deducting the price paid to the producers (21.6¢) and the minimum processing cost (12.2¢), the net margin remaining to the processor is 11.2¢, or some 10 times the 1.1¢ margin realized by the processors operating in the more competitive Minneapolis/St. Paul market.

Now the particularly troublesome part of this matter is this. According to these scholars, *all of the 17 "unfair" or "anticompetitive" practices prohibited by the Minnesota statute mentioned above—price discrimination, sales below cost, secret rebates, advertising allowances, gifts to customers, loans, extended credit, free equipment and the like—were allegedly being employed with considerable vigor in the competitive market (Minneapolis/St. Paul). In the noncompetitive market, however (Duluth/Superior), all was peaceful and quiet; none of those 17 "unfair" practices were anywhere in evidence.*

FLUID MILK MARKETS, MINNESOTA, 1967

City	Number of firms	Share of 4 largest (percent)	Average wholesale price (½ gal.)	Average producer price (cents)	Minimum processing cost (cents)	Net margin (cents)
Minneapolis-St. Paul.....	19	38.0	33.8	20.9	11.8	1.1
Duluth-Superior.....	8	95.3	45.0	21.6	12.2	11.2
Rochester.....	6	93.6	36.7	20.8	12.2	3.7
St. Cloud.....	7	95.3	34.2	19.4	12.8	2.0
Fargo-Moorhead.....	4	100.0	36.9	20.7	12.0	4.2

Source: Dr. Ronald D. Knutson, "Price and Trade Practice Regulation in the Minnesota Fluid Milk Industry" (University of Minnesota, St. Paul, 1967); R. D. Knutson and E. F. Koller, "Costs and Margins in Minnesota Fluid Milk Plants" (University of Minnesota Agricultural Experiment Station St. Paul, Bulletin 483, April 1967).

The paradox here, at least from the viewpoint of a consumer protection agency, is that we have, as noted, traditionally defined "competition" in terms of certain *conduct* patterns—namely, the *absence* of such practices as these—on the assumption that the public interest in lower prices and the other accompaniments of competition were best served simply by preventing precisely this kind of business behavior. In other words, the first reaction of virtually any antitrust lawyer to the situation described by this report would have been, *in the absence of the market share and price and cost data presented here*, to sue not the firms operating in the high-price, noncompetitive market, but those vigorously scrambling for business in the low-price, highly competitive area. It need hardly be added that an antitrust action that did in fact succeed in stamping out the 17 controversial practices in question could be considered something less than a smashing success *from the consumer's viewpoint* if it also had the effect of raising the price of milk in that city up to the Duluth/Superior price level.

We mention this example not to suggest that any of the Commissions' own cases have in fact had any such negative effects but to point to the dangers involved and to emphasize the nature of the skills that, ideally, would be brought into play in the case-selection process here. Once it is understood that cases differ substantially in their potential return to the public—i.e., that a given case can have a large, small, or even a *negative* effect on the interests of the consuming public—it is easy to see that some quite technical economic analysis is required if we are to be expected to do the best job possible. If we elect to spend, say, \$50,000 on an investigation that promises to save the public only \$100,000 in lower prices in the future, when we *could* have used that \$50,000 to bring *another* case that would have been expected to yield 10 times that amount, or \$1 million, we have misallocated the public's funds and the true economic cost of the smaller case we did in fact bring was not simply the \$50,000 we actually spent but the \$1 million we *could* have alternatively saved the public. (If different consumer groups are involved in the two cases, we have, in substance, effected a "transfer" of money from the one to the other, i.e., the latter was allowed to "lose" \$1 million in order to "save" \$100,000 for the other.) Similarly, if the Commission as a whole selects the wrong cases—e.g., if it chooses to bring cases that yield, say, \$50 million to the public per year (in lower prices and the like), when a different "set" of cases it could have brought on the same number of enforcement dollars would have yielded, say, \$10 billion to the consuming public, the true "cost" of the Commission's policy choices has not been simply the amount of its actual budgetary expenditures, but the entire \$10 billion it let pass by. It is in this larger sense that one can say a "cheap" enforcement policy might ultimately prove to be a very expensive one indeed.

To put the matter rather bluntly, this country's laws against monopolization and the various forms of consumer-exploitation that it implies have not, at least until the last few years, kept pace with the changes that have come about in our various industrial organizations. Markets are being "restructured" almost daily by private business firms, while the public itself is frequently assumed, without much discussion, to have no right, save in the case of mergers, to undo what business has done. The so-called "anticompetitive practices" that were so popular with the industrial barons of the late 19th and early 20th century years have, for the most part, gone the way of the "horizontal" merger, being replaced by something more subtle and elusive. Much of what the law forbids today, the modern would-be monopolist doesn't *need* to practice anyway. And what he *does* need in order to ply his trade, the law often allows. The point, of course, is that, in many areas, the law has seized the shadow and missed the substance of the problem at hand. While it chases a menagerie of relatively insignificant business "practices," new oligopolies are being perfected and more consumers are being compelled to pay prices that are higher and higher above the level that would have prevailed had competition remained effective in those industries.

The question, of course, is whether the law can and should be directed away from the relatively superficial features of business "conduct" that have preoccupied it in the past and begin to assess the genuinely significant (from the consumer's standpoint) questions of *structure* (concentration, product differentiation, and entry barriers) and *performance* (particularly prices). Legally, the issue is whether it either is or should be considered a violation of the Sherman Act and/or the Federal Trade Commission Act for, say, three or four firms to "concentrate" 70% or 80% of an industry in their hands and then exercise the power that market share gives them to charge a price that exceeds by, say, 20%

the price that would have prevailed had that market remained less concentrated. As we indicated above, the precedent in this area is thin indeed, and a careful and comprehensive development of the law and economics of the monopoly/oligopoly phenomenon would no doubt be necessary in order to convince the courts that the substance of the problem—non-competitive structure and performance characteristics, particularly the unnecessarily concentrated markets and super-competitive prices characteristic of many of these industries—can and should be reached directly, rather than attempting to reach it indirectly, by challenging only one of its many, and often elusive, symptoms. If the anti-monopoly laws really have as their base and interest of *consumers*, then one would suppose this kind of structure-performance pattern should be the principal focus of their concern, not business morality, as such. If they do not have such a focus, then, as one commentator has recently suggested, “reason can help us no further.”

One other introductory matter should be mentioned here. A fairly common belief among antitrust attorneys is that the use of “economic evidence” tends to prolong cases, to produce the so-called “big case.” The fact of the matter is exactly the opposite. As Dr. Bain has put it: “This prolongation and expense of antimonopoly actions results in large part from the fact that establishment of *conduct* offenses generally requires almost endless exploration of the minutiae of the business practices and policies of the defendants, and endless arguments about what can be inferred from these practices and policies. Five or ten years from initiation to conclusion of a monopoly case is not unusual. In effect, a *conduct* offense is much more difficult to establish than a *structural* offense would be.” Dr. Joe S. Bain, *Industrial Organization* 562 (2d ed., 1968) (emphasis added).

The experience of this Division bears this out. It is our experience that the “conduct” part of certain of our cases greatly exceed the relatively small portion needed to develop the structure-performance characteristics of the industry.

RECOMMENDATION

This Division recommends that the Commission authorize it to conduct an investigation of the breakfast cereal industry for the purpose of determining the structure, conduct, and performance of that industry; whether competition is functioning effectively in that industry, particularly competition in the matter of price, and, if not, what remediable measures might be necessary in order to make it effective there; and whether the competition in that industry, if present, is of the kind that is consistent with the best interests of the consuming public.

We estimate that, assuming no court actions on the part of the proposed respondents to interfere, the investigation could be fully or substantially completed in approximately 90 days. Two attorneys would be required, plus an accountant and one or more economic experts (probably from the academic community).

The relative brevity of the investigation contemplated here stems from three factors: (a) This Division has just completed a full-scale monopoly trial that involved a related industry, macaroni; (b) a great deal of information about the structure-performance characteristics of the industry is already available to us in published form, including the names of the economists who have done special work here; and (c) the structural case is inherently much briefer than the conduct type of case.

In terms of legal theory of the case, the major thrust here would be aimed, as noted, at the structure/performance characteristics of the industry, particularly its high concentration ratios and supercompetitive prices. We would supplement this, however, with a certain amount of conduct analysis along the following lines. There can no longer be any serious doubt about the capacity of certain kinds of advertising, pursued with sufficient intensity, to bring about a massive restructuring of an industry, to “concentrate” its sales volume in the hands of two or three firms and thus to impose on the consuming public all the ills the law has long recognized as being associated with inordinately high concentration ratios. In a situation where advertising has *in fact* been used to achieve this kind of result, it should enjoy no more immunity from the antitrust laws than any other kind of concentration-increasing behavior. If the law will not allow three or four firms to gather the bulk of an industry’s sales into their hands by means of, say, mergers, it is far from clear as to why they should be allowed to achieve the same *result*—concentration and the high prices and the like that it brings with it—by another technique that is equally unrelated to genuine competitive rivalry in terms of price and quality. *The “conduct” text here, to the extent that it is applicable at all, should be the same as in a merger case, namely, whether the be-*

havior in question has resulted in the requisite injury to competition. If it has, then it should not, in our view, be allowed to claim immunity from the antitrust laws merely on the invocation of the traditional taboo against any kind of advertising-based monopoly proceeding. It should be put to the test in a litigated case and see if the industry can adequately explain why the fact that it has been allowed to harvest monopoly profits for a decade or so gives it a vested right to go on harvesting them in perpetuity.

We would emphasize again, however, that the central thrust of any proceeding here would be oriented primarily toward the structure/performance characteristics of the industry in question and that the role of the relevant conduct described above—the use of a very high advertising/sales ratio—is a secondary one. First, we expect that, should litigation eventually result, perhaps as much as 90% of the evidence introduced by complaint counsel would be aimed at developing those non-competitive features of the industry's structure and performance, a rather modest 10% or so to its conduct or behavioral features. Secondly, the "conduct" pattern we expect to find in the industry is not the gravamen of the case in another and even more fundamental sense, namely, it does not necessarily bear a great deal of relation to the kind of relief that we might ultimately want to ask for. For example, an offer from the three dominant firms here to revise their advertising/sales ratio downward—from, say, its present level of 20% or more to, perhaps, a much more modest 2% or 3% figure (Bain suggests 5% as the "very high" point at which a significant product differentiation barrier generally tends to emerge, *id.*, p. 415)—would by no means necessarily constitute a satisfactory resolution of the matter from the consumer's standpoint. If they offered such a "settlement," the reasonable inference would be that they had found some *other* way to maintain their dominant *market shares* and their *monopoly prices*. And *these*, not their advertising schedules, are our real concern here. Everyone is always interested in eliminating, of course, any and all devices that have proven helpful to the monopolist or the oligopolist in developing and maintaining his power, but we think it important to distinguish carefully between the ends themselves and the particular means of getting there that happen to have been used in the past. It is monopoly the law is concerned with, for example, not advertising: and the fact that a monopoly or an oligopoly happens to have been built or maintained by advertising in a particular instance does not mean that that is the *only* way it could have been built or maintained in that industry in the past or the *only* way it can be built or maintained there in the future.

The breakfast cereal industry has annual sales of nearly \$1 billion, and ranks among the top 15 of our 417 four-digit manufacturing industries in terms of concentration. (As noted, the 3 largest firms in the industry hold some 83% of its total sales volume.) Advertising is estimated to equal approximately 20% or more of those firms' total sales. There are believed to be no significant economies of scale that would make it uneconomical to have the industry competitively structured. In short, there are *potential gains to the consumer* here from a restoration of effective competition this industry of perhaps as much as 20% to 25% in lower cereal prices, a savings of some \$150 to \$250 million. And of course the very lowest income groups would be the principal beneficiaries since a disproportionately large portion of their total income is spent on food (up to 50%, versus some 20% for the average income family), particularly on the basic grain products. There are some other, related potential benefits here as well, particularly the possibility of opening up the market in a serious way to the approximately 50 small firms that, while they currently account, as noted, for an aggregate of only about 2% of the industry's sales, sell products of comparable quality for as much as 25% or more less than the big three charge for their more highly advertised brands. We are aware of no matter within the competence of this Division that offers a higher potential return on its enforcement dollar.

We recommend that the attached Resolution authorizing an investigation be adopted by the Commission.

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
 Philip Elman
 Everette MacIntyre
 Mary Gardiner Jones
 James M. Nicholson

RESOLUTION DIRECTING INVESTIGATION OF THE BREAKFAST CEREAL INDUSTRY
AND OF KELLOGG CO., GENERAL MILLS, INC., GENERAL FOODS CORP., AND OF
OTHER PERSONS AND CORPORATIONS ENGAGED IN THE PRODUCTION, DISTRI-
BUTION, AND SALE OF BREAKFAST CEREALS

Whereas the Commission is of the opinion that an investigation should be conducted of the structure, conduct, and performance of the breakfast cereal industry and of Kellogg Co., General Mills, Inc., General Foods Corp. and other persons and corporations engaged in the production, distribution, and sale of breakfast cereals to determine whether that industry is effectively competitive in its structure, conduct, and performance characteristics, particularly whether the public interest in effective competition in terms of price and other beneficial forms is being served in that industry, and whether any or all of such persons have been or are engaging in acts or practices that tend unduly to concentrate sales in the hands of a relatively few firms, to raise costs and prices above the levels that would have prevailed had competition been effective, and to otherwise deny the consuming public the benefits of effective competition that would have prevailed had the industry been competitive in its structure, conduct, and performance characteristics, and that may constitute violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45 (a) (1)) ; and

Whereas, the Commission believes it is in the public interest to conduct such an investigation; and

Whereas the Commission has authority under Sections 5, 6, 9, and 10 of the Federal Trade Commission Act (15 U.S.C. 45, 46, 49, and 50) and Sections 2 and 11 of the Clayton Act (15 U.S.C. 13 and 21) to investigate any person, partnership or corporation engaged in commerce and their relation to other corporations, individuals, associations, and partnerships and their acts and practices;

Now, Therefore, Be It Resolved That the Commission in the exercise of the powers vested in it by law, pursuant to its published procedures and rules of practice (16 C.F.R. Section 1.1 et seq.), and with the aid of any compulsory processes available to it, forthwith proceed with a nonpublic investigation, for the reasons and purposes herein stated.

By the Commission.

JOSEPH W. SHEA,
Secretary.

MEMORANDUM

JUNE 5, 1969.

Subject: Commissioner Jones' Memorandum, Budget Plans of Division of Mergers, Fiscal 1971.

To: Commission.

From: Division of Mergers, Bureau of Restraint of Trade.

This is in response to Commissioner Jones' memorandum to the Commission, dated May 27, 1969, subject as above, and to her transmittal requesting "the Bureaus to respond in writing before the Commission's scheduled budget meeting."

Par. 1: The Division of Mergers selected 10 priority projects in order to comply with the Chairman's directive of March 20, 1969, which stated, in part, as follows: "I want to stress that your statement should focus primarily on what you are going to do—limited by divisions to your six to ten most important projects—rather than on personnel requests." In merger law enforcement and development, we have no standard matrix to follow in determining which transactions should have a priority. On the contrary, it is the day-to-day development of a merger trend, plus our increasing expertise within an industry derived from in-depth investigations relating to specific transactions, or reaction to trends emanating from Commission level (such as the consumer protection activities), which affects our decision to select industry groupings on a priority basis.

During our budget deliberations and presentation last year it appeared there was some feeling the Commission's activities affecting food, clothing and housing should merit priority status. To the extent possible, and concomitant with the Division's overall responsibilities, earnest effort has been made to give preference to investigations affecting those areas of the national economy. Furthermore, in our day-to-day liaison with Justice, both agencies endeavor to avoid duplication of effort by having the agency with greater expertise in a product or industry area handle merger enforcement for that industry.

Our response to the direct question: "What are the reasons in terms of size of industry sales, size of industry members, growing concentration, number of industry members, etc. for each listed projects?" is as follows:

The Division of Mergers does not have immediately available answers to this broad question relating to industry structure on a listed project basis. With the exception of cement, each of the priority projects consist of several separate industries which comprise the project category. For example, grocery products includes many industries which market some 8,000 items sold in an average supermarket. The Commission's Enforcement Policy for Grocery Products Manufacturing indicates that in 1963 there were 32,000 food manufacturers, representing a decline from the 40,000 which existed in 1947. The cement industry consists of some 48 cement manufacturers and well over 4,000 ready-mix concrete producers, according to the Commission's Enforcement Policy for Cement.

The non-priority projects grouping includes numerous industries in each category, such as: drugs, pharmaceuticals, cosmetics and sundries; food distribution; housewares and household appliances, electrical and non-electrical; plastics; reciprocity; Section 8; and textiles. However, in the non-priority projects certain specific industries are involved, such as baking, confectionary, dairy, department stores, fertilizer, furniture, insurance, truck-trailers, shipping containers and vending. With respect to these, some of the information requested is believed to be available in various investigational files, but it would take considerable time to assimilate it. This has not been done in the interest of expedition, so that an overall response to Commissioner Jones' memorandum can be submitted before the June 12th budget meeting. If such detailed information is required concerning the non-priority projects, we will obtain it upon request.

Par. 2: Up to this point, the existence of guidelines has resulted in a priority item. It has been our experience in cement and food distribution that the publicity attendant to those industries requires an additional amount of professional time to supervise the preparation of, and to dispatch annually the Section 6(b) orders and reporting forms, and subsequently to screen and evaluate the reported transactions and complaints. Thus, the guidelines have become priority items, because our experience to date indicates that considerable implementation is required to keep them effective and meaningful. They cannot be published and forgotten.

Par. 3: The Division of Mergers proceeds primarily on a case-by-case basis, and when we are successful in obtaining divestiture there is inevitably some industry restructuring involved. Basically, the Division responds to mergers as they occur. When numerous transactions occur within an industry, or in closely related

industries, it may indicate a trend. At this point the Division outlines an affirmative program to do what it can to halt the trend. In such instance, we might favor allocating manpower to such an industry over an isolated merger in another industry for which no merger trend is apparent. In addition, various outside forces intervene to inject programs which the Division must execute, such as through Commission directives, by issuance of industry-wide enforcement policies (guidelines), or as an outgrowth of economic studies of either specific industries or specific practices (reciprocity).

Coming directly to the question posed concerning what goals the Division expects to reach in Fiscal 1971, by each listed project and how it is to be reached, it is noted that when mergers are challenged on a case-by-case basis, the results thereof on an industry-wide basis are largely salutary. For example, the five department store cases and orders resulting therefrom, issued in 1965 and 1966, had a very salutary effect in arresting a developing merger trend in this industry. This situation is true with respect to most merger proceedings on a case-by-case basis. Other than the re-structuring achieved by divestiture in specific cases, the results on an industry basis flow not directly but indirectly from specific merger proceedings. Thus, these are the anticipated results of the specific merger investigations and formal proceedings now pending in the priority projects as well as in some of the non-priority projects. Inasmuch as litigation moves slowly and there is considerable uncertainty as to whether and when cases will be settled or decided on the merits by the Commission, it is most difficult to specify if the goal of the proceeding and its salutary effects will be achieved in Fiscal 1971, or in some subsequent fiscal year. In other words, merger matters categorized by priority projects to a large extent consist of an on-going program in many respects—programs that require anywhere from three to five years for completion. The only alternative to a case-by-case approach is greater utilization in appropriate circumstances of industry-wide approaches, as typified by issuance of enforcement policy statements (guidelines) by the Commission for specific industries, where merger trends may be developing. However, such trends in specific industries are not too prevalent at the moment, since larger merger diversification is the principal type of merger activity occurring at this time.

Answering specifically as to the effectiveness of spreading the Division's resources over the listed projects, it all boils down to an effort to remain flexible enough to investigate proposed major mergers as they are announced daily, and at the same time channel our resources and major activities for planning purposes along specified project lines. It should be remembered that rarely are these projects susceptible of being completed upon an annual basis. However, in this context, as more and more formal cases are brought they necessarily absorb a greater portion of our manpower, and our planning flexibility is reduced. This is true because once litigation is started it has to be followed through to completion, requiring considerable manpower—no less than two, and most of the time three, attorneys on major merger cases. Until this fiscal year (1969) we have been settling most cases, with relatively few proceeding to litigation. During Fiscal 1969 the situation has reversed, with the result that more manpower is required to carry forward the on-going program, and resources are not available for maintaining essential flexibility.

Answering further the question of whether or not manpower shortage will mean the Division is going to handle several of the listed projects inadequately, the answer is an emphatic "no". What it does mean is that whatever projects this Division undertakes will be handled properly and adequately, or they will not be undertaken at all. It also means, in regard to the priority projects, that (1) lumber and building supplies, and (2) apparel will have to be deferred until sufficient manpower is available to handle them properly.

JUNE 20, 1969.

Subject: Budget Plans of Division of Mergers—Supplementary Report for Fiscal 1971.

To: Commission.

From: Division of Mergers.

Reference is made to Commissioner Jones' memorandum of May 27, 1969, subject as above, and to the reply from this Division dated June 5, 1969. On

page 2, at the end of the third paragraph, we stated: "If such detailed information is required concerning the non-priority projects, we will obtain it upon request."

The following is an effort to supply the information available concerning non-priority projects with respect to "size of industry sales, size of industry members, growing concentration, number of industry members, etc." as set forth by Commissioner Jones.

Fertilizer—This project became active in June 1965 when 3 major oil companies acquired major independent fertilizer manufacturers; the Department of Justice began an investigation but after a few weeks transferred the files to the Commission; 2 additional Commission files were opened in 1966 involving similar acquisitions; total sales in 1967 were \$1.2 billion, with about 150 companies and concentration ratios of 34% for the top 4 and 54% for the top 5 companies; statistical information is sketchy with respect to this industry due to differing types of fertilizers involved and overlaps between producers.

Truck-trailers & shipping containers—Total industry sales in 1966 were about \$796 million, with approximately 200 establishments, and with concentration ratio of 53% for the top 4 and 66% for the top 8 companies; the Commission's decision in the *Freuhauf* case has created a continuing interest in this industry. The present merger trend involves trailer manufacturers expanding by the acquisition of shipping container producers and ship building companies.

Insurance—This is a very broad field which is experiencing rapid merger activity, much of a conglomerate nature involving banks and other financial institutions; life insurance (SIC 631) has annual sales of some \$153 billion, with 1,730 companies listed in 1967; it is a very complicated industry concerning which this Division has no special expertise, but is one which demands attention.

Department Stores—In 1963 sales by department stores totaled about \$20.5 billion by some 4,250 establishments (SIC 531); the Division has had considerable experience in the field in the recent past, has obtained some consent orders, and must continue to police merger activities as they arise; one present investigation promises to go to complaint, or to consent settlement.

Vending—This project involves both merchandising and manufacturing and has been the subject of considerable activity by the Division in recent years; 1968 sales approximately \$4.5 billion, and there are 5600-6000 companies engaged in automatic merchandising; high consumer interest requires continuing attention in this area.

Apparel—This project covers a vast field of related industries which had 1967 shipments of \$20.8 billion, and about 15-20,000 establishments; concentration ratios vary widely and no average figure can be derived from the statistics, but in the more important categories such as men's and boys' suits and women's dresses the top 4 have over 20% and the top 8 as high as 57% of the market share; the Division has 6 major investigative files, some involving giant conglomerates, which require continuing attention.

Confectionery—This industry is highly concentrated with annual sales of about \$2.5 billion from some 1,200 establishments; concentration ratios range from 24% for the top 4 and 34% for the top 8 in candy, to 88% for the top 4 and 96% for the top 8 in chewing gum; for reasons not yet clear, numerous conglomerate companies are buying out members of this industry at an increased tempo, and this development must be watched and investigated where indicated.

Dairy products—This has been a Commission project for over 10 years due to increased concentration through acquisitions; 1967 shipments were \$12.9 billion for fluid milk there are over 4,600 establishments with a concentration ratio of 23% for the top 4 and 30% for the top 8 companies; due to the Division's long experience with this industry and present orders outstanding against the major dairy chains we will continue to pay close attention to any future acquisitions or mergers.

Bakery products—This industry has had a history similar to that of the dairy products industry; 1967 shipments were \$5.3 billion, from some 5,000 establishments; the concentration ratio for bread is 25% for the top 4 and 37% for the top 8, but for biscuits, crackers and pretzels jumps to 59% for the top 4 and 68% for the top 8 companies; again, outstanding Commission orders and industry familiarity require a continuing interest in future acquisitions or mergers on the part of this Division.

MEMORANDUM

JUNE 20, 1969.

Subject: Fiscal 1971 Budget Submissions.

To: Commission.

From: Director, Bureau of Restraint of Trade.

Responsive to the Chairman's memorandum of March 20, 1969, submissions captioned "Ideas and Basic Plans for Fiscal 1971 Budget" were forwarded from each division by memorandum from this Bureau dated April 25, 1969.

The Division of Mergers later forwarded its response to Commissioner Jones' May 27, 1969 request for additional data, by memorandum dated June 5, 1969. However, in order to consolidate all of the fiscal 1971 budget material from this Bureau a copy of that memorandum is also attached herewith.

A substantial number of memorandum-reports, some of which include various addenda, have been prepared by the several divisions of the Bureau. Some memoranda are addressed to the Commission and some to the Bureau. Responses to requests by Commissioners Jones and Nicholson were separately made in most instances, but in some cases more than one memorandum was prepared in dealing with particular requests.

Forwarded from the Division of Mergers is a copy of that division's June 5, 1969 response to Commissioner Jones' memorandum. A further memorandum dated June 17, 1969, deals with "Fiscal Year 1970 Budget Estimates, Revised June 16, 1969." The memorandum dated June 18, 1969, is responsive to Commissioner Nicholson's requests. The Division's final memorandum, dated June 20, 1969, provides data in further response to Commissioner Jones.

The Division of General Trade Restraints' memorandum dated June 18, 1969, is in response to Commissioner Jones' memorandum of May 27, 1969. Attached with this memorandum are Appendices A through D. A further memorandum from the Division of General Trade Restraints is in response to Commissioner Nicholson's memorandum. Also attached are Appendices A through C.

The first Division of Discriminatory Practices' memorandum dated June 18, 1969, is in response to the requests by Commissioner Jones. A second memorandum bearing the same date, is in response to Commissioner Nicholson. Transmitted with this second memorandum, are memoranda from staff attorneys relating to (1) the food industry; (2) fresh fruits and vegetables; (3) apparel; (4) dairy industry; and (5) publishing industry.

The Division of Compliance's memorandum of June 17, 1969, combines responses to Commissioner Jones and Commissioner Nicholson. A memorandum submitting budget justification data from the Division of Accounting, dated June 18, 1969, is also forwarded.

Finally, a memorandum from the Bureau of Restraint of Trade dated June 20, 1969, styled "Response to Commissioner Nicholson's Memorandum of June 10, 1969," is submitted. There is attached with this memorandum Appendices 1 through 4.

This, I believe, completes the supplementary material requested subsequent to the Bureau's submission of April 25, 1969, in initial response to the Chairman's memorandum of March 20, 1969.

Respectfully submitted,

CECIL G. MILES, *Director,*
Bureau of Restraint of Trade.

MEMORANDUM

JUNE 4, 1969.

Subject: Plans for fiscal 1971 budget.
 To: Commission.
 From: Division of Scientific Opinions.

DIVISION OF SCIENTIFIC OPINIONS

The activities of the Division of Scientific Opinions are concerned primarily with consumer health protection and arise out of the Commission's authority over the advertising of foods, drugs, devices, and cosmetics under Sections 12 through 15 inclusive of the Federal Trade Commission Act, and also through activities concerned with the advertising of a variety of related commodities under the general authority of Section 5 of the Act, but which in one way or another affect the health of consumers. The prodigious task of regulating the advertising and other promotional efforts in the field of consumer health protection may be gleaned from the statistic that in 1967 (data for the calendar year 1968 are not yet available) the sales of packaged medication alone exceeded \$2,200,000,000, and from the further statistic that during the same period the cost of advertising the principal brands of drugs and other health aids came to more than \$300,000,000. Similarly, in the area of cosmetics and other toiletries sales during 1967 exceeded several billion dollars and advertising budgets for the principal brands of such articles totaled more than \$300,000,000. The 1967 money figures in this report as they pertain to product category sales volume and advertising expenditures, are taken from data published in the Drug Trade News of July and August 1968, a well-known trade publication for the drug and cosmetic industries. The 1967 data are the latest available.

The Division of Scientific Opinions provides scientific advice and assistance in scientific matters to the Commission and to various operating divisions, including the Division of Food and Drug Advertising, Division of Special Projects, Division of General Practices, and the Division of Compliance of the Bureau of Deceptive Practices, and the Division of Advisory Opinions, the Division of Trade Regulation Rules and the Division of Industry Guides of the Bureau of Industry Guidance. On occasion, we are consulted by the Bureau of Textiles and Furs, the Bureau of Restraint of Trade and the Bureau of Economics. Since this Division is technically not an operating division but serves more in an advisory capacity, the subject matter and volume of work performed by this division depends in part upon the demands for advice and assistance made by the various operating divisions. This makes it somewhat difficult to project unilaterally a program of future activities for the Division of Scientific Opinions. This Division does, of course, actively participate in project and program planning with respect to Section 15 and other commodities for which health or other scientific claims are made in advertising. There follows a discussion of various projects affecting consumer health with which this Division is likely to be concerned, and which will require close surveillance and regulatory attention in order to curb false and misleading advertising.

Manpower requirements have been estimated for each of the "continuing projects" and for each of the "new projects." A tabular summary of these professional needs is attached hereto. There will doubtless be some overlapping among some of the projects, and also between some projects and matters handled as part of the routine workload. This overlapping may result in some overall economy in prospective manpower needs but not much net saving is anticipated since a slackening in one project area is commonly picked up by increased promotional activity in another, especially with the expanding growth of the economy and its usual concomitant of deceptive advertising practices. It should be noted, however, that most of this Division's presently available professional manpower is consumed by the routine and ad hoc "special" matters that arise in connection with the day to day operations of the Commission, unrelated to specific project undertakings. Little time is left for project work.

I. CONTINUING PROJECTS

A. Drug and Device Industry

The Division of Scientific Opinions based its recommendations on long time familiarity with the promotional practices of the particular industries being regulated, constant surveillance of the trade press with particular reference to the volume of advertising and sales of various types of products and new pro-

motional schemes, regular liaison with other regulatory agencies, comments in the medical literature about abuses, and review of the NAS-NRC advisory panel opinions on labeling of non-prescription drugs. We have known for years that most drug and special dietary food advertising is designed to and does mislead the public as to the value of the products and the indications for their use. Neither our manpower supply nor our assigned role have permitted us previously to recommend initiation of the steps necessary to correct the situation.

1. *FTC-FDA Evaluation of Non-Prescription Drug Claims*

This project involves ultimately a review of the advertising claims for several thousand drug products. This division is currently working with FDA in formulating new patterns of labeling, to be promulgated by FDA, which will incorporate the opinions of the NAS-NRC panels which have evaluated their efficacy, and the principle of more informative affirmative disclosures of the limitations of and contra-indications to their uses. Thereafter, the Commission should consider the desirability and feasibility of issuing a series of trade regulation rules which would embody the principles so established but apply them to advertising of all comparable drugs, whether or not they were ever "new drugs". The alternative would be a series of individual complaints against manufacturers who violated in advertising the principles set forth in the FDA regulations on labeling. Either approach would involve extensive participation by the scientific staff in fiscal 1971 and thereafter.

The categories of drugs covered in this FDA-FTC cooperative review include (with some overlapping) :

- Dentifrices and mouthwashes.
- Sore throat remedies (gargles and lozenges).
- Nasal drops, sprays, inhalers.
- Analgesics.
- Antihistamines.
- Cough preparations.
- Asthma preparations.
- Compound Cold Tablets.
- Drugs for premenstrual tension and menstrual cramps.
- Laxatives.
- Antacids, plus a few other products for other gastroenterologic problems such as diarrhea.
- Drugs for motion sickness.
- Ophthalmic preparations.
- Contraceptives.
- Douche preparations.
- Iron preparations.
- Single vitamin preparations.
- Multivitamin and vitamin-mineral preparations.
- Salt substitutes.
- Insulin preparations.
- Antibiotic ointments (plus a few other antibiotic-containing products from previous categories).
- Topical antihistamines.
- Topical antiseptic preparations.
- Dandruff preparations.
- Antifungal preparations (athlete's foot).
- Deodorants and antiperspirants.
- Sun-screen preparations.
- Topical anesthetic preparations.
- Counter-irritants.
- Miscellaneous skin "protective" products.
- Miscellaneous skin preparations for poison ivy, insect bites, etc.
- Rectal suppositories.
- Miscellaneous.

It should be stressed that products covered by new drug applications represent only the visible portion of the iceberg. For most categories of drugs listed there are many more products on the market that were not handled as new drugs than that were.

Preliminary evaluation of the NAS-NRC panel reports in this Division has been completed. Letters have been sent to every manufacturer of a non-prescription drug which went through the new drug procedures between 1938 and 1962 and is still being marketed, requesting recent advertising. Many of the replies

have been reviewed. It is already apparent that most of the advertising money for drug advertising to the public is spent for products which are not on this list—although they may be substantially identical. In general, new drug applications have been submitted by companies which by choice do not advertise to the laity. When the drugs are no longer “new” they are copied by “proprietary” manufacturers, who then advertise them heavily to the public. Many of the specific drugs reviewed by the panels are no longer even marketed by their originators. The regulatory problem, therefore, will be concentrated on the “me too” products manufactured or sold by other companies.

We envisage immediate regulatory problems in connection with several major categories of products, i.e., cough preparations, antacids, laxatives, mouthwashes, topical antiseptics and antibiotics, topical anesthetic preparations to name a few, which will be considered in more detail under New Projects—Drug Industry.

It is our intention to propose a series of trade regulation rules covering categories of non-prescription drugs. The first, dealing with antiseptic mouthwashes, gargles, and throat lozenges and representing an extension of the principles established in Sucrets case, has been tentatively drafted in this Division. Time has not yet been available to evaluate it at the Bureau level. If the final draft meets with approval by the Commission and is consistent with the position of FDA, which has yet to be ascertained, we would then propose that a trade regulation rule be promulgated.

Similar approaches are contemplated for a number of other categories of products. We foresee ultimately a series of rules specifying legitimate claims in advertising for all major categories of old drugs. After consultation with FDA physicians and after the Appeal Court decision on the SSS case, we intend to propose a trade regulation rule hearing on iron preparations designed to cover the entire industry and to remedy some of the defects in the present Geritol order.

Manpower Requirements.—It is conservatively estimated that at least three physicians will be required for this project in order to implement the results of the NAS-NRC panel reports as they affect our jurisdictional sphere, quite apart from any other project. Allowing for the vagaries and imponderables of a project of this magnitude, and assuming that three professionals could be assigned to it, our best “guesstimate” is that a minimum of about three years would be required to complete the most important categories. Hopefully one-third would be finished at the end of Fiscal 1971.

How much of the FTC-FDA Evaluation of Non-Prescription Drug Claims Project will be completed in Fiscal 1971 with action taken, will depend in part on how many professional people can be allocated to this task. At the present time we are hard put to assign anyone to this program unless other work is stopped, or alternatively the staff is substantially augmented.

2. Analgesic Product Advertising

This project involves the advertising of oral nonprescription analgesic drugs, analgesic rubs for skin application and oral products offered for arthritis and rheumatism. It has been reported that the 1967 sales of products in this highly competitive field totaled more than \$500,000,000 and that advertising promotion expenditures exceeded \$100,000,000. Many companies are engaged in promoting a large number of these products in the marketplace. These constitute a substantial portion of the over-the-counter drug business in the United States, and are the largest single category of nonprescription drugs in terms of consumer dollars.

Pain-relieving drugs are of immediate moment to the consumer and his health, are used by all ages and classes of people, and are, therefore, a fertile area for exaggerated claims and public deception. The advertising claims deal with comparative speed of onset, efficacy, and duration of analgesia as well as alleged freedom from gastrointestinal irritation and other toxic effects. The products for arthritis and rheumatism are promoted for an alleged anti-inflammatory effect to relieve pain and reduce the stiffness and swelling of arthritis and rheumatism, and present problems of substantial public health significance since the questionable promotion is directed to an estimated 12 million arthritics in this country, many of whom are elderly.

In hearings before the Special Committee on Aging, United States Senate, 88th Congress, 1st Session, on “Frauds and Quackery Affecting the Older Citizen,” representatives of The Arthritis and Rheumatism Foundation stated that quackery on a more sophisticated level still besets the arthritic sufferer and urged correction of regulatory agency understaffing as well as broader publiciz-

ing of enforcement actions. The Arthritis and Rheumatism Foundation estimated that all forms of "frauds and fallacies" cost arthritis sufferers \$250,000,000 annually.

A proposed Trade Regulation Rule for analgesic drugs was published in July, 1967. This proposed rule has already been challenged in the courts. A public hearing on the proposed rule will probably be held during fiscal 1970 and a final rule adopted. Any final Commission decision with respect to a Trade Regulation Rule will doubtless be fully contested by the analgesic manufacturers.

The past history of analgesic advertising leaves no doubt but that this problem will carry over into and well beyond fiscal 1971. It may become necessary, pending a final outcome of a Trade Regulation Rule and the whole analgesic problem, to undertake proceedings in individual cases of questionable advertising of analgesic products, especially with respect to those promoted for arthritis and rheumatism which would be relatively unaffected by the proposed Trade Regulation Rule for analgesic drugs since other claims in addition to those of pain relief are involved.

Manpower Requirements.—It is estimated that this project will require the full time of at least two medical officers into and well beyond fiscal 1971. On an annualized basis, oral non-prescription analgesic drug advertising will consume one-man year, analgesic rubs for skin application one-half man year and oral arthritis and rheumatism product advertising one-half man year.

3. Vitamin-Mineral Product Advertising

This project involves a wide variety of vitamin and mineral preparations promoted to the public with all kinds of health claims. The Food and Drug Administration's special dietary food regulations when finally promulgated will not, in our opinion, cover the question of drug claims for these products. New products continue to be brought on the market and new claims not previously made or covered by outstanding Commission orders show up in advertising.

During 1967 the sales of over-the-counter vitamin-mineral preparations approximated \$200,000,000 while about \$13,500,000 was spent in their promotion.

Manpower Requirements.—This product category will continue to require close surveillance and regulatory attention which will doubtless extend through fiscal 1971 and beyond. No curtailment of promotional activity in this field is anticipated. It is estimated that this project will consume the full time of at least one medical officer in order to cope with the steady parade of vitamin-mineral product advertising.

4. Weight Reduction Advertising Claims for Drugs, Plans, Formulas and Devices

It has been estimated that from 25 to 30% of the population of the United States is overweight. Because the dangers of obesity to health have been widely publicized in the lay press, public interest remains high in all schemes advertised to bring about a loss of weight. A large number of weight reducing drugs, plans, and formulas including dietary supplements continue to be promoted actively for weight reduction as are a broad spectrum of girdles, belts, vibrators, massagers, steam bath cabinets, slim suits and exercisers. Weight reduction promotional schemes flourish and have become a substantial commercial enterprise.

It has been reported that during 1967 sales of products in the dietary aids category alone totaled \$149,000,000 and that advertising promotional expenditures for this dietary aid category exceeded \$20,000,000. Past experience indicates that drugs, plans, formulas and devices advertised for weight reduction purposes are likely to continue to be actively promoted with questionable representations. It is anticipated that such practices will require regulatory attention throughout fiscal 1971.

Manpower Requirements.—It is estimated that this project will require the full time of one medical officer throughout fiscal 1971 and beyond. No diminution of promotional schemes in this area is foreseen during the next few years.

B. Cigarette Industry

Cigarettes represent the single most important product health hazard in the United States affecting the lives and welfare of more than 50,000,000 people in this country. Cigarette advertising and promotional expenditures for all media reached a total of \$312,000,000 for 1967. Expenditures on filter tip cigarette advertising in 1967 constituted 95% of total cigarette advertising expenditures. These figures reflect the continuing intensity of cigarette promotion to the public, especially of the filter tip brands. Filter tip cigarettes are being actively

advertised to the public with a variety of tar and nicotine reduction claims, including the newly introduced promotion of gas phase reduction of cigarette smoke.

The prohibition in the Cigarette Labeling and Advertising Act against requiring a warning in advertising will expire on June 30, 1969, unless extended by Congress. The Commission has reinstituted its proceeding for the promulgation of a trade regulation rule regarding unfair and deceptive acts or practices in the advertising of cigarettes. Moreover, the Federal Cigarette Labeling and Advertising Act requires the submission by the Commission of annual reports to Congress regardless of whether or not the ban on advertising is extended.

The Commission's program on labeling and advertising of cigarettes is a continuing project of considerable magnitude that will require close surveillance and regulatory action through fiscal 1971 and into the foreseeable future. If legislation now being considered by Congress should be enacted into law, it would become necessary to test filter efficiency for those noxious substances found to be "incriminated agents."

The Commission's Cigarette Testing Laboratory continues its program of testing and reporting three times a year the tar and nicotine content of domestic brands of cigarettes to enable the public to choose cigarettes spewing less tar and nicotine and thereby lessen the hazard to their health.

A variety of new devices, processes and filters are being developed which purport to lower in varying degree the tar, nicotine or benzopyrene content of cigarette smoke. Reduction of certain gas phase constituents is also alleged. Some of the proponents of these devices and processes testified at the hearings on cigarette smoking held recently by the House Commerce Committee and followed their testimony by requests for Commission staff conferences and advisory opinions. These companies wish to market their devices, filters and processes with claims of reduced health hazard. Their proposals are long on claims but short on scientific evidence. Increasing amounts of the staff's time are being consumed by these matters including for some of them, an evaluation of voluminous reports submitted in connection with proposed advertising claims. It is apparent that the staff will be confronted with increasingly complex problems of a scientific and technical nature requiring frequent and extensive consultation with experts inside and outside government. These complex problems cannot be ignored nor our consideration of them deferred. Recently, a non-tobacco "cigarette" product made of processed lettuce leaf came to market with implied safety claims. Although it contains no nicotine, vegetable matter when burned at high temperatures yields a tar which has been reported to produce skin cancer, much like tobacco, when applied to animals.

Manpower and Other Requirements.—Based on the past several years experience, it is estimated that for fiscal 1971 and the next few years at least three professional people (two medical officers and one non-medical scientist) will be required to cope with scientific and technical problems in the field of smoking and health arising out of advertising promotion of cigarettes. The Commission's Cigarette Testing Laboratory now needs an additional GS-3 clerk to be used in the office to assist in preparing reports on the results of cigarette tar and nicotine analyses including typing and filing work.

In the event that cigarette gas phase advertising promotion compels the Commission to undertake gas phase analyses in its Cigarette Testing Laboratory, additional personnel, laboratory space and laboratory equipment would be needed. On the basis of present operations and careful estimates, it is calculated that three additional GS-4 laboratory technicians, 500 square feet of additional air-conditioned laboratory space and additional laboratory equipment totaling about \$37,000 would be required.

C. Food Industry

1. *Cereal Foods and Breads*

Cereal foods and breads are being promoted to the public with a variety of special health claims. New claims for this product category continue to surface in the advertising from time to time. This project with heavy activity can be expected to continue through fiscal 1971.

2. *Soft Drinks and Powdered Beverage Mixes*

Various fluid and powdered beverage mixes are being advertised to the public. Some are being offered impliedly as a substitute for natural juices, to wit, Orange Plus. This project requires continuing surveillance and regulatory attention and can be expected to extend through fiscal 1971.

3. Miscellaneous Food Products

Health claims of one kind or another for miscellaneous food products constitute a substantial volume of work for this division and will continue to do so in fiscal 1971, although there is no definite pattern whereby one can predict exactly how many or which products will require our consideration. Current examples of this type of problem are Swift's Meats-for-Babies making startling health claims (such as prevent colds, fight infection), and various imitation food products.

Manpower Requirements.—It is estimated on the basis of past experience that the full time of two and one-half professional people (two medical officer man-years and one-half man-year of a non-medical scientist) will be required to deal with the regulatory problems arising out of food industry advertising in fiscal 1971 and beyond. It is anticipated that commodities in this project area will continue to be intensively promoted in advertising necessitating close observation and regulatory attention.

D. Economic Poisons and Pesticide Industry

This category includes insecticides, disinfectants, weed killers, and rodenticides as well as economic poisons and pesticides.

This project, which is likely to be continued on an extensive scale, is concerned primarily with use and safety claims in advertising which contradict, negate, detract from, or are inconsistent with any statement, warning, or directions for use in the labeling of such products. Such advertising may adversely affect the public health by inducing persons to use these products in a careless and harmful manner. Such advertising is also a matter of considerable concern to the Pesticides Regulation Division of the Department of Agriculture, which agency is charged with the enforcement of the Federal Insecticide, Fungicide and Rodenticide Act and with whom we have been working and continue to work closely on our mutual problems.

Some 500 companies distribute approximately 60,000 individual products in this category and will require time-consuming review by this Division. It has been reported that sales for 1968 exceeded \$4,000,000,000 and that advertising promotion commensurate with that sales volume is directed to agricultural, industrial and home users of the products.

A trade regulation rule proceeding for this class of products has been initiated but is not yet completed. The record is closed. A final report will be prepared and submitted to the Commission. A broad scale review of the advertising of products in this category will then be undertaken. It is anticipated that this project will carry through the entire fiscal year 1971. The promulgation of a trade regulation rule for pesticides advertising is being vigorously opposed by the affected industry. We therefore anticipate that the work entailed by this project will not diminish during fiscal 1971. Further, in the absence of a trade regulation rule, the control of pesticides advertising will require a substantially greater amount of this Division's effort in evaluating claims and in seeking expert scientific testimony for case-by-case consideration of the advertising. While the consideration of pesticides advertising is not new, a new regulatory approach to deceptive pesticides advertising has been made feasible by changes in the Department of Agriculture's laws and procedures in the last five years. Therefore an intensified approach to objectionable pesticides advertising is now possible.

Manpower Requirements.—It is estimated that this project will require the full time of at least one scientist through fiscal 1971 and beyond in order to implement a Trade Regulation Rule for this class of products. It should also be noted that the thorny issue of comparative efficacy claims will not be resolved by the TRR and will continue to require surveillance and regulatory attention at the staff level.

E. Cosmetic Industry

Cosmetic products are widely advertised by a large number of companies to promote thousands of cosmetic preparations. Deception in many cases is by innuendo and indirection and regulatory action depends on the interpretation placed upon the advertising as a whole. This category embraces eye lotions and washes, lip protectors, face and skin creams, including bleach creams and hormone creams, wrinkle removers, depilatories, deodorants, anti-perspirants, sun tan lotions and oils, waveset kits, dandruff removers, hair dyes and other hair preparations, and a host of miscellaneous toiletries.

During 1967, total sales of products in the cosmetic category are reported to have exceeded \$4,000,000,000 with an annual advertising expenditure of more

than \$300,000,000. This project is of a continuing nature since new products and promotions spring up perennially. It will doubtless continue into fiscal 1971 and beyond.

Manpower Requirements.—It is estimated that this project will require during fiscal 1971 the equivalent of the full time of one professional member consisting of one-half man-year of a medical officer and one-half man-year of a non-medical scientist.

F. Formal Liaison Activities

Early recognition of problem areas can be enhanced by close and regular liaison with other government agencies engaged in consumer protection activities. At present, this Division maintains day-to-day operational liaison as necessary with FDA, Pesticides Regulation Division of USDA, certain offices of the Public Health Service, such as the National Clearinghouse for Smoking and Health, National Cancer Institute, and certain community health services. Members of this Division attend regular liaison meetings with FDA and with the Federal Committee on Pest Control. Through fiscal 1971 and beyond we anticipate increased liaison obligations with the above and other agencies as a means of early detection of new problem areas. Such liaison is essential to our "early warning intelligence" to facilitate the recognition of potential problems so they can more readily be dealt with on a preventive, rather than on an after-the-fact basis. Proper and adequate liaison consumes time like any other investigational activity, but properly conducted can lead to the cultivation of valuable sources of scientific information which will aid the staff in dealing with problems in their incipient stages. Increased liaison is suggested or contemplated with the following agencies: FDA, Natl. Clearinghouse for Smoking and Health, Natl. Cancer Inst., Federal Committee on Pest Control, Natl. Inst. of Environmental Health Sciences, and Pesticides Regulation Division of USDA.

It is essential that channels of communication be established with various scientific organizations for the appointment of scientific advisory committees to cooperate with the Federal Trade Commission and to whom the staff could turn for consultation and help on the wide variety of scientific problems that arise in connection with the Commission's regulatory operations. The nurturing of such cooperative relationships will require continuing active liaison by this Division with a substantial investment of time.

Manpower Requirement.—It is estimated that effective formal liaison activities inside and outside of government will require during fiscal 1971 the equivalent of about one-half man-year, probably divided between a medical officer and non-medical scientist.

II. NEW PROJECTS

As stated in the Division of Scientific Opinions memorandum of June 4, 1969 transmitting to the Commission its fiscal 1971 budget plans, it is futile to discuss new projects and programs without a massive transfusion of professional and supporting clerical personnel to remedy the Division's manpower anemia. The Division's present workload is becoming unmanageable and without substantial increases in manpower projects now in progress are unlikely to receive adequate coverage much less taking on new ones however desirable or needy such projects may be. As observed in the aforementioned memorandum the day to day operational demands preclude the assumption by this Division of any further responsibilities and may even necessitate curtailing or abandoning some of what it is now doing.

The undertaking of any new projects will become feasible only if the professional staff and supporting clerical personnel are substantially augmented. There follows a list and discussion of those "new projects" which are deemed to be of sufficient public interest and health importance as to warrant regulatory consideration on a product category and industry-wide basis.

A. Drug and Device Industry

1. Cough Preparations

In 1967 the public spent \$211,060,000 on cough preparations (drugs, lozenges, troches, sirups, elixirs and expectorants), and the industry spent over \$14,000,000 in advertising them. A trade regulation rule incorporating the NAS-NRC panel recommendations as well as the significant principles established in the Commission's case against Merck (Succrets) will be recommended and could extend into and well beyond fiscal 1971.

Manpower Requirements.—It is estimated that this project would require one half year of medical officer's time.

2. Mouth Washes, Gargles, Antiseptics, and Aerosol Disinfectant Sprays

The industry spent \$45,465,000 in 1967 advertising 19 brands, with a cost to the public of \$200,470,000. The experts who have evaluated these products feel that no medicinal or therapeutic or preventive claims may justifiably be made for any of these products, which are advertised for the prevention and treatment of colds, sore throats, influenza and other ailments. Lysol Disinfectant Spray and Listerine exemplify the problem. It may be possible to handle these in the same rule as the cough preparations, or two separate hearings may prove necessary. In either event we foresee action extending through fiscal 1971 and longer.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time.

3. Common Colds and Sinus Preparations

A wide variety of preparations including cold tablets, capsules and vaccines, antihistamines, nose drops, nasal sprays and inhalants, and salves and ointments are advertised with many questionable claims for the common cold and its many symptoms, and for sinus conditions. The consumer spent about \$255,000,000 on common cold and sinus preparations during 1967 while industry advertising promotional expenditures exceeded \$25,000,000. Indicative of the public interest is the estimate that some 500,000,000 cases of the common cold alone occur annually.

Manpower Requirements.—It is estimated that this project would require one and one half man years of a medical officer's time.

4. Antacids and Laxatives

The customers spent \$91,950,000 in 1967 for antacids, and \$183,600,000 for laxatives. Advertising figures are given for the two categories combined as \$36,757,000. A major regulatory effort extending over several years will undoubtedly be necessary to handle the deceptive problems of which we are now aware with respect to antacids. Laxatives may require a trade regulation rule to limit claims and to require affirmative disclosures. It is unlikely that this could be undertaken prior to fiscal 1971.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time.

5. Topical Antiseptics

These products constitute a large proportion of the \$28,094,000 spent in advertising skin medications. The public spent \$58,930,000 in external antiseptics alone. It is doubtful whether many of these products possess any useful properties, medically speaking. These products will probably require more individualized handling, so that the project will start later and extend into fiscal 1971 and beyond.

Manpower Requirements.—It is estimated that this project would require one half man year of a medical officer's time.

6. Dentifrice and Dental Preparations

Dentifrice advertising has been the subject of Congressional investigation and consumer organization criticism. Involved are questions of excessive abrasiveness, whitening claims and dental decay protection claims. The advertising bombards the public with scientific sounding test results from which the public cannot determine for itself whether the claims are true, half-true or false.

The dentifrice field is highly competitive with so-called new products being introduced frequently. The volume of advertising is substantial with more than \$39,000,000 having been spent by industry in 1967. The public is reported to have spent more than \$316,000,000 on dentifrices in 1967.

Manpower Requirements.—It is estimated that this project would require one-half man year of a medical officer's time and one and one-half man years of a non-medical scientist's time.

7. Sedatives and Stimulants

Advertising product promotions for relief of tension, anxiety, nervousness and insomnia, and to calm "jittery" nerves and induce sleep are increasing, as are products being offered to keep you awake if you are tired and sleepy. Such

claims are suspect and these products constitute another project for fiscal 1971. In 1967, industry spent over \$8,800,000 advertising eight principal brands of sedatives and stimulants while the public spent almost \$25,000,000 on non-prescription sleeping aids alone.

Manpower Requirements.—It is estimated that this project would require one half man hour year of a medical officer's time.

8. *Skin Remedies*

Products for psoriasis, acne and other skin conditions are being actively advertised and promoted to the public often with exaggerated claims. This product category is another project for fiscal 1971. In 1967, the public spent more than \$41,000,000 for acne aid products alone.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time.

9. *Miscellaneous Drug Product Advertising*

Adequate coverage of the advertising of a miscellaneous variety of products offered for memory impairment, epilepsy, diarrhea, asthma, relaxation, burns, foot trouble, aphrodisia, weakness, fatigue and numerous other symptoms, conditions and diseases is another project to be deferred until fiscal 1971.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time.

10. *Miscellaneous Device Product Advertising*

The propriety of advertising claims for a miscellaneous variety of devices such as oxygen inhalers, circulatory improvement devices, sun lamps, bed warmers, bed boards, sleep inducing and teaching devices, electric toothbrushes, electric shavers, vaporizers, therapeutic shoe devices and devices with general health claims, is another project to be deferred until fiscal 1971.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time and one man year of a non-medical scientist's time.

B. Food Industry

1. *Vegetable Oil, Vegetable Shortening and Margarine Product Advertising*

More than 500,000 deaths annually are attributed to heart attacks. Many thousands of these deaths occur among people in the prime of life. Heart attacks are responsible for more than 25% of all deaths in the United States. The pathological condition underlying the development of heart attacks is atherosclerosis or hardening of the arteries characterized by fatty degeneration of the blood vessels. Experimental evidence points to a strong association between elevated blood cholesterol levels and atherosclerosis, and between high saturated dietary fat intake (animal fats such as bacon, lard, beef fat, butter, cream, and egg yolks) and above normal blood cholesterol levels. The substitution of polyunsaturated fats (mostly liquid vegetable oils and fish oils) for a substantial percentage of saturated fat intake has been reported to lower the blood cholesterol level.

The American Heart Association has taken a strong official position in publications and releases addressed to the laity and to the medical profession on the need of curtailing animal fat intake and substituting instead polyunsaturated fatty acid containing foods such as vegetable oils and margarine. It must be emphasized that not all vegetable oils and margarines are high in polyunsaturated fatty acids.

There has been wide-spread exposure of the general public to information on the subject of edible oils and fats and the possible health benefits from increased consumption of polyunsaturated fats (vegetable and fish oils) and simultaneous decreased intake of saturated fats (animal fats, such as bacon, lard, beef fat, butter cream and egg yolks). The news media have informed the consumer that there is a strong association between elevated blood cholesterol and atherosclerosis, and between high saturated fat intake and above normal blood cholesterol levels; and that the substitution of polyunsaturated fats for a substantial percentage of saturated fat intake has been reported to lower the blood cholesterol level. The general public has also been told that the pathological condition underlying the development of heart attacks is atherosclerosis or hardening of the arteries, and that heart attacks are responsible for more than 25% of all deaths in the United States.

Various vegetable oil, vegetable shortening and margarine products are being promoted to the consumer as good sources of polyunsaturated fats. Many are being advertised as being high, higher and highest in polyunsaturated fats and low, lower and lowest in saturated fat. Food fats and oils contain three kinds of fatty acids, saturated, monounsaturated and polyunsaturated. A single food may, and usually does, contain varying amounts of all three kinds of fatty acids. Liquid vegetable oils which have been hydrogenated or "hardened" for use in margarine and shortening manufacture have lost part of their original polyunsaturated fat content. Hydrogenation chemically converts some of the polyunsaturated fat into saturated fat, the degree of conversion depending upon the extent of the hydrogenation and the particular process employed. Since margarine and other vegetable oil products vary in their content of each of the three kinds of fatty acids, and in other respects which may be of health significance, depending not only upon the basic ingredients used but also upon the method of manufacture of the finished product, neither the consumer nor most physicians are presently in a position to make perceptive selections.

Neither current labeling nor current advertising of this product category provides sufficient information to enable consumers or physicians to make a knowledgeable choice on the basis of relative content of polyunsaturated fats and saturated fats from among the products on the market. There have been a number of complaints from consumers and physicians about the failure of labeling and advertising to provide this needed information.

By memorandum of September 28, 1966, the Division of Scientific Opinions suggested, and by memorandum of October 10, 1966, the Commission authorized this Division to implement its recommendation that companies, which voluntarily promote their oils, fats and fatty foods as being high in polyunsaturated fatty acids, state in advertising how much polyunsaturated, monounsaturated and saturated fat are present in the product. The Division of Scientific Opinions had stated in this memorandum that if the health value of substitution of polyunsaturated for saturated fatty acids in the diet is as great as many physicians believe it to be, the deception inherent in inadequate declaration of the ingredients in such products may be material. By Commission memorandum of January 13, 1967, the Bureau of Deceptive Practices was relieved of the duty of submitting further interim reports and the then Bureau Director suspended further work on this project. It is recommended that this project be renewed.

Manpower Requirements.—It is our intention to recommend a trade regulation rule proceeding as a proposed solution to the problem presently raised by vegetable and margarine advertising. Prior to such staff recommendation, liaison with the Food and Drug Administration, and with the Food and Nutrition Board of the National Research Council is deemed desirable to develop a common enforceable scientific policy in this area. Consultation with the Council on Foods and Nutrition of the American Medical Association may also be advisable. It is estimated that one man-year of a medical officer and one man-year of a non-medical scientist would be required to undertake and see this project to fruition.

2. *Special Dietary Foods*

Pending the completion of the Food and Drug Administration's hearing on proposed regulations for foods for special dietary use, which have been actively under way for almost one year, we have been relatively inactive in this field. A final decision by FDA is anticipated during fiscal 1970 so that a project undertaking in this category by FTC can be programmed for fiscal 1971.

Manpower Requirements.—It is estimated that this project would require one man year of a medical officer's time.

3. *Artificial Sweeteners*

A major new project which should be started because it involves a health question is a re-evaluation of advertising for all low-calorie drinks containing artificial sweeteners. In the light of new scientific evidence of the potential hazard of artificial sweeteners, the Food and Drug Administration has recently initiated major labeling changes.

In 1967 industry was reported to have spent over \$4,500,000 to advertise and promote artificial sweeteners, while the public spent more than \$47,000,000 in their purchase.

Manpower Requirements.—It is estimated that this project would require one half man year of a medical officer's time.

C. Miscellaneous Product and Device Advertising Other Than Foods, Drugs, Devices and Cosmetics

There are a large number of products and devices that can be grouped together in a miscellaneous category. This category includes cooking utensils, detergents, soaps, household and other cleaning agents, bleach dispensers, silver cleaners, paint removers, plastic cements, soil conditioners, fertilizers, silage treatments, window cleaners, solvents employed in coin-operated machines and water sterilizers.

An evaluation of the advertising of these products and devices from the standpoint of their efficacy and safety is another project for 1971.

Manpower Requirements.—It is estimated that this project would require one half man year of a medical officer's time and one and one half man years of a non-medical scientist's time.

Respectfully submitted,

GEORGE DOBBS, M.D.,
Associate Chief, Division of Scientific Opinions.

TABULAR SUMMARY OF PROJECT MANPOWER NEEDS FOR FISCAL 1971

	Medical officers	Nonmedical scientists
I. Continuing Projects		
A. Drug and device industry:		
1. FTC-FDA evaluation of nonprescription drug claims.....	3	-----
2. Analgesic product advertising.....	2	-----
3. Vitamin-mineral product advertising.....	1	-----
4. Weight reduction advertising claims for drugs, plans, formulas and devices.....	1	-----
B. Cigarette industry.....	2	1
C. Food industry.....	2	1½
D. Economic poisons and pesticide industry.....	-----	1
E. Cosmetic industry.....	½	½
F. Formal liaison.....	¼	¼
Subtotals of estimated manpower needs for fiscal 1971.....	11¾	3¼
II. New Projects		
A. Drug and device industry:		
1. Cough preparations.....	½	-----
2. Mouthwashes, gargles, antiseptics, and aerosol disinfectant sprays.....	1	-----
3. Common cold and sinus preparations.....	1½	-----
4. Antacids and laxatives.....	1	-----
5. Topical antiseptics.....	½	-----
6. Dentifrice and dentifrice preparations.....	½	1½
7. Sedatives and stimulants.....	1	-----
8. Skin remedies.....	1	-----
9. Miscellaneous drug product advertising.....	1	-----
10. Miscellaneous device product advertising.....	1	1
B. Food industry:		
1. Vegetable oil, shortening and margarine product advertising.....	1	1
2. Special dietary foods.....	1	-----
3. Artificial sweeteners.....	½	-----
C. Miscellaneous product and device advertising (other than foods, drugs, devices and cosmetics).....	½	1½
Subtotal of estimated manpower needs for fiscal 1971.....	12	5
Combined totals of I and II.....	23¾	8½

MEMORANDUM

JUNE 10, 1969.

Subject: Budget Plans of the Bureau of Restraint of Trade for Fiscal 1971.

To: Commission.

From: James M. Nicholson.

The comments made below on the budget plans of the Bureau of Restraint of Trade and the Division of Mergers should not be interpreted as singling out either of these units for special criticism. On the contrary, the care and thoroughness of the planning of these units exceed that of most others.

My comments are meant to apply to all budget plans which have been submitted, and I request that this memorandum be distributed to all operating units as illustrative of the kind of analysis I would like to see.

I. BUREAU OF RESTRAINT OF TRADE

In the Chairman's directive to Bureau Directors of March 20, 1969 he instructed the Directors to: ". . . consolidate and *evaluate* [emphasis in original] the division proposals."

In the report of the Bureau of Restraint of Trade I find no more than restatements of the responses of each of the divisions (perhaps a consolidation), but no evaluations. Just as the responsibility of the Commission is to evaluate the relative merits of the budget requests of the various bureaus and make an overall allocation of funds, the responsibility of each Bureau Director is to make similar judgments and choices within the operating divisions of his Bureau. If the Bureau hierarchy has any justification, it must be to relate the efforts of each of its divisions to over-all Bureau objectives.

At the very least, the Bureau Director has the responsibility to *evaluate* the proposals of each division, not as autonomous units (and even that has not been done here), but as an integral part of the over-all Bureau effort. To my knowledge this has never been done. Certainly it has not been done for fiscal 1971. I, for one, am unwilling to consider a proposal like the one made last year when each of the major operating divisions within the Bureau were given almost identical "goodies" in terms of new men (8, 8, 8 and 7). This year the formula seems to be a 20% increase for everybody. Much more should be done by the Bureau Director to formulate a rational allocation of resources.

II. DIVISION OF MERGERS

I recognize that the future workload of this Division is uniquely difficult to predict. Mergers may occur or become imminent during the fiscal year which require an immediate challenge and a sudden shift in priorities. This problem, notwithstanding, this Division should provide a substantially improved Program Plan for consideration by its Bureau and by the Commission.

PENDING MATTERS

I am well aware that the Division must project and make educated guesses in preparing estimates and evaluations for fiscal 1971—a twelve-month period beginning more than 12 months from now. Nevertheless, some of the Division's *present* commitments are likely to extend into fiscal 1971 and these may require an allocation of part of the funds for fiscal 1971. The Division plan, in my judgment, has not adequately taken into account current matters. Existing commitments should be treated separately from future commitments because the Division knows (or should know) with far more authority the budgetary requirements for the former.

There is still another reason for the Division to discuss in detail those projects likely to be concluded during fiscal 1970. The Commission's Budget for that year has not yet been approved by the Congress, and the Commission retains under Reorganization Plan 8 the authority to reallocate whatever appropriations are eventually made. In my opinion, this is one of the Commission's most significant tools. The preparation of the 1971 fiscal year budget happens to be coincident with the actual fiscal appropriation for the current year: it can, therefore, provide the Commission with the information necessary to make such a reallocation.

In reporting on pending matters, the Division should start with current litigation. Recognizing the Commission's separation from the staff in pending adjudicative matters, the staff should designate the cases by some unrelated

number (without disclosing name or actual docket number), and give the following information:

- (a) Industry involved;
- (b) Volume of sales of companies involved;
- (c) Man-year investment to date (using 1800 hours as one man-year, but *not* attaching any dollar value to such man-years);
- (d) Estimated man-years to complete the Division's responsibility in the matter, and the fiscal year in which such completion is estimated. If it is estimated that the parties *may* accept the decision of the hearing examiner or that a settlement might be reached without appeal to the Commission, it is possible that alternative estimates might be necessary here (recognizing always that these figures are estimates and may be altered substantially);
- (e) An estimate of the likelihood of an appeal to the courts, assuming there is some substantial basis for making such an estimate.

Next, with respect to pending complaints not yet in litigation the Division should report the same information suggested on adjudicative matters, but now including the names of the parties. In addition, the Division should report its evaluation of the estimated final dispositions, including what it expects to be accomplished, and give its comments on the following two points:

- (a) Whether the case involves any novel approach or theory and, if so, what;
- (b) How this case may be related to any industrywide approach.

PROSPECTIVE COMMITMENTS

On the subject of prospective commitments the Bureau Director in his report states:

"A substantially complete critical survey of the universe of mergers (at least of the larger mergers) over a given time period, is accomplished in the conduct of Section 7 enforcement, providing a readily useable basis for comparative evaluation of competitive impact in different industries and marketing environments related to particular acquisitions, mergers or merger trends."

I am not sure I know what this means. Does it mean there resides somewhere in the building an actual survey of all merger activities prepared in summary form? If so, the Commission should have it. Does it mean that studies conducted by the Division and the Bureau of Economics in individual matters constitute, separately or cumulatively, the "... readily useable basis for comparative evaluation ..."? Or does "... the conduct of Section 7 enforcement ..." simply refer to the aggregate of testimony and documents introduced into evidence in all Section 7 hearings ... of a given time period ...? Such a survey—depending on what is meant by the word—could be useful to the Commission in exercising its reallocation discretion. The Division itself could use such a survey in determining its future commitments.

Considerably more detail should be supplied about prospective preliminary investigations. In 1968 there were 1,895 mergers and 162 joint ventures examined on a preliminary basis. In the 1970 Budget presented to Congress the estimates were 2,100 and 195 for 1969, and the estimates for fiscal year 1970 were 2,200 and 190. We now know what actually happened in fiscal year 1969 (except for the final 30 days); therefore, an accurate final estimate can be made for that year, and in light of the last quarter's experience in 1969, a more accurate estimate can be made for 1970. On the basis of this actual experience and perhaps the "survey" referred to above, a tighter estimate for 1971 should be made. In other words, based upon the man-year experience of the Division for FY 1968 and FY 1969, a man-year estimate for FY 1970 and FY 1971 should be made.

It would be helpful to the Commission if the Division could also furnish criteria used in determining whether to make a preliminary investigation, and any changes in those criteria necessitated by the recent increase in the pace of the merger movement.

The responsibility for pre-merger notification, which the Commission has given this Division during FY 1969, was not taken into consideration in establishing the budget for FY 1970. It should, however, be a factor in projecting the budget of the Division for FY 1971 because the man-year commitment for this project may affect the figures for preliminary investigations and formal investigations. Therefore, some estimates should be made for the man-years required for this effort in FY 1970 and FY 1971, based, if possible, on any experience in

the short period of FY 1969 when these requirements were in effect. Furthermore, to assist the Commission in making any reallocation of the 1970 appropriations which may be required, the Division should indicate any downward or upward adjustments made in the estimate of preliminary and formal investigations as a result of the pre-notification procedure.

In the area of formal investigations I must defer to the inquiries made by Commissioner Jones in her memorandum of May 27, 1969. In reviewing the report of the Division, I draw the following conclusions, which should be corrected if in error:

(a) *Priority 1.*—(Grocery products) There are nine pending investigations of which four will result in a complaint recommendation. These will take an undetermined amount of time in FY 1970 and will require five man-years in FY 1971 (with moderate increases in FY 1972 and 1973). If this projection contemplates more matters than these, then how many and how was the five man-year figure reached?

(b) *Priority 2.*—(Auto Parts) There are 13 pending investigations which will probably result in at least three recommendations of complaint. Again, five attorneys for FY 1971 are required. The same questions put with respect to Priority 1 apply here.

(c) *Priority 3.*—(Cement) There are 12 pending investigations which will result in at least one recommendation of complaint. Again the magic five which again raises the questions raised above.

(d) *Priority 4.*—(Special Projects) Pre-merger notification, the conglomerate merger study, and others likely to arise will require at least three man-years in FY 1971. If the Commission decides to take any action with respect to the concentrated industry problem, it would seem to me that this is too modest, not to mention whatever other special projects might arise. Since the Commission has in recent times imposed a number of special and unanticipated burdens on this Division, it might be helpful if the Division could enlighten us on the impact of these special chores on scheduled efforts.

(e) *Priority 5.*—(Commercial and Industrial Equipment, Machinery and Supplies) There are 13 pending investigations and four likely complaint recommendations. It is estimated that these (plus two pending adjudicative) will take four man-years in the period FY 1970–1973. Although I approve the longer estimate, I can see no relation to the figures cited above and therefore request the further analysis suggested with respect to Priority 1.

(f) *Priority 6.*—(Metals, Minerals and Mining) We have seven investigations with considerable activity and more is in offering, requiring an estimated four man-years during FY 1971. It is interesting to note that the *Kennecott* litigation alone is taking three man-years. Without discussing that matter, I think it would be helpful if the staff would treat in their budget submission the relative times for litigation of different types of matters. In light of the Bureau of Economics' memorandum and analysis in *Sterling* on the general operating record of the Commission, as contrasted with Justice, I wonder if the resource problems of this Division has not been a larger problem than the Commission has been aware.

(g) *Priority 7.*—(Lumber and Building Supplies). Three man-years in FY 1971 with respect to eight pending investigations—and perhaps more coming. The staff asserts that a challenge will have a slowing effect. In light of the staff comments it would seem that although this priority may properly be “down the line” (a question that can be better evaluated when the staff responds to Commissioner Jones’ memo), perhaps the bringing of one test case ought to be given a very high priority. The answers to the questions asked above would seem helpful here, too.

(h) *Priority 8.*—(Apparel) ; *Priority 9.*—(Paper and Paper Products). These two projects of five man-years and 12 pending investigations do not appear to me to be particularly crucial although they may need continuing vigil. Further analysis along the lines suggested by Commissioner Jones is obviously needed.

(i) *Priority 10.*—(Miscellaneous). To maintain flexibility the Division needs a reserve available to handle emerging problems like the merger trend in mobil homes. However, it seems to me the priority of this project cannot be anticipated since a new and critical trend in a significant industry could well make this a **project of the first priority**.

(j) *Non-priority Projects.*—Since these 55 mergers are apparently to be given no manpower for the next two years, it would seem the Division should close them out. Continued pendency will require paper shuffling with consequent expenditure of resources.

SUMMARY

The Commission has already made certain commitments of its resources to the field of mergers; additional resources are committed by the adoption of various procedural methods (e.g., pre-merger notification). Together these constitute a floor to the operational budget of the Division. Therefore, I suggest that the Division summarize the man-years estimates for pending adjudicative matters, pending complaints, pending investigations, preliminary investigations and the pre-merger notification programs. Although the Commission can change its decisions in these areas, They represent in the aggregate an entirely different decisional process from that necessary to future commitments.

The projected man-years for the prospective opening of formal investigations and the issuance of complaints represents the prospective responsibility of the Commission. Looking to trends and the matters discussed above, I would hope the Division could give us greater guidance.

I have suggested throughout that man-years be used rather than dollar value being attached. This is due to an earlier study conducted by my office (and referred to from time to time in some of my circulations) indicating that a charge of \$20 per hour might well represent a fair estimate. This was determined by dividing the total hours of the professional staff into our annual budget. At 1800 hours/man-year this would indicate a value of \$36,000. We have this Division using a value of \$13,000/man-year while the Division of Discriminatory Practices uses \$20,000/man-year. I think that this is a matter on which the Comptroller should advise us and that the Divisions and Bureaus should use the man-year approach until that report is made.

COMMISSIONER NICHOLSON'S REQUEST FOR DATA RE FY 1971 BUDGET JUSTIFICATION

(In addition to other data requested)

DIVISION DEADLINE JUNE 18, 1969

"Existing" commitments to be treated *separately* from "future" commitments. (The Commission can *reallocate* its appropriation—therefore show *interim* changes)

Divide your budget justification submittal as follows:

I. *Pending Matters*

A. Current *cases in litigation* including complaints already issued (do not disclose case names or numbers).

1. Industry involved.
2. Volume of sales of companies involved.
3. Man-year investment to date.
4. Man-years to complete.
5. Alternative possibilities (requiring alternative projections).

B. Pending complaints (including complaints being prepared). Here, you *disclose* the names of the parties.

1. Industry involved.
2. Volume of sales of companies involved.
3. Man-year investment to date.
4. Man-years to complete.
5. Alternative possibilities. *Plus!*
6. *Evaluation*—what it expects to accomplish.
 - (a) Any novel approach? New legal application, etc.?
 - (b) Is it related to any industry-wide approach?

(The following topic is out-of-sequence, as I interpret it, but should be included somewhere (probably under "FY 1971 Future Commitments") in your submission. It appears to refer to the correction of projections merely and to the making of re-projections based on your *most recent* fiscal-year experience.)

"*Prospective Commitments*" (refers to merger screening and selection).

As applied to other Divisions, this apparently refers to internal and external (applications for complaint in the instance of "external") case selection and

similar projections, i.e., you should correct last budget request projections (as appearing in the FY 1970 budget) on the basis of *actual* number of letters of complaints received, etc. and actual 7-digit matters in FY 1969, etc., and re-project these figures on the basis of last year's experience.

1. Bring these projections up-to-date from FY 1970 *estimates* (for application to FY 1971).

2. Disclose the *selection criteria* used.

C. *Formal Investigations* (which are included in major projects).

1. Supply evaluation information as requested by Commissioner Jones. (Commissioner Jones requested Merger Division to supply justification for each project in terms of industry sales, size of industry members, growing concentration, number of industry members, etc. *As applied to the other divisions*, this parallels what Commissioner Nicholson requests as "evaluation" for each listed major project. *Note*, however, that the nature of justification for General Trade Restraints and Discriminatory Practices' matters, for example, may, under their statutes, require a somewhat different kind of justification data than that applicable to mergers. Therefore, justify *each* project according to the priority that you are assigning to it, *on the basis of the specific significance of that project which is material to your statutory area.*)

2. As to *each* priority project show:

(a) Number of investigations presently pending.

(b) What will be accomplished during FY 1970.

(c) How is manpower for FY 1971 computed in light of what is to be done in FY 1970 as answered in "(b)" above?

(1) What *additional* investigations may be expected?

(2) Relate FY 1971 manpower justification to what is actually expected to be done *specifically* in FY 1971. (If projected further e.g. to FY 1973, this should be noted.)

[Commissioner Nicholson would also like to comment, in appropriate place, as to the impact on scheduled projects of Commission Directions.]

II. *Future Commitments for FY 1971.*

In addition to the pending matters which will extend into FY 1971, what are your proposals for the future and their significance? Evaluate on the same kind of basis as for ongoing projects.

MEMORANDUM

JUNE 18, 1969.

Subject: Budget Plans for Fiscal 1971.

To: Commission.

From: Division of Mergers.

This is the Division of Mergers response to Commissioner Nicholson's memorandum to the Commission of June 10, 1969, directing the Divisions to provide additional information and justification for the Fiscal 1971 budget estimates. An effort has been made to answer Commissioner Nicholson's memorandum on an item by item, *seriatim* basis, insofar as possible.

A. Pending Matters

As was suggested, the procedure followed in arriving at revised Fiscal 1971 estimates was to, first, re-evaluate the Fiscal 1970 estimates in the light of actual experiences during Fiscal 1969, which ends in less than two weeks. This has been done, and an up-to-date Fiscal 1970 budget estimate has been prepared and is forwarded herewith. In the course of this procedure, it is apparent that the Division predictions for Fiscal 1971 were, in actuality, almost exactly what will be required for Fiscal 1970. In other words, our 1970 estimates were too modest, due to the lack of factual experience upon which to base it, and due also to administrative restrictions, such as a man-power ceiling and flat percentage increase allocations—which were arbitrarily levied against our original estimates. Thus, we now have for the Commissions' consideration a tighter Fiscal 1970 budget estimate, and a more realistic Fiscal 1971 estimate which may, in turn, be tightened up by a re-evaluation one year hence.

There are attached as Appendix A and Appendix B to this memorandum, a list of cases currently in litigation within the Division, and a list of investigations for which complaints are pending or are in final stages of preparation but which are not yet in litigation, respectively. For each grouping and for each case we have endeavored to provide the information specified in items (a) and (e) on page 3 and items (a) and (b) on page 4 of Commissioner Nicholson's memorandum.

B. Prospective Commitments

In response to the questions posed under this heading, the Division does not have a summary of actual surveys of all merger activities, nor does the Bureau of Economics, to the best of our knowledge. The paragraph quoted in the Nicholson memorandum was intended to relate to merger screening activities conducted by this Division and the Division of Economic Evidence, which are formalized by a listing and brief description of mergers as they are reported in the news media. The Bureau of Economics picks up all mergers and joint ventures which are reported in the standard periodicals and newspapers. By experience, the Bureau of Economics indicates that 61% of those reported are actually given some form of preliminary screening by the Commission staff, either economic or legal or both. These are then reported to the Commission for statistical purposes. The original Fiscal 1969 estimate for this activity was 2100 mergers and 195 joint ventures; the actual figure as of June 30, 1969 (estimated for last quarter) will be: 2850 mergers and 185 joint ventures. This means not only that many more mergers were reported than were anticipated but also that some 750 more mergers were preliminarily examined (screened) than the 2100 originally estimated when the FY 1969 estimated input was prepared over a year ago. Joint venture activity has remained constant. Based upon this accelerated pace of merger activity, our Fiscal 1971 forecast for mergers to be examined must be dramatically revised and increased to an anticipated 3000 mergers and with joint ventures being expected to continue as was originally estimated at about 190.

With respect to the criteria used in selecting mergers for preliminary investigation, they have remained pretty much the same in spite of the increased tempo in merger activity, and are listed as follows: (1) the importance of the industry involved to the national economy; (2) the competitive significance of mergers within the specific industry involved; (3) the concern within and without the industry with respect to mergers in this industry (4) the remedy which can logically be anticipated; (5) the likelihood of developing new and novel theories of violation; and (6) the economic and legal resources available to the Commission and the staff for accomplishing a desired economic goal, such as

the restructuring of an industry or the prevention of a merger trend in its incipency.

The pre-merger notification program did not become effective until May 9, 1969, and in view of this there is insufficient actual experience data upon which to predicate anything more than a tentative prediction as to its probable manpower requirements. However, it is already apparent that there will be a significant increase in the administrative time needed to screen, acknowledge and handle merger reports and notifications as they are received and to make a preliminary evaluation of the need for further investigation. The Division of Economic Evidence plays an important part in this process. In the revised Fiscal 1971 budget estimate (submitted herewith), we have taken into consideration probable manpower requirements for this work and they are set forth under the specific project headings; the adjustments have all been upwards.

Priority 1.—(Grocery products) The revised Fiscal 1970 estimate specifies 5 man-years for this industry, based upon the four prospective complaints to be issued. The Fiscal 1971 estimate has been increased to 6 man-years. The rule of thumb used is to allocate one man-year for each outstanding complaint, and to anticipate two additional complaints from mergers yet to occur during the next year. However, in projecting for the years beyond no one can reasonably predict how many mergers will take place within an industry and how many will develop into complaints. It is a judgement process which is speculative at best, and which is made by the Chief of the Division upon the basis of experience and observation of current merger activity occurring in the business world. This is a continuing project which is likely to require 6 man-years in FY 1970, perhaps decreasing to 4 man-years in Fiscal 1973 and 1974.

Note: The man-year estimate of 1 man-year per complaint, present or anticipated, and the judgement process referred to above apply to all projects discussed in this memorandum.

Priority 2.—(Auto Parts) This has been revised upward to 5 man-years for Fiscal 1970 and 6 for Fiscal 1971. There is little doubt but that within this industry there will be a continuing merger activity, barring an unforeseen economic depression in the auto industry. Current investigations and litigation will reveal additional violations as our expertise in the field increases. At least 2 additional complaints from pending investigations or future mergers are contemplated during Fiscal 1971, and the category will likely require comparable manpower during Fiscal 1972 and 1973.

Priority 3.—(Cement) Contrary to the expectations of some, the Commission's enforcement policy statement for this industry has not lessened the manpower requirements. It may increase manpower needs due to the necessity for resolving, one way or another, all outstanding investigations and complaints involving members of the industry. Additionally, the Section 6(b) survey activities place an additional burden upon the staff. With these factors in mind the Fiscal 1970 estimate has been increased to 5 man-years and the 1971 to 6 man-years. Here again an allowance of 2 man years is being made for 2 more complaints from pending investigations or future mergers. The project is a continuing one with little likelihood of any manpower reduction before FY 1973 or 1974.

Priority 4.—(Special Projects) The requirements for this category have been more realistically set at 3 man-years for Fiscal 1970 and 5 man-years for 1971, based upon experiences during the current period. With respect to special and unanticipated projects which the Commission imposes upon this Division, it can be said that such projects completely alter the predicted work schedule in almost every instance. Commission projects are always of major import, and are of invaluable guidance in setting the policy for merger enforcement. However, they are implemented precipitously, in most instances, and it is never possible to work them into the advance budget planning procedures. It is always necessary to forgo a scheduled effort in order to accommodate a new Commission project, just as is the case when an unexpected major merger is reported in the press and it is necessary to institute immediate investigation and, perhaps, litigation. These are variables which we know will arise, but for which the PPBS makes little or no allowance.

Since it is contemplated that special project assignments by the Commission will continue and will increase, because they generally envision the use of industry-wide approaches or something other than the case-by-case approach to merger enforcement, this, too, seemingly will be a continuing project requiring increasing amounts of manpower in FYs 1972-1974.

Priority 5.—(Commercial & Industrial Equipment, Machinery and Supplies) This is an agglomeration of a number of heavy industry groupings which is more or less in a state of flux. The individual investigations included often develop into a separate industry grouping and are then removed from this category, while new matters are being added from time to time. It is believed that our original estimates for Fiscal 1970 and 1971 are realistic and adequate and no change is recommended. The breadth of this project encompasses many industries primarily in the broad manufacturing area. Since present indications are that merger activity in this area is not abating, the project is a continuing one which will probably require comparable man-power in FYs 1972-1974.

Priority 6.—(Metals, Minerals and Mining) Hearings in the Kennecott matter have concluded and the preparation of proposed findings and briefs will be accomplished during FY 1970. Whatever initial decision is issued will undoubtedly be appealed and will create a continuing demand in FY 1971 upon the manpower resources of the Division. Considerable merger activity in the minerals and mining field is expected in the future as the ownership and control of natural resources becomes more important. With this in view, the Fiscal 1970 requirement has been raised to 4 man-years, with an additional increase to 5 man-years in Fiscal 1971. However, hopefully we will be past midstream with this project by FY 1972 when the manpower allocation can be reduced 2 or 3 man-years.

Answering specifically regarding relative times for litigation, the experience of this Division is that merger cases generally take a minimum of one year and on an average of 1½ years with the Hearing Examiner (from original assignment, pre-trial, trial, findings and briefs and initial decision); and an average of at least one year with the Commission (from notice of intention to appeal, briefs, oral argument and decision by the Commission).

Priority 7.—(Lumber & Building Supplies) Like the preceding category, this involves control of natural resources, or raw timber, by the manufacturers of finished building products. The specific goal sought in this area is to preserve sources of supply to the small, non-integrated manufacturers insofar as is possible through enforcement of the Clayton Act. In this era of short money supply, with the building industry frozen due to lack of financial support, it is most important to preserve whatever competition exists, in the hope that when business improves there will be ample opportunity for entry and growth by the independents. The bringing of one or more test cases, as suggested, usually requires more than average manpower, and is one reason the relatively high estimate of 3 man-years for Fiscal 1970 and 4 man-years for 1971 has been presented. We are just initiating this project, consequently it will likely require at least comparable manpower in FYs 1972-1974.

Priority 8.—(Apparel) This category is a favorite target of the conglomerate-minded company because there are so many potential plums to be picked and because such a huge industry supports a large cash flow which is tempting. It is relatively safe from antitrust laws because merger market shares are usually quite small, making it difficult to prove substantial competitive effect. However, the number of mergers in the industry and the trend toward vertical integration make it important to maintain our interest in it, and to keep current of any trends. The 3 man-years for Fiscal 1970 and 1971 do not seem excessive for this work. Since a minimum of 2 complaints from pending investigations or future mergers are expected to develop, this project will likely continue during FYs 1972-1974.

Priority 9.—(Paper & Paper Products) The present goal in maintaining an interest in this grouping is to preserve whatever gains have been attained through the Commission's past interest in challenging acquisitions and mergers in the industry. Some of the early Commission decisions under Section 7, such as *Crown-Zellerbach*, stand as a warning to industry members who may be acquisition-minded, and the Division must maintain a high degree of surveillance in order to keep the enforcement crusade alive. The 2 man-years estimated for Fiscal 1970 and 1971 appear minimal to accomplish this purpose. One man-year is allocated for the present outstanding complaint and the other man-year is in contemplation of at least one more complaint from pending investigations or future mergers. Hopefully, manpower requirements for this project will not be increased in FYs 1972-1974.

Priority 10.—(Miscellaneous) This is a catch-all group, but it encompasses individual investigations which may easily develop into litigated cases. The Division gives a high degree of attention to many of the individual investigations included herein, and for the lack of any other priority grouping to which they

may be assigned we feel that this is a reasonable attempt to provide some coverage in the budget estimates. Our original estimate was only a token figure, and upon reflection has been increased to 4 man-years for Fiscal 1970 and 6 man-years for Fiscal 1971. The new manpower estimate was increased with the idea of allowing the Division some flexibility to deal with unanticipated and unexpected mergers and merger trends which likely will occur and will require prompt action. Since this is a continuing broad project, comparable manpower requirements will be required in FYs 1972-1974.

Non-priority Projects.—In our original Fiscal 1970 estimate there was no breakdown between priority and nonpriority projects. As a matter of fact, the present nonpriority industries which were in the original estimate called for an allocation of 16 man-years. After the directive from the Chairman which called for priority groupings, our total estimated requirements were put under "priority," while "nonpriority" received nothing. In view the Commissioner Nicholson's memorandum and the readjustment which it provoked, the 10 non-priority industries are estimated to require a total of 4 man-years for Fiscal 1970. This will support a caretaker type operation only, and would undoubtedly be increased if sufficient manpower is made available in the near future. There is an additional reason why these investigations cannot be preemptorily closed out. The Administrative Manual, Appendix I, paragraph 6-051.14C does not list "insufficient manpower" as an acceptable reason for closing an investigative file. Nevertheless, the Division plans to continue its present policy of having the staff (whenever there is any spare time) close out old investigations.

C. Summary

Lastly, the June 10th memorandum suggests submission of a summary of man-year estimates in a form different from that used heretofore, either for the budget requirements or in response to Commissioner Jones' memorandum. In line with that suggestion, the following is an effort to realign the Division of Mergers requirements for Fiscal 1971.

Fiscal 1971 man-year requirements

Pending adjudicative matters-----	25
Pending complaints-----	10
Pending investigations-----	15
Preliminary investigations-----	3
Pre-merger notification programs-----	5
Total -----	58
Respectfully submitted.	

WILLIAM J. BOYD, Jr.,
Chief, Division of Mergers.

APPENDIX A

FORMAL MERGER CASES NOW IN LITIGATION

Case "A".—Cabinet hardware; sales of companies \$228 million; investment to 4/30/69, 1.3 man-years; completion during FY 1971 with 1 man-year needed; appeal involves an expansion of theory of elimination of potential competition; not related to any industrywide approach.

Case "B".—Pneumatic staplers & nailers; sales of acquiring \$68.2 million, of acquired \$9.6 million; investment to 4/30/69, 1.3 man-years; settlement agreed to by parties and if accepted no man-years will be needed, otherwise 1 man-year with completion in FY 1970; no appeal likely; not related to industrywide approach.

Case "C".—Typewriters; sales of acquiring \$1.9 billion, of acquired \$12.9 million; investment to date, 6.9 man-years; needed to complete, 4 man-years; completion in FY 1973; court appeal likely; no novel theory; not related to industrywide approach.

Case "D".—Auto parts; combined sales \$225 million; investment to 4/30/69, 6.8 man-years; needed to complete, 2 man-years; completion by FY 1971; appeal to courts is likely; no novel theory involved; not related to industrywide approach.

Case "E".—cement; sales of acquiring \$83 million, of acquired \$11 million; investment to date, 4.8 man-years; needed to complete, 1 man-year; completion

in FY 1971; likely to be appealed to courts; no novel theory; directly related to policy statement re Vertical Mergers In The Cement Industry.

Case "F".—cement; sales of acquiring \$24 million, of acquired \$3 million; investment to 4/30/69, three-tenths of one man-year; needed to complete, 2 man-years; completion during FY 1970; no appeal likely; no novel theory; related to enforcement policy statement re Vertical Mergers in the Cement Industry.

Case "G".—auto parts and components; sales of acquiring \$200 million, of acquired \$13 million; investment to 4/30/69, one-half man-year; needed to complete, 2 man-years; completion in FY 1970; appeal to courts probable; no novel theory involved; related to the automotive parts industry project.

Case "H".—synthetic nylon yarn, webbing and belting; sales of acquiring \$1.2 billion, of acquired \$34.2 million; investment to 4/30/69, 2 man-years; needed to complete, 1 man-year; completion during FY 1970; appeal to courts likely; no novel theory; not related to an industrywide approach.

Case "I".—auto parts; sales of acquiring \$1.3 billion, of acquired \$67 million; investment to 4/30/69, 8.1 man-years; needed to complete, $\frac{1}{2}$ man-year; completion in FY 1970; appeal likely; involves an expansion of theory of potential competition; related to the automotive parts industry project.

Case "J".—coal; sales of acquiring \$740 million, of acquired \$234 million; investment to 4/30/69, 3.6 man-years; needed to complete, $\frac{3}{4}$ man-year; completion during FY 1970; appeal likely if divestiture is ordered; involves an expansion of theory of elimination of potential competition; not related to an industrywide approach.

Case "K".—gift wrap and ribbons; sales of acquiring \$24 million, of acquired \$21 million; investment to 4/30/69, three-tenths of one man-year; needed to complete, 1 man-year; completion (after appeal to Commission) in FY 1971; appeal to courts likely; no novel theory involved; not related to industrywide approach.

Case "L".—cement; sales of acquiring \$84 million, of acquired \$8 million; no man-year investment to date as case was reopened by the Commission for consideration of a revised order; needed to complete, $\frac{1}{4}$ man-year; completion during FY 1970; appeal not likely; falls within the enforcement policy statement re Vertical Mergers in the Cement Industry.

APPENDIX B

DIVISION OF MERGERS PENDING COMPLAINTS (NOT YET IN LITIGATION)

671 0655—*Studebaker Corp.*

671 0644—*Studebaker Corp.*

671 0610—*Tung-Sol Electric, Inc.*

Auto parts and electric generators; combined sales \$710 million; combined investment for these three files, to be made into a single complaint, as of April 30, 1969, 1.8 man-years; needed to complete, 4 man-years, with completion in FY 1972; appeal to courts likely; involves a further expansion of the elimination of potential competition theory; not related to an industrywide approach.

661 0641—*Sterling Drug, Inc.*

Non-food household consumer products; combined sales \$425 million; investment to date, 1.6 man-years; needed to complete 1 man-year; completion during FY 1971; appeal to courts likely; involves application of theory of elimination of potential competition to broad lines of commerce in addition to traditional lines of commerce; not related to an industrywide approach.

691 0621—*Stapling Machines Co.*

Gummed tape dispensers; accurate sales figures not available; investment to date, no man-years; needed to complete, 1/12 man-year; completion by settlement predicted for FY 1970; no court appeal likely; no novel theory; no industrywide approach applicable.

681 0654—*General Mills, Inc.*

Frozen packaged seafood; sales figures not available at this time; investment to date, 9/10 man-year; needed for completion, 4 man-years; completion in FY 1972; appeal to courts likely; no novel theory; no industrywide approach applicable.

691 0643—*Monsanto Co.*

Control valves, instrumentations and systems; Monsanto sales \$1.8 billion, Fisher Governor sales \$72 million; investment to date, no man-years; needed for completion, 1 man-year; completion in FY 1971; appeal to court likely; no novel theory; no industrywide approach applicable.

681 0667—*The American Tobacco Co.*

Prune juice and applesauce; American's sales \$1.5 billion, Duffy-Mott's sales \$71 million; investment to date, $\frac{9}{10}$ man-year; needed for completion 1.5 man-years; completion in FY 1971; appeal to court likely; no novel theory; no industrywide approach applicable.

691 0603—*Beatrice Foods Co.*

Institutional wholesaling of dry groceries, frozen food, etc.; Beatrice sales \$1.3 billion, John Sexton & Co. sales \$90 million; investment to date, $\frac{7}{10}$ man-year; needed for completion, 1 man-year; completion in FY 1970; court appeal likely; no novel theory; no industrywide approach applicable.

681 0644—*Textron, Inc.*

Ball bearings; Textron sales \$1.7 billion, Fafnir Bearing Co. sales \$196 million; investment to date, $\frac{9}{10}$ man-year; needed for completion, 6 man-years; completion in FY 1972; appeal to court likely; no novel theory; no industrywide approach applicable.

691 0633—*Oregon Portland Cement Co.*

Cement; Oregon's sales \$9.7 million, Idaho Portland's sales \$1.9 million; investment to date, no man-years; needed for completion, 1 man-year completion in FY 1970, probably by consent order; appeal to court unpredictable; no novel theory; enforcement policy statement for Vertical Mergers in the Cement Industry applicable.

651 0628—*Ash Grove Cement Co.*

Cement; Ash Grove's sales \$25 million, acquired companies sales \$4 million; investment to date, $\frac{2}{10}$ man-year; needed for completion, 2 man-years completion in FY 1970; no appeal likely; no novel theory; enforcement policy statement for Vertical Mergers in the Cement Industry applicable.

691 0637—*OKC Corp.*

Cement; OKC sales \$39 million, acquired company sales \$11 million; investment to date, 3/10 man-year; needed for completion, 1 man-year; completion in FY 1971; court appeal likely; no novel theory; enforcement policy statement re Vertical Mergers in the Cement Industry applicable.

691 0625—*Chemtron Corp.*

Are welding apparatus; combined sales \$350 million; investment to date, 2/10 man year; needed for completion, no man-years (consent order has been accepted by the Commission); completion in FY 1970; no novel theory; enforcement policy re Vertical Mergers in the Cement Industry applicable.

661 0627—*Hercules, Inc.*

Polypropylene resin and rope; Hercules sales \$582 million, Columbia Rope Co. sales \$11 million; investment to date, 1.4 man-years; needed for completion, no man-years (consent settlement anticipated); completion in FY 1970; no appeal likely; no novel theory; no industrywide approach applicable.

651 0647—*McCrory Corp.*

Retail trade general merchandise, apparel and accessories; sales of McCrory \$181 million, sales of 3 acquired firms \$467 million; investment to date, 1 man-year; needed for completion, 4 man-years; completion in FY 1972; court appeal, perhaps; no novel theory; Apparel Industry Project industrywide approach applicable.

691 0624—*White Consolidated Industries*

Machinery; sales of White \$800 million, sales of Allis-Chalmers \$800 million; investment to date, 6/10 man-year; needed for completion, 1 man-year; completion in FY 1970, probably by consent settlement; no appeal likely; theory involves broadening the line of commerce under Elimination of Potential Competition category; no industrywide approach applicable.

MEMORANDUM

JUNE 18, 1969.

Subject: Response to Commissioner Nicholson on Budget Plans.

To: Director, Bureau of Restraint of Trade.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices.

Attached hereto are five (5) separate memoranda treating our priority major projects. The projects, in order of priority, are (1) Chain-Grocers-Food Distribution (2) Apparel Industry (3) Dairy Industry (4) Fresh Fruits and Vegetables (5) Tri-Partite Arrangements and (6) Publishing Industry. These show our justification for being in each industry.

In addition, we are attaching a copy of our response to Commissioner Jones' request showing justification for other projects engaged in by Division. They cover Automotive Parts, Drug Industry, Department Store Industry, Baking Industry, Drapery Hardware Industry and a sample of miscellaneous cases.

As to the selection process, a lot of thinking and planning is continuously being done on what resource investments should be made. We do not launch a new investigation for every complaint we receive from businessmen who allege that they are being unlawfully injured in the competitive struggle. In fact, increased selectivity in screening has been our policy and practice for many years. In fiscal 1969, approximately 49 investigations were selected out of approximately 800 applications for complaints. The selection process required an evaluation of, among other things, the market structure, requisite public interest, congressional interest, relative size of the participants, substantiality of the practice, jurisdiction and likelihood of a successful remedy. Moreover, when we did initiate an investigation we were moving into areas where we had reason to believe that a violation was occurring.

Also transmitted herewith is a schedule showing a comparison between actual FY 1969 experience with previous budget estimates for FY 1969. Experience in FY 1970 should approximate that for FY 1969.

Also attached are schedules showing information requested on formal and pending complaints.

COMPARISON OF ACTUAL FISCAL YEAR 1969 EXPERIENCE WITH ESTIMATES FOR FISCAL YEAR 1969

Workload statistics	Actual fiscal year 1969	Estimated fiscal year 1969
Applications for complaint:		
On hand beginning of year.....	67	58
Received.....	299	400
Disposed of.....	270	375
Pending end of year.....	96	83
Formal investigations:		
Pending beginning of year.....	299	299
Initiated or reopened.....	49	100
Completed or closed.....	99	150
Pending end of year.....	250	249
Complaints issued:		
Pending beginning of year.....	13	13
Approved for negotiation or reopened.....	3	25
Dispositions:		
Consent.....	10	20
Litigated.....	1	5
Other.....		
Pending end of year.....	11	13
Litigated cases:		
Pending beginning of year.....	4	4
Complaints issued or reopened.....	7	8
Docketed orders issued.....	1	6
Pending end of year.....	10	6
Voluntary compliance.....	15	20

Note.—Estimate for fiscal year 1970 should approximate fiscal year 1969 experience.

I. *Pending Matters*A. *Cases in Litigation—4[(a)—(d)]*1. *Industries involved:*

- (a) Liquefied petroleum gas
- (b) Corn products
- (c) Food and non-edible grocery store products
- (d) Women's apparel

2. *Volume of sales:*

- (a) \$43,717,000
- (b) \$1.6 billion
- (c) \$500,000,000 (approx.)
- (d) \$9,000,000

3. *Man-years investment to date:*

- (a) 6½
- (b) 4½
- (c) 4
- (d) 1 (approx.)

4. *Man-years to complete:*

- (a) 2¹
- (b) 2*
- (c) ½
- (d) ⅓ (approx.)

5. *Alternative possibilities:*

- (a) None
- (b) Consent agreements or assurances by all leading industry members to discontinue practices involved.
- (c) None
- (d) None

6. *Expected accomplishments:*

- (a) Prevent largest independent distributor/dealer in industry from using its purchasing power to obtain a price advantage over its smaller competitors.
- (b) Elimination of industry practice of granting preferential discounts to favored customers in guise of payments for services not rendered.
- (c) Deter this respondent and discourage others from using their purchasing power to induce suppliers to grant special benefits.
- (d) Compel compliance with a law which a great number of fellow-industry members are already under order to obey.

B. Pending Complaints—10—I—Five Cases [Each case names a food chain plus its "field" or "ground" broker and in some instances, a divisions or subsidiary of the chain or individuals who are owners or operators of the brokerage firm. This report will name only the chain involved.]

1. *Industry involved:* Fresh fruits and vegetables.2. *Volume of sales of companies involved:*

- (a) Food Fair—\$1.3 billion
- (b) Jewel Tea—\$1.2 billion
- (c) First National—\$640 million
- (d) Borman—\$314 million
- (e) H. C. Bohack—\$207 million

3. *Man-years investment to date:* 2½.4. *Man-years to complete:* 6

5. *Alternative possibilities:* None. Trade Practice Rules exist for this Industry and have been ignored by the respondents even though the practices involved have been specifically declared to be violative of Sec. 2(c) by the Rules.

6. *Evaluation:* If these matters are brought to a successful conclusion, such result should serve to inhibit and discourage large grocery chains from shifting their procurement costs to their suppliers and should establish confidence in and compliance with the Rules by all industry members.

The practice involved is industry-wide and the named chains are among the largest of those employing field or ground brokers.

II—United Fruit Co., Harbor Banana Distributing, Inc.

1. *Industry involved:* Bananas.

2. *Volume of sales of companies involved:* United Fruit Co.—\$500,000,000; Harbor Banana Distr. Inc.—\$6,000,000

3. *Man-years investment to date:* 2½ (approx.)4. *Man-years to complete:* 2½.

5. *Alternative possibilities:* Consent agreement as to one respondent but this disposition does not appear likely as to the other.

¹ Together with other industry members.

6. *Evaluation*: We believe the case presents a novel approach to established rather than new legal principles.

United is the major importer of bananas and Harbor is the major wholesaler of bananas in the Los Angeles area. The latter, together with a recently acquired distributor, controls approximately 70% of the Los Angeles banana market.

In our opinion the activities of the respondents—price concessions on the part of United and Harbor's acquisition of a competitor together with its previously existing storage and ripening capacity—indicate a course of action which by design or effect will inevitably monopolize the entire market involved and we believe that the injuries suffered by the other members of the wholesale banana market in the Los Angeles area are substantial and readily apparent.

III—Supermarket Broadcasting Network, Inc.

1. *Industry involved*: Edible and inedible grocery store products.
2. *Volume of sales of company involved*: \$1,000,000 [but see item 6 below].
3. *Man-years investment to date*: Less than 1 (approx. 1600 hours).
4. *Man-years to complete*: Less than $\frac{1}{10}$ th since respondent has agreed in principle to a proposed Consent Order.
5. *Alternative possibilities*: None.
6. *Evaluation*: This is one of several tripartite matters. (see discussion under "Tripartite Arrangements")

It is novel in that for the first time, the third party promoter of a promotional program, the intermediary between supplier and customer, is being challenged. Although the intermediary's sales are only in the area of about \$1,000,000, the sales of the suppliers he represents involve many millions of dollars in the retail grocery industry.

The purpose of this approach is to avoid a multiplicity of suits by proceeding against the prime movant of a plan which involves the granting of discriminatory payments by participating suppliers, and/or the inducement and receipt of such payments by customers.

IV—Jos. Schlitz Brewing Co.

1. *Industry involved*: Malt beverage (beer)
2. *Volume of sales of company involved*: \$400 million
3. *Man-year investment to date*: $3\frac{1}{2}$
4. *Man-years to complete*: Zero (if Consent Agreement is accepted) $1\frac{1}{2}$ (if Agreement rejected).
5. *Alternative possibilities*: None.
6. *Evaluation*: It will prevent discriminations by the second largest brewer in the country. This will significantly enhance the relative competitive position of the large number of small producers of so-called "local" popular priced beer. These popular priced beers account for 80% of the beer sold in the United States. Total sales are very substantial.

V—Two cases.

- (a) Knoll Associates, Inc.²
- (b) Lehigh Furniture Co., (a subsidiary of Litton Industries, Inc.)
1. *Industry involved*: Contemporary wood office furniture.
2. *Volume of sales of companies involved*:
 - (a) Knoll—"in excess of \$9 million" (per respondent.)
 - (b) Lehigh—\$1.5 million (estimate) (no breakdown kept by the parent Litton whose total sales exceed \$1.5 billion).
3. *Man-year investment to date*:
 - (a) Knoll ³— $\frac{1}{10}$ (see fn. supra)
 - (b) Lehigh— $\frac{3}{4}$ (approx.)

²This case was remanded by the Seventh Circuit after setting aside the Commission's Order, with instructions to reconsider the record "excepting . . . all evidence and testimony given or produced by or through . . ." a witness. By Order dated April 8, 1969, the Commission directed respondent and complaint counsel to file briefs setting forth their views as to whether or not the record, absent the specified evidence, would support the entry of an Order and subsequently the parties entered in to negotiations looking toward an Agreement containing a consent order. Time invested and to be spent in completing this matter will be estimated running from approximately April 8, 1969.

³The original matter took approximately $2\frac{9}{10}$ man-years before Commission and approximately $\frac{8}{10}$ year at appellate level.

4. *Man-years to complete:*
 - (a) Knoll—1/100 (if agreement accepted—if not—may take 2)
 - (b) 1/10 if agreement accepted (1 if not).
5. *Alternative possibilities:*
 - (a) Knoll—none, other than dismissal
 - (b) Lehigh—none other than dismissal.
6. *Evaluation:* With the final disposition of Knoll the orders in two companion matters will become final. If Lehigh is also concluded favorably, we will have obtained orders against the dominant members (six) of the industry.

MAJOR PROJECTS

CHAIN GROCERS—FOOD DISTRIBUTION

It is anticipated that some time prior to FY 1971, that several pending matters will result in recommendations for complaint. The litigations involved would extend well into FY 1971 and, quite possibly, into FY 1972.

In *Alterman Foods, Inc. File No. 671 0222*, the proposed charges involve receiving unlawful discriminatory promotional allowances in violation of Sec. 5 of the FTC Act. The conduct of this firm is notorious and since the firm indicates an unwillingness to modify their conduct, consent order settlement appears to be an unlikely alternative.

Likewise, a similar Sec. 5 proceeding appears likely against *Kroger*, File No. 691 0014. This matter is now under expedite investigation with special Commission authority. Because of the nature and magnitude of the practice, we feel that *Kroger* should be under order. Accordingly, we have declined a voluntary compliance suggestion.

The project team handling this industry contemplate other litigation that will carry into FY 1971 or commence in that period.

(a) *United Fruit Company, et al., File No. 671 0187*. This matter involves a joint seller and customer proceeding under Sec. 2(a) and 2(f) with several monopoly charges against the customer. A recommendation is pending with the Commission to accept a consent order from United and also to issue a complaint against the customer, Harbor Banana Distributors. If recommendation is adopted, part 3 complaint will issue in the next fiscal year.

(b) *Purex Corporation Ltd, 671 0114*. This matter involves discrimination in price in the sale of private label bleach. We consider this a significant case which will show adverse effects of private labeling at the primary line of competition. Purex is using raw market power to drive locals out of business in an attempt to gain monopoly power in the sale of this product.

(c) *Super Value Stores, File No. 691 0027* involves an unauthorized deduction by a power buyer of discounts from invoices from suppliers.

In our plans for FY 71 Budget, we projected six (6) attorneys for this project. In addition to the above-mentioned probable litigation, routine scrutiny of the industry will require their efforts on a continuing basis.

APPAREL INDUSTRY

All compliance reports still extant are expected to be forwarded to the Commission before the end of FY 1970. Thus will leave only civil penalty investigations and a few initial investigations undisposed of by the end of FY 1970. The two initial investigations which we have in the field should be returned early in FY 1970 and will be disposed of by the end of that year. If they result in litigation, that will run into FY 1971, but should terminate during that year. There will probably be some civil penalty investigations active in FY 1971 and beyond: this is a necessarily continuing activity. FY 1971 will mark five years since the Commission made its Orders to Cease and Desist final in this industry. Although we have not submitted any plan for such a follow-up, it appears to me that FY 1971 would be a good time for at least spot-checking compliance by Section 6(b) Orders to File Special Reports.

There are two matters still pending from the Commission's inquiry into this industry in 1962. They are: *Korell Corporation, D-8777* and *Evan-Picone Inc., File 671 0162*.

In Korell, the complaint has been issued and pre-trial stipulations etc. are being drafted. It is anticipated that this matter will be concluded in FY 1971.

In Evan-Picone, the files were returned from the field just last month. A preliminary review indicates a violation of Section 2(d). Accordingly, work has commenced looking towards the issuance of a complaint. It is anticipated that Evan-Picone will be substantially completed in FY 1971. We have projected two (2) attorneys for this project.

DAIRY INDUSTRY

It is anticipated that some time prior to FY 1971, that at least two or three of the presently pending seven digit matters involving the dairy industry will result in recommendations for complaint. The litigations involved would undoubtedly extend well into FY 1971 and, quite possibly, into FY 1972.

The matters nearest the complaint stage are File Nos. 661 0093, Prairie Farms Dairy, Inc. and 681 0030, The Borden Company. In the Prairie Farms case a recommendation for complaint has been received from the attorney-examiner. There appear to be several violations of Section 2(a) of the amended Clayton Act by Prairie Farms. However, the documentary evidence requisite to prove such charges is woefully lacking. It is estimated that it will take from three to four months to complete this file. At that time a recommendation for complaint will most likely be filed.

In the Borden case, a supplementary investigation by this Division is nearing completion. A recommendation for complaint may be forwarded within the next three months.

There are six other investigations pending in the field which offer distinct possibilities of complaint. Since the estimated completion dates in these investigations seem to be quite fluid it is difficult to predict when they will be received from the field offices. However, it is very possible that one or more of these may result in recommendations for complaint prior to or during FY 1971.

At the same time continued scrutiny will be required of the dairy industry, especially in the areas of private label contracts between the major dairies and the major chains and inducements of discriminatory prices by chain stores. Such investigations are becoming more and more dependent upon compulsory process and investigational hearings (See File Nos. 661 0172, 671 0149, 681 0030 and 681 0137).

In addition to the probability that litigation in two or more cases will extend into FY 1972, it is apparent that our routine scrutiny of the dairy industry, plus future investigations and matters going to complaint will continue to require the efforts of from three to five attorneys during FY 1972. We have requested three (3) attorneys for FY 1971.

As for alternatives for our sub-goals, industry scrutiny and investigation of private label contracts and chain store pressures on the dairy industry, it would appear that the principal alternative approach would be that of the rule-making procedure. However, this would not appear to be a workable solution to dairy industry problems. Regulations set up at the state and local levels appear to have had a less than salutary effect. They tend to preserve the inefficient and, in the long run, only encourage backward integration by the chain stores.

FRESH FRUITS AND VEGETABLES

Notice of issuance of intention to issue complaints have been served charging five retail food chains and six "ground" or "field" brokers with violations of Section 2(c) of the Amended Clayton Act. It appears unlikely from negotiations that respondents will settle this matter. Accordingly, these cases should be in litigation in FY 1971. Six (6) attorneys have been requested to handle this litigation in FY 1971.

TRI-PARTITE ARRANGEMENTS

This project was undertaken pursuant to Commission direction. Two (2) investigations [involving at least 10 top chain grocers] are in progress. In *Store Cast Corporation of America*, File No. 671 0067, the New York office advises that this investigation is almost complete. This case will probably involve litigation because respondent is involved in discriminatory activity and a consent order would put it out of business. [Pursuant to these programs the participating suppliers, directly or indirectly, grant preferential advertising allowances or services to the participating retail grocery chain. The programs make no provision

for granting allowances or furnishing services on a proportionate basis to competing retailers.] Litigation of this matter will carry into FY 1971. Two attorneys have been requested.

PUBLISHING INDUSTRY—PRESTIGE PAPERBACK AND HARDBACK PUBLISHERS

In a recent status report to the Commission this Division recommended that Section 6(b) reports be secured from a representative number (we have in mind about 50) of publishers in this industry—the reports to cover the heavy sales period in the fall of 1969.

If the Commission authorizes such action the reports should be processed and analyzed by spring of 1970. We will then be in a position to determine whether substantial conformance to the Commission's Guides has been achieved.

If such conformance is not indicated then further investigation and the issuance of formal complaints will be required. I further anticipate that certain members of this industry may take this opportunity to oppose the 6(b) reports and contest the Guides. Two (2) attorneys requested for FY 1971.

OTHER PROJECTS

AUTOMOTIVE PARTS

An investigation was recently initiated under Section 2(a) and 2(f) of the amended Clayton Act against a major oil company (subject to one of the "TBA" orders) and two of its suppliers. One of the two suppliers also has a nationwide network of warehouses. The investigation, initially, is limited to the two suppliers, with the possibility of expansion to others. The warehouse of one of the suppliers is reportedly a major factor in the distribution of "private label" items sold through the gasoline station of the major oil company. The two suppliers, although selling a "private label" item to the oil company, are also large national factors in the sale of "branded" products. The reason we initiated this investigation is to get some understanding of the new "purchase and resale" program of the oil company. Also, the applicant's attorney indicated the practices of this oil company present a "test case". In other words, if the Commission does not proceed against this oil company, the other majors probably would follow their program of selling "private label" products in competition with the "independent" wholesalers and thus take away from the "independents" all of the gasoline station business. This matter is in its initial stages. 156 hours have been spent on it so far. The practice is reportedly nationwide. This matter will undoubtedly carry through the next fiscal year because of the complexities of dealing with a major distributor of "TBA" items, and also the problems inherent in prosecuting a "private label" matter. It might also lead into investigation of other oil companies engaging in the same type of practices.

Another serious problem that appears to be prevalent in the automotive replacement parts industry, based on a substantial number of complaints we have received, is the so-called "chicken wire warehouse." This involves the joint ownership of a warehouse and one or more jobber outlets. A warehouse price is granted on all purchases. This is affecting the competition of the legitimate warehouses and jobbers. But the problem is also directly related to the Commission's treatment of "buying group". Of even greater significance is the investigation ordered by the Commission to discern the effects of the Advisory Opinion in the *Matter of General Motors Corporation* (Docket No. 5620), which deals directly with joint ownership. The outcome of the General Motors matter, and the directions thus emanating from the Commission should serve as a policy guideline in all such joint ownership matters.

We presently have three (3) related matters in the field for Section 2(a)—price discrimination investigations. They all involve "volume rebates." One (in the Kansas City Office) is reportedly completed or nearly completed. Man hours on that one are 427. The other two are in the initial stages of investigation. Man hours so far are 39 and 97. There has been an indication in the Kansas City Office investigation that a closing recommendation will probably be forthcoming on the basis of "meeting competition." The time necessary for full investigation of the other two matters should not exceed the time required for the Kansas City investigation. The reason these three matters were investigated is because "volume rebates" were the subject of some of the Commission's very early automotive parts matters. Such pricing systems were consistently held to be unlawful. It was my recommendation when I recommended these investigations that if the

facts disclosed 2(a) violations, complaints issue without the opportunity of Voluntary Compliance, because of the long history of "volume rebate" matters at the Commission. Another factor I wanted determined was why, after so many years of litigation in the industry, "volume rebates" still exist.

Substantial manpower will be required to evaluate these investigations in FY 1971. Our budget request covers only two (2) attorneys for FY 1971.

DRUG INDUSTRY

Our investigations in this industry involve the following problems:

1. Institutional and Professional purchase and resale to potential derogation of private markets.
2. Diversion by exempt or non-competitive sources into regular commercial channels, with attendant dislocation.
3. Arbitrary offering and pricing of bulk and non-standard package sizes.
4. Straight price and discriminatory concessions.
5. Dual distribution.

We have six (6) investigations in the field involving drug problems. The investigations should be completed and evaluated in FY 1971. The investigations have not progressed to the point where an accurate prognosis can be made as to whether complaints will issue. It is hoped that the problems in this industry can be solved without costly litigation. Two (2) attorneys requested for FY 1971.

DEPARTMENT STORE INDUSTRY

At the present time there are active matters involving Montgomery Ward & Company, Inc., File No. 651 0096 and R. H. Macy, File No. 681 0126.

In connection with the former the charge will be violation of Section 5 of the Federal Trade Commission Act for inducing services which appear to be in violation of Section 2(e). At the present time the files are being reviewed for preparation of formal complaint.

With respect to R. H. Macy, the matter is currently being investigated by the New York Office for possible violation of Section 5 of the Federal Trade Commission Act for inducing violations of Sections 2(d) and (e) on the part of its vendors.

In addition to the foregoing, the Bureau has recommended to the Commission by memorandum dated May 29, 1969, that Federated Department Stores, Allied Stores Corporation, May Department Stores, Association Dry Goods Corporation and R. H. Macy be investigated to determine whether these large complexes are receiving special prices and/or promotional allowances from suppliers which may be in violation of Section 2(f) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act. The Commission directed that this industry be studied by the Bureau of Economics.

Since the Montgomery Ward and Macy investigations do not include pricing practices, they should probably be also forwarded to the Bureau of Economics to assure uniform industry-wide treatment. We cannot anticipate whether the Bureau of Economic's recommendation will require manpower expenditure in FY 1971.

BAKING INDUSTRY

The Commission continues to receive a large number of complaints from independent bakers because of discriminatory and below cost selling of bread by large national and regional bakeries. Private label is the most serious problem in the industry. Vertical integration by grocery chains has cut into the market share of the independents. The five (5) investigations in progress should be completed and evaluated by the end of FY 1971. Two (2) attorneys requested for FY 1971.

DRAPERY HARDWARE INDUSTRY

We intend to recommend that the five cases in this industry be closed. If this recommendation is accepted the Division will no longer be involved in this industry. If rejected, we would estimate that complaints would be recommended in at least three of the cases. Except for the Kirsch Co., File No. 671 0235, none of the investigations were extended to cover evidence of injury. Consequently, supplemental investigation would be needed in the other files. Hopefully this and the recommendations of this Division would be completed by the end of fiscal 1971. If this schedule were realized we could anticipate that fiscal 1972 would be spent in preparation for hearings, pre-trial, and perhaps hearings in

one of the cases. At least one other attorney and an accountant would be needed to litigate these cases. The *Grabber* case at times required the full time efforts of three attorneys and one accountant.

MISCELLANEOUS

BUYING GROUPS OF INSTITUTIONAL DISTRIBUTORS

These cases involve purchases of dry (canned and/or frozen) grocery products by various groups of institutional food distributors who resell their merchandise to large food organizations such as restaurants, hospitals and schools. Five investigational files have been opened and are in various stages of progress toward eventual complaint and trial. The cases involve:

Nugget Distributors, Inc., File No. 671 0184

Stewart Tucker, Inc., File No. 681 0077

Continental Organization of Distributor Enterprises, File No. 691 0001

Frozen Food Forum, Inc., File No. 671 0102

National Institutional Food Distributor Associates, Inc., File No. 671 0103

United Institutional Distributor Corp., File No. 651 0168

Each of these cases resulted from complaints by food brokers either as individuals or through the National Food Brokers Association. It is charged that these proposed respondents are enterprises formed by institutional food distributors to purchase grocery products on their behalf at reduced prices made possible by elimination of brokerage fees which would normally have been paid to "independent" brokers by suppliers of these distributors. Two of these cases will be shortly forwarded to the Commission with recommendations that complaints issue.

SNACK FOODS INDUSTRY

An investigation of Frito-Lay in the Chicago market area has been recently completed. (File 661 0036) Frito-Lay is the snack foods industry's largest producer. The Field Office has recommended complaint on the basis of violation of Sections 2(a) and 2(d) of the Clayton Act. We feel that the Section 2(d) charge against Frito-Lay in this matter may not have much merit, but a Section 2(a) complaint may possibly issue on the basis of discriminatory discount allowances. It is anticipated that Frito-Lay would not accept a consent order and litigation would probably last until at least 1970.

Frito-Lay in the meantime has petitioned us to take action on an industry-wide basis in the snack foods industry with regard to alleged industry-wide discriminatory practices. We are presently considering the feasibility of such an industry-wide approach but, at this time, we are not sufficiently far along in our study of this matter to state that this would be our recommendation. Industry-wide action would take considerable time and probably would extend into FY 1971.

E. I. du Pont de Nemours, et al. File No. 621 0266

Industry—Cellophane sheets used in wrapping meat.

Violation—Section 2(a) price discrimination; Section 5.

Status: Field investigation completed; Pending determination as to disposition.

This investigation centers around the pricing practices of the three domestic producers of cellophane used in wrapping fresh meat. In addition to price discrimination, the investigation has borne out incidents of vertical as well as horizontal price conspiracies, resulting in injury to secondary as well as tertiary line competition.

The case involves novel questions of law involving particularly the meeting competition defense and the indirect purchaser doctrine. The short range goal since it is apparent that the product itself, cellophane, has been largely supplanted by another product, is not directly related to the cellophane industry but rather to the systematic pricing plan of E. I. du Pont Co. Inc., in its practice of assisting its customers to meet a lower price extended by its customers competitors. A determination of the illegality of such practice and a recognition of its inherent anticompetitive effects should deter similar violations by other producers in other industries.

In the event that the Division should recommend complaint and that the Commission issue same, it is estimated that litigation may ensue which could conceivably extend to 1971 and possibility 1972.

Coca-Cola, Inc. File No. 681 0015**Industry—Coffee**

Violation—Section 2(a) price discrimination; Section 3, Clayton Act

Status: In field

The substance of this investigation revolves around the activities of two coffee divisions of the Coca-Cola Company: Tenco, Inc. and Duncan Foods, both of which were recently acquired by Coca-Cola. The investigation is directed to the anticompetitive effects of allegedly below cost prices on sales by Coca-Cola. The market is apparently characterized by a growing concentration as allegedly seven coffee companies in the relevant market have either gone out of business or trying to liquidate their ventures in order to do so.

The short range goal is to determine if there is a causal link between the primary line injury and growing concentration and the below cost sales.

Another aspect of the case may also have played a significant part in the apparent reduction of competitors. It was alleged that Duncan Foods, through its division Huggins-Young, is involved, in its institutional sales of roasted coffee, in a tying arrangement with Coca-Cola in the sales of its syrup.

The long range goal in this investigation is to protect the viability of the efficient competitor and halt the trend toward increasing competition, resulting from anticompetitive pricing practices. However as a budgetary consideration, it is difficult to forecast any specific estimates as such must necessarily depend upon the results of the field investigation.

Argus, Inc. File No. 681 0042**Industry—Photographic Equipment and Supplies**

Violation—Section 2(a) price discrimination; secondary line

Status: In field

This investigation centers around those engaged in the mail order resale of photographic equipment and supplies purchased from Argus. In addition to the complainant there are six to twelve other such mail order wholesalers. It was alleged that Argus was favoring another category of customer (wholesaler) who are in direct competition with the mail order firms, in that they serve the same customer accounts.

The investigation was initiated to determine if the pricing practices as alleged (price discriminations) had an anticompetitive effect on the mail order wholesalers and to determine if the ability of this class of customer to compete was impaired.

Preliminary reports from the field indicate that there may be a violation of Section 2(d) and (e) regarding promotional allowances and/or services.

It is impossible at this time to estimate any long range goals with relation to this investigation, however. This necessarily is dependent upon the outcome of the field investigation.

OUTDOOR METAL SHEDS

Arrow Metal Products, File No. 671 0258 is presently being forwarded from the Washington Field Office to the Bureau with a recommendation for complaint.

The charges will be violation of Sections 2(a) and 2(d) of the amended Clayton Act in the sales of outdoor metal sheds.

The proposed respondent has been in business for about 5 years, during which time it has captured 40% of this particular market.

Indications are that this has been accomplished through enticing price advantages being offered to large volume buyers such as Penney's, Giants, AMC and others.

This complaint will also be forwarded to the Commission with recommendation in early FY 1970 and is expected to carry into FY 1971.

MEMORANDUM

JUNE 6, 1969.

Subject: Budget—Major Project—Marketers of Fresh Fruits and Vegetables
 Unnamed, File No. 681 0040.

To: Francis C. Mayer, Chief, Division of Discriminatory Practices.

From: Basil J. Mezines, Lewis F. Parker, Alan M. Frey, Trial Attorneys, Division of Discriminatory Practices.

Notice of intention to issue complaints have been served on the following proposed respondents and the matter is now involved in consent negotiations:

FOOD CHAINS

Jewel Companies, Inc., 135 S. LaSalle Street, Chicago, Illinois.
 Borman Food Stores, Inc., 12300 Mark Twain, Detroit, Michigan.
 First National Stores, Inc., 5 Middlesex Avenue, Somerville, Massachusetts.
 H. C. Bohack Co., 4825 Metropolitan Avenue, Brooklyn, New York.
 Food Fair Stores, Inc., 3175 John F. Kennedy Blvd., Philadelphia, Pennsylvania.

"FIELD" OR "GROUND BROKERS" FOR THE RESPECTIVE CHAINS

Jack Stires, Inc., 795 Desert Gardens Drive, El Centro, California.
 P. & R. Brokerage Co., 12 E. Gabilan Street, Salinas, California.
 Ruby Produce Co., Inc., Cherry Street, Pedrickton, New Jersey.
 Henderson Distributing Co., Inc., State Farmers Market, Pahokee, Florida.
 Hallee-Boy Sales, P.O. Box 7741, Orlando, Florida: John P. Storm, a corporation.

OTHERS (AS IDENTIFIED)

J. E. Perishables, a division of Jewel, 1955 West North Avenue, Melrose Park, Illinois; John C. Stires II, president of Jack Stires, Inc.
 Frank V. Condello, a partner in P & R Brokerage.
 Samuel Harry Rubenstein, Ruby's president.
 Vinson Henderson, president of Henderson Distributing.
 World-Wide Produce Co., Inc., 10 Oregon Avenue, Philadelphia, Pennsylvania.
 a wholly-owned subsidiary of Food Fair; Ivin and Harold Arost, partners in Hallee-Boy Sales; John P. Storm, and officer of John P. Storm.

SALES OF PROPOSED RESPONDENTS

Food Fair, 1.3 billion dollars.
 Jewel Tea, 1.2 billion dollars.
 First National, 640 million dollars.
 Borman, 314 million dollars.
 H. C. Bohack, 207 million dollars.

Since the complaints charge that the brokers are agents of the chains, separate figures concerning the brokers' operations are not necessary.

OTHER RELEVANT INFORMATION

Investigation to date has consumed $2\frac{1}{2}$ man years for the entire project.
 It is estimated that in order to conduct complete trial of all these matters, it will require 6 man years.

Alternative possibilities, since respondents will not settle this matter, are unlikely. However, if Commission feels there is no public interest in pursuing this matter (in fact, a request is now pending before the Commission demanding dismissal of complaints on essentially this basis) complaints could be withdrawn. At the same time, however, the Trade Practice Conference Rules For The Fresh Fruit and Vegetable Industry would have to be annulled since the Commission announced in these Rules that the practices involved in these complaints violated Section 2(c).

An evaluation of these matters indicates that if the Commission brings these matters to a successful conclusion, it will inhibit and discourage large grocery chains from shifting their procurement cost to their suppliers to the detriment of their competitors.

This practice is industry-wide. Therefore, the approach taken in issuing complaints against the large chains and their brokers was done at the direction of the Commission in hopes that those primarily responsible for this practice would be restrained from continuation thereof.

MEMORANDUM

JUNE 18, 1969.

Subject: Apparel Industry.

To: Francis C. Mayer, Chief, Division of Discriminatory Practices.

From: Lawrence E. Gray, Attorney, Division of Discriminatory Practices.

Herewith, as you requested, is a resume and appraisal of our present and planned work in the apparel industry.

Work in this \$7,600,000,000 industry divides into three general categories: new investigations, compliance matters which have not been presented to the Commission, and compliance matters where the Commission has rejected reports of compliance and directed investigation or submission of new reports.

Assigned to me are three cases in the initial investigation stage: Reliance Manufacturing Co., 641 0236; McGregor-Doniger Co., 671 0137; and Mann Manufacturing, Inc., 681 0132.

Reliance is tied up in the courts on the basis of a challenge to the Commission's issuance of an Order to File Special Report in the particular matter. Sales figures are not available, nor is a prediction on ultimate disposition. 7 hours have been charged to the case.

McGregor-Doniger: 123 hours to date; sales over \$50,000,000; if field investigation produces evidence leading to a consent, settlement, another 500-600 hours may be needed. If case goes to trial, probably 1000-1200 hours will be required. File was opened on application for complaint by allegedly disfavored customer. In view of widespread Orders in the industry, plus importance of McGregor-Doniger, the matter is of particular significance.

Mann Manufacturing, Inc.: 1051 hours to date, 500-600 more anticipated for completion; sales not available. Mann is an important producer of slacks, blue jeans, etc., and competes with Hortex Mfg. Co. and H. D. Lee, both of which are under Order. Allegations here were 2(a) and (e) violations, however, as well as of violations of 2(d). Hours estimated as necessary for completion assume a consent order.

Some 65 apparel industry reports of compliance are not yet in proper shape for forwarding to the Commission. It is anticipated that all will be forwarded to the Commission with recommendations for acceptance and filing in FY 1970. Assuming an average of four hours on each case, a total of 260 hours will be required. Some few may require field investigation if seemingly-acceptable reports cannot be developed.

Seven compliance reports have been rejected by the Commission, with directions in some cases to investigate and in others to allow the filing of new reports. All seven respondents have been notified by letter of the rejection of their reports

and whether the Commission has directed an investigation or the filing of a new report.

William B. Kessler, Inc., C-408; 37 hours in; sales \$15,000,000. Directions here are for submission of a new report: 10-15 hours more work is all that should be required.

Levin & Co., C-414; 46 hours in; sales \$1,300,000. Directions here are for investigation; however, counsel for Levin & Co. has called and is coming in on June 20 to submit additional material and discuss matter. If acceptable compliance report can be developed without investigation by field, 20-30 hours may be all that is needed. If field investigation must go forward, 1200-1800 hours may be necessary.

Morrison Knitwear Co., Inc., C-426; 45 hours in; sales over \$2,500,000. Field investigation is directed, and respondent has been so notified. There has been no contact by respondent, so full investigation is anticipated, with possibly 1200-1800 hours needed.

Norman Wiatt Company, C-489; 30 hours in; sales over \$4,500,000. Directions are for submission of new report: no more than 10-15 additional hours required.

Westbury Fashions, Inc., C-970; 65 hours in; sales not available. Directions are for investigation, but attorney for Westbury advises that new material indicating compliance is forthcoming. If acceptable report can be developed, only 20-30 hours may be needed. If matter must go to field, 1200-1800 hours may be required.

Rhoda Lee, Inc., C-412; 1788 hours in; sales \$5,000,000. 400 hours necessary to prepare for certification to Department of Justice.

Campus Casuals of California, C-935; 424 hours in; sales over \$9,000,000. No more than 8-10 hours necessary to prepare recommendation in this matter. Field investigation discloses no substantial violation of order and recommends closing.

In sum, the submission of initial compliance reports will be completed by the end of FY 1970. Open into FY 1971, however, will be investigatory files now in the field and those compliance files on which field work must be done, either for minimal checking or preparation of civil penalty cases. In addition, FY 1971 will mark five years since the Commission made final its Orders to Cease and Desist in the industry. It would be advisable, I believe, to spot check compliance at that time by means of Section 6(b) Orders issued to fifty or sixty respondents whose reports have been accepted and filed. Assuming an average of twenty hours per case to be checked, the entire project would take no more than 1200 hours.

JUNE 18, 1969.

MEMORANDUM

Subject: Special Report Re FY 1971 Budget Justification General Food Industry and Tri-Partite Promotion Plans.

To: Francis C. Mayer, Chief, Division of Discriminatory Practices.

From: Ivan W. Smith and Robert E. Freer, Jr., Attorneys, Division of Discriminatory Practices.

The staff members assigned to the general food industry have responsibility for all products normally sold in retail grocery stores except for bread, dairy products, snack foods, and fresh fruits and vegetables, which are covered by specialists on other teams. There is also special handling of food distribution brokerage problems.

In a typical modern supermarket there are 7,000 to 10,000 inventory items including products which are also distributed in other channels. The team's responsibility includes all levels of distribution. Annual sales of products in retail grocery stores is about \$75 billion. The food industry team is also responsible for distribution in outlets, such as hotels, restaurants and institutions which adds about \$10 billion to the industry. About 18% of all personal income in the United States is spent on food products. There are about 230,000 grocery stores in the United States, 35,000 of which are supermarkets.

The retailer is the keystone of the food distribution industry. Although nationwide concentration figures do not seem to be high, the industry has high regional concentration. Therefore, although there are 81 retail chains sharing about half the national market, this figure does not accurately reflect regional concentration. In any event, because of the importance of grocery store products to the public, even a little monopoly concentration is bad.

The anti-discrimination laws are essential to the continued competitive health of the food industry, particularly at the retail level. Retail chain net profits on sales have run about 1.2% for the past several years. It is a very efficient industry with inventory turnover running about 14 times or more annually. Market share can be gained or lost by the use or failure to use out-of-store advertising (typically about 1% of sales) games (about 1% of sales) and trading stamps (about 1%). Retail pricing is very critical; the difference between a discount type operation and a regular supermarket may be no more than 1% of sales; 2% being more typical. A price discrimination of 1%, or less, can seriously and quickly affect the ability of the disfavored to compete. In this price sensitive industry the merchant who pays more but cannot sell for more is necessarily hurt.

In some industries, there tends to be a countervailing public weal in concentration, although temporary. If concentration provides economies of scale, then for so long as competitive vigor is undiminished, there is some public benefit to be found in lower prices or improved quality and service. Food retailing, however, is not an example of this. The opportunity for real economies of scale are limited.

The National Commission on Food Marketing relying, in part, upon data supplied by our Bureau of Economics reported in 1966 that the smaller regional chains operating 10 to 100 supermarkets are growing at a faster rate and are increasing their market shares significantly faster than the chains operating more than 100 stores. The Food Commission regarded the 10 unit operation as the differentiation point between "chain" and "independent," suggesting, perhaps, that the breaking point of efficiency is at the 10 unit mark.

We believe that the efficiency point is actually somewhat lower. A direct buying retail chain with 5 stores and a warehouse can purchase, warehouse, disseminate to retail stores and sell to the public with almost as much efficiency as the 500 unit chain. Even smaller operations, members of retailer owned cooperatives or wholesaler sponsored voluntary groups, can compete with the giants if they are well run. All of this assumes that the smaller operator and the giant begin at a comparable inventory cost base, which, in turn, assumes enforcement of the Robinson-Patman Amendment.

Our point is this: Even if there were no sociological mandates from Congress for maintaining small retail businesses, and even if there was no value in preserving the small merchants as a seed bed for future competition at some expense of present efficiency, even then, in terms of present competition, there is no excuse for allowing monopoly concentration under the mistaken idea that it is a price to pay for efficiency. We can have both efficiency and atomistic competition with the former assured by the latter. The current trend which sees the smaller chains gaining on the giants attests to the natural economic health and rationale of small units. With a continued favorable climate, including a

fairly equal starting point, the small merchant can compete and, perhaps, even prevail over the large chains until he, too, is faced with diseconomies of scale in his own top heavy and unresponsive organization.

It has been suggested by critics of the Discriminatory Practices staff that we have unreasonably and futilely wasted our resources in the defense of antiquated mom and pop stores to the prejudice of the entire food distribution industry. This idea that the staff is dedicated to the protection of dirty old men and women swatting dirty old flies in dirty old stores is as old and full of cobwebs as the stores envisioned. Our goal is not to protect the inefficient outmoded retailer. We couldn't. Our goal is the opposite. The giant customer favored with a price discrimination has lost its major motive to remain efficient. It can show a profit, drive out competition and maintain a lazy operation all at the same time if it is armed with sufficient quantities of its supplier's funds, or, more realistically, its competitors' money.

SELECTION CRITERIA

In the discussion of the matters being pursued by the food industry team, it can be noted that there are only a few investigations against sellers. Most are against buyers or, in the case of tripartite promotional plans, they are buyer directed. One reason for this is for efficiency. Literally dozens, possibly hundreds of discriminatory pricing violations can be halted with an action against one inducing customer. Similarly, we have been able to block a potential for hundreds of 2(d) violations in one action against an inducing buyer.

Another reason for proceeding against buyers instead of sellers is because power is centered in buyers. A&P has annual sales of over \$5.5 billion, followed by Safeway and Kroger with about \$3.5 billion and \$3 billion respectively. In all, nine retail chains have sales of \$1 billion or more, 19 exceed \$500 million and about 50 have annual sales of \$100 million or more.

A comparison of the above with the annual sales of some well known food manufacturers, relatively large at their level of distribution, illustrates the unbalanced nature of the seller-customer relationship. For example, Campbell Soup had sales of \$800 million in 1967, H. J. Heinz \$740 million, Del Monte \$533 million and General Mills had only \$590 million. General Foods, the largest of the firms manufacturing grocery store products exclusively had 1967 sales of about \$1.7 billion, fully 1 billion less than the number three retail food chain, Kroger. Hundreds of small suppliers have annual sales of only 1 or 2 million dollars, about equal to that of a single supermarket. This illustrates the often heard complaint of food manufacturers; that to refuse the favoritism demands of a large chain customer is to invite disaster. The seller needs the customer more than the customer needs the seller. Therefore, as a practical matter enforcement action against the buyer is more realistic in terms of effectiveness of relief, and simple fairness.

Also it may be noted that most of the cases in the industry are concerned with promotional allowance discriminations and not price. We can only suggest the reason or reasons for this. The most likely is the probability that simple price discriminations are relatively rare. There is little that can be done to hide or explain a price discrimination; it shows by simple invoice comparison, and cost justification is quite difficult in sales to retailers. This effect was anticipated by the congressional sponsors of the Robinson-Patman Amendment and was the underlying purpose of Sections 2(d) and 2(e). This is the reason for the *per se* nature of those sections.

In the course of investigating collateral matters, we have examined stacks of invoices, and we feel that price discriminations are not, in fact, the favored methods of granting discrimination. It has also occurred to us that the applicants for complaints may not be aware of price discriminations, but learn of promotional allowance violations when the recipient uses the discriminatory payments in advertising.

Most of our matters have been initiated after the application of competitors. Others, however, we have learned of from trade journals or in collateral investigations. Although we would not wish to have our projects directed by the random receipt of applications for complaint, and we guard against this, we believe that competitors' complaints are sound sources of information. The reliability of this information is sometimes indicated when a certain practice is brought to our attention by more than one competitor and from other sources. Members of this industry, laymen, and small merchants, have a surprising sophistication in their knowledge of the anti-discrimination laws. They speak with easy

familiarity about the good faith required in meeting competition and the cost justification proviso, for example. Most industry members, well aware of the value of a competitive advantage, are supporters of solid Robinson-Patman enforcement.

Our standards in case selection are simple. The primedeterminer, is the test: Who is hurt? How much? Can we help? Should we?

Most of the following listed cases, as specifically noted, are sound and are the hard residue of many situations we have examined. Most are matters which will probably require litigation, a task that will call for total commitment of our energies.

Anticipating this, we have tried to handle the matters coming before us in the most efficient way possible, consistent with a just result and the public interest. In the past few years we have negotiated satisfactory voluntary compliance settlements with 3 of the top twenty chains, driven a 4th into compliance during investigation. Also, we have had voluntary compliance settlements from several others of the top 80 firms. Had these matters been litigated, the staff members assigned to this industry would have been able to accomplish nothing else.

Our case assignments fall within three basic theories of approaches, (1) 2(f) amended Clayton Act and Section 5 Federal Trade Commission Act proceeding against inducing by power buyers, (2) tripartite promotional plans which are really a sub part of the inducing by buyer cases because they involve several buyers joined by a promoter inducing promotional benefits, and (3) general cases, initiated not as a part of a standing project, but for reasons peculiar to each.

INDUCING BUYER CASES

UNIDENTIFIED PRESENT LITIGATION

We are within a few days of closing the record in a litigation involving a large retail grocery chain charged with inducing discriminatory promotional allowances. Providing the requested information on this matter, even without naming the respondent, could be regarded as an improper *ex parte* communication because it is the only such matter now pending, and it may soon be before the Commission on appeal. The respondent would be identified and the merits discussed *ex parte* by including this matter in this report.

THE KROGER COMPANY

The Kroger Company (691 0014) is under investigation for inducing violations of Section 2(d) of the Clayton Act. This is the third investigation number assigned concerning the same basic practice and is in the field with express authority from the Commission for expedite handling.

Kroger, third among supermarket chains, has annual sales approximating \$3 billion. For many years the staff has been concerned with Kroger's practice of inducing discriminatory prices, allowances and services from suppliers but the listed man hour investment to date on this case is only 83 hours because it does not reflect the earlier investigations. It is estimated that the chances of litigation in this matter are about even, and thus the man hour commitment for the future is difficult to estimate. Because of the seriousness of Kroger's various practices and the prolonged period of their use, the Bureau of Field Operations has declined to stop the current investigation to explore the suggestion of Kroger that voluntary compliance may be dispositive.

For the same reasons, the staff believes that an order will be necessary to adequately protect the public interest but will, of course, forward to the Commission any actual offer of voluntary compliance by Kroger.

ALTERMAN FOODS, INC.

Currently pending in our Atlanta Field Office is an investigation involving Alterman Foods Inc. (671 0222) operators of the Big Apple grocery stores. Current annual sales are approximately \$150,000,000.

With 735 man hours invested, the investigation in this case is substantially completed, and it appears that it will be submitted with a recommendation for complaint in the near future.

The charge will be a violation of Section 5, FTC Act in connection with the inducement of discriminatory promotional allowances for participation by suppliers in an annual food show put on by Alterman. Litigation is almost certain in this matter. Although the substantive legal and factual aspects of this case are relatively simple, we can expect procedural delaying tactics from respondent's counsel and this will occupy much of our time. This case is important because although the respondent is relatively small (43rd nationally, 2nd or 3rd regionally) its conduct is notorious and they will not agree to the slightest modification of their activities to satisfy the law. This case must be carried as a "continuing responsibility" and will take several man years to see through to a final order.

SUPER VALU STORES, INC.

There is pending with the staff an investigation into the practice by *Super Valu Stores Inc.* 691 0026 of requesting payment by suppliers of the 2% prompt payment discount on free goods. Super Valu is a major factor in both the retail sale and wholesale of grocery products with sales in excess of \$1 billion annually. The man hour investment in the case is currently 130, and it is anticipated that approximately one man year will be necessary to complete this matter if trial is not necessary.

The amount of discrimination in an individual case induced by Super Valu, although not large, becomes significant when applied across the board on a vast array of products by a company of Super Valu's immense power.

PARK N SHOP CENTERS, ALLIED SUPERMARKETS

Pending in the Atlanta Field Office is an investigation involving Allied Supermarkets K Mart Division and the Park N Shop Food Centers in the Charlotte, N.C. market area. Allied Supermarkets has annual sales in excess of \$800 million.

The complaining parties are a number of small independent grocers who allege that the proposed respondents are inducing suppliers to supply personnel to stock shelves and to perform other services which are not available to them. The failure to accord this service to the smaller independents forces their unit costs to be much higher than that of the proposed respondents and is hurting their ability to compete.

Currently 56 hours have been devoted to these cases and the staff will explore the possibility of voluntary compliance in this matter as well as be alert to the possibility of industry-wide solutions. It is expected that it will take less than one-fourth man year to handle both these cases.

As time and resources permit, we anticipate the need to initiate at least one more such investigation (against Winn-Dixie) based upon present information. In the normal course of events, we should be learning of additional matters to handle in this category, possibly at the rate of one or two each year.

TRI-PARTITE PROMOTIONAL PLANS

SUPERMARKET BROADCAST NETWORK, STORECAST CORP OF AMERICA AND BEAM-CAST, INC.

We currently have under investigation in files 671 0066, 671 0067 and 681 0021 three cases involving Beam Cast Inc., Storecast Corporation of America and Supermarket Broadcasting Network which have a total of 3600 man hours invested in them. These matters involve tripartite promotions in the retail grocery industry and 681 0021, Supermarket Broadcasting Network, (SBN) is a "pending complaint." The proposed respondent in that matter as in the others is the prime movant in its promotional plan.

The SBN case has incurred an investment of 1600 hours to date and it is projected that it will be completed within somewhat less than $\frac{1}{10}$ man years in that it is presently in Consent Order proceedings. The other cases, however, possibly will require litigation and probably will take 3 man years to complete. This particularly true in the case of Storecast. Beam Cast, Inc. has asked for a conference with the staff to explore non-litigative solutions which be available and the staff will explore this possibility.

EVALUATION

The proposed respondent SBN has billings of about 1 million annually. Beam Cast and Storecast exceed this amount, but the exact figures are not yet available. To measure the importance of the investigations, billings of the proposed respondents should not be compared with sales of products as in other investigations because the entire amount of the billings represents the questioned consideration. The billings are the amount of the alleged unlawful promotional payments flowing from large suppliers to very large grocery store chains. The sales of products to which the payments relate would exceed at least 100 million and sales of all the parties involved in the plans would be measured in billions.

GENERAL CASES

UNITED FRUIT COMPANY ET AL.

There is currently pending before the Commission in file 671 0187 a case involving the United Fruit Co. and Harbor Banana Distributors, Inc. The Staff is recommending complaint under Part 3 of the Rules. The United Fruit Company is the major importer of bananas and current sales approximate 500 million annually. Harbor Banana is the major wholesaler of bananas in the Los Angeles area. Together with the McCann Company, which it acquired in 1968, Harbor controls approximately 70% of the Los Angeles banana market. This merger is one of the aspects challenged by the complaint.

The man hour investment in this case to date is 4631, and it is estimated that at least one of the proposed respondents' settlement proposals will be rejected and that trial will be necessary requiring more man years of staff effort.

This case contains many charges of violation of the Federal Trade Commission Act and the Clayton Act. The injuries suffered by the members of the wholesale banana market in the Los Angeles area are immediate and substantial.

The practices engaged in by one of the respondents in this case are in open violation of the law and are part of its plan to monopolize the entire relevant market involved.

The Commission must show that even a relatively small business market must be protected from attempts to illegally monopolize it.

The approach taken to attack the actions of the other respondent is new but, if successful, could have wide application to other violations of the Federal Trade Commission Act and the Clayton Act.

PUREX CORPORATION LTD.

The staff has invested 337 hours in an investigation of Purex Corporation involving a discrimination in price between the proposed respondents' branded label and customers' label products. The investigation concerns household detergent and chlorine bleach, with emphasis on the bleach. This case is considered important by the staff because of Purex's size (annual sales \$200 million +), predominant position, and because it illustrates an important principle and needed area of effort by the Commission.

Here's why: Liquid bleach, by whomever manufactured and however labeled is usually chemically the same. It is simple and inexpensive to manufacture, but it is very heavy and bulky. Therefore, freight is an important part of its cost. For this reason it is an ideal product for smaller local producers, and bottling

under customers' labels is a marketing method for the small locals who do not have their own label with consumer demand. Purex, however, has invaded the private label market and is driving locals out. There is no economic basis for Purex to do this consistent with the public interest; no efficiencies; no economies of scale; just market power. By this case with its uncluttered factual basis, we can develop and illustrate an important principal of law relating to the effects of private labeling at the primary level.

It will require $\frac{1}{2}$ to 1 man-year to complete investigations.

HILLS BROTHERS COFFEE COMPANY AND COCA-COLA COMPANY

We have two cases involving Hills Brothers Coffee Company (691 0027) and the foods division of Coca-Cola (691 0015). The annual sales of Hills are not announced but it is a major supplier of coffee and some idea of its size can be obtained by the fact that it employs more than 2600 people. Coca Cola annual sales are in excess of 1 billion one-hundred million.

The current investment of time on both cases combined is 65 hours, and we have obtained a generally satisfactory letter of compliance from Hills and are awaiting further information from Coca-Cola. It is estimated that it will take less than $\frac{1}{10}$ man year to complete both cases.

These cases are discussed together because the practice in both instances is the same. Basically both companies use a promotional program requiring their customers to meet a quota of purchases established at some earlier period in order to qualify for a discount in price and to sell more of the product for an additional bonus. The practice is basically the same as one which has been discussed and found to be potentially unlawful by the Commission in advisory opinion 673 7011. The use of such a plan results in different net prices being paid by competing retailers, and in the extremely competitive grocery market, even a small price difference is potentially harmful to the small grocer who has neither the shelf space nor storage capacity to buy in the quantities necessary to take full advantage of such an offer. It is the staff's opinion that use of such quota systems in effect makes them functionally unavailable to many customers, and we are pursuing our inquiry in this area currently.

The staff would further like to point out that we object to the use of such plans because they allow a supplier to maintain or increase his share of the market without relation to his service or product merit and to do so by discriminatory means.

RALSTON PURINA COMPANY

We are currently investigating the Chicken of the Sea Division of Ralston Purina Company (681 0133) as potentially the lead case in an industry-wide problem of large producers of frozen shrimp products using practices ranging from discriminatory promotional allowances and services to outright commercial bribery.

Ralston Purina has sales in excess of 1.3 billion and the investment in this case to date is 263 hours. We anticipate the need to open two or three more investigations in this area and find an estimate of future man hour commitment difficult to make. We are, however, hoping to find an industry wide solution to the problems at hand because the size of the frozen shrimp industry and the impact of these practices upon the market is insufficient to justify complaints unless we are forced into this position.

MEMORANDUM

JUNE 18, 1969.

Subject: Fiscal year 1971 budget justification.

To: Francis C. Mayer, Chief, Division of Discriminatory Practices.

From: John J. Mathias and Rafe H. Cloe, Trial Attorneys, Division of Discriminatory Practices.

The undersigned are involved in a team effort on matters involving discriminatory and unfair business practices in the dairy industry. We are jointly assigned to all of such matters and are, therefore, submitting a joint report.

THE DAIRY INDUSTRY

The dairy industry is one of the basic food industries. It is also one of the largest industries in the nation, with sales of fluid milk products and frozen desserts totaling approximately \$10 billion based on 1967 census reports. The dairy industry has been widely recognized at almost every level of government as an essential industry which warrants special concern.

The number of companies engaged in the dairy business has experienced a precipitate decline since World War II. From 1948 to January 1965 the number of producer-dealer milk processing plants in the United States dropped from 11,319 to 1,677.¹ Producer-dealers are dairy farmers who have integrated into processing and distribution of milk from their own herds. During this same period, the number of processor-distributor milk processing plants in the United States declined from 8,392 to 3,920.² Processor-distributors buy their raw milk from others. Ninety-four percent of the processor-distributors in 1965 were local proprietary firms (local independents) most of whom operated only a single processing plant.³ By 1968, in the 74 federal milk marketing order areas, which account for 70 percent of all milk sales, producer-dealer plants had dropped to 417, and processor-distributor plants to 1,637 owned by 1,412 firms.⁴

CHANGES IN THE DAIRY INDUSTRY

Prior staff reports have outlined the technological and marketing changes which have reformed the dairy industry over the past several decades. Those changes will not be described again in detail here. However, as those reports have indicated, retail home delivery sales declined steadily between 1955 and the mid-sixties; milk sales have become increasingly concentrated out of retail grocery stores—especially the large supermarkets; competition for the major chain store accounts has been intense, with the major interstate dairy operations taking the lion's share of such business; private label has increased rapidly over the past six years, thus giving the supermarkets far greater bargaining power; and the threat of backward integration by supermarket chains hangs heavy over the dairy industry's head.

One of the most significant factors in the elimination of great numbers of independent dairies has been the decline in retail home delivery sales. During the period 1955 through 1963 the decline in such sales ran at an average of 1.6 percentage points per year. The rate of decline has slowed since 1963.⁵ However, during the period of rapid decline, many small local dairies which were primarily dependent on such sales went out of business.

The threat of backward integration by the chain stores is keenly felt by the dairy industry. How real that threat is remains to be seen. However, with the exception of Safeway Stores and The Kroger Co., backward integrating by the major chains has occurred primarily in states having rigid wholesale and retail price controls. It is possible that such state laws provide unreasonably high profit margins which encourage backward integration, so that the chains can enjoy this plum for themselves. In most areas of the country, where prices are set at the various trade levels through vigorous competition, there seems to be less encouragement for the chains to enter the dairy processing field.

¹ Technical Study No. 3, National Commission on Food Marketing, p. 64.

² Ibid., p. 61.

³ Ibid., p. 61.

⁴ *Hiland Dairy et al v. The Kroger Company*, Petition for a Writ of Certiorari, filed January 28, 1969, p. 16.

⁵ *The Supermarket and Milk Distribution*, Alden C. Manchester, Chief, Animal Products Branch, U.S. Department of Agriculture, Speech before International Association of Milk Control Agencies, Milwaukee, Wisconsin, August 13, 1968.

THE DAIRY INDUSTRY TODAY

It has been the observation of the staff, based on current investigations and complaints received, that the dairy industry has now reached a leveling off stage. As noted by Dr. Manchester, *supra*, the decline in retail home delivery sales has slowed somewhat. The independent dairies remaining are more substantial, with a healthier segment of their sales devoted to wholesale and industrial sales. Many are diversifying their interests by expanding into related fields, such as snack foods and convenience retail grocery stores. Fewer of the dairies coming to the Commission for help today are merely old family firms resting on their hopes for a return to "the good old days."

This does not mean, however, that the dairy industry is currently free from competitive problems. Concentration still pushes forward, although at a somewhat lessened pace. As a matter of fact, the temptation for antitrust violations would appear to be greater now than at any time in the last two decades. The large dairy concerns can no longer sit back and wait for their independent competitors to wilt and die in a particular area. Nor can they simply buy up their healthy competition, since most major dairies are under Section 7 cease and desist orders and the others are sure they will be if they expand further through mergers.

At the same time, the chain supermarket outlets become more and more important in dairy retailing. With private label and the threat of backward integration, there is tremendous market pressure to grant favored prices and services to such chains. Of slightly less importance are the large independent retail grocers usually found in each market. Again the competition for shelf space is intense and the temptation to grant discriminatory prices is great.

The complaints being received from the dairy industry at the present time are fewer. However, they are more selective and appear to offer greater opportunity for some corrective action.

PAST ENFORCEMENT EFFORTS

The Commission has been heavily committed to the dairy industry over a good number of years. These efforts have been far more successful than we have often been given credit for. Divestiture orders and orders restricting future acquisitions have been entered against National Dairy, Borden, Beatrice, Foremost and Dean.⁶ Numerous formal complaints have also been filed against national and regional dairy firms charging violations of the Robinson-Patman Act and the Federal Trade Commission Act.⁷ Also, Assurances of Voluntary Compliance have been received from Fairmont Foods Company, Land O'Lakes Creameries, Inc. and Producers Association of San Antonio, Inc., in matters involving various charges, including price discrimination and below cost sales.⁸ In addition, a number of anticompetitive disturbances have ended shortly after the Commission's expression of interest has been made. For instance, in the Dayton, Ohio market area, in 1966, a price war resulted in milk being priced out-of-store at 19¢ per gallon, and less, so that many dairies were dumping their milk out rather than stand the loss of processing and sale. For most independent dairies, extinction was imminent. Prices rose to a more competitive level shortly after the Commission sent an Attorney into the market area. In this, and other similar instances, the causation of the price wars was impossible to establish, so that no complaints were issued. However, the extreme anticompetitive factors in the market area were eliminated through the action taken.

SMALL BUSINESS APPROACH

The dairy team has used the "small business approach" to cut down on the number of investigations and man hours spent on the dairy industry. Under

⁶ Dkts. 6651, 6652, 6653, 6495 and 8764, respectively.

⁷ National Dairy Products Corporation, Dkt. 7018; Foremost Dairies, Inc., Dkt. 7475; Central Arkansas Milk Producers Ass'n, Dkt. 8391; The Borden Company, Dkt. 7474; Beatrice Foods Co., Dkt. 7599; Dean Milk Co., Dkt. 8032; H. P. Hood & Sons, Inc., Dkt. 7709; H. P. Hood & Sons, Inc., and The Great Atlantic & Pacific Tea Company, Inc., Dkt. 8273; Adams Dairy, Inc. and The Kroger Co., Dkt. 7596; Adams Dairy, Inc. and Safeway Stores, Inc., Dkt. 7597; Adams Dairy Inc. and The Great Atlantic & Pacific Tea Company, Inc., Dkt. 7598; United Farmers of New England, Inc., Dkt. 8406; Kellie Creamery Co., Dkt. 7783; Page Dairy Company, Dkt. 5974; Beatrice Foods Co. and The Kroger Co., Dkt. 8663.

⁸ Files No. 611 0159, 671 0015 and 671 0227, respectively.

this approach, all complaints received from the industry are put through a preliminary correspondence inquiry prior to assigning a seven-digit number. A great percentage of such complaints are eliminated at this stage as not warranting further action. Reasons for closing such correspondence matters include: insubstantial amount of sales involves, apparent cost justification, private controversy and refutation of complainants' charges.

This approach has greatly limited the time and effort spent by the Commission on dairy matters. In the current fiscal year, only three dairy matters have been assigned seven-digit numbers. These matters, as will be more fully noted below, all appear to be warranted in order to prevent substantial erosion of significant competitive factors in the markets involved. One other investigation will probably be proposed early in FY 1970 (See Pet-Zausner matter below). The latter investigation might result in the preservation of competition in the evaporated milk industry in Northeastern United States.

PROSPECTS FOR THE FUTURE

As noted above, the dairy industry has, at present, apparently reached a leveling-off stage. The remaining independents appear to be more substantial and more viable. Many have diversified their interests so that they are better prepared to withstand temporary market upsets.

On the other hand, the market for fluid milk is constantly narrowing. The retail supermarket becomes more and more important in the marketing of milk. Yet the number of such retail outlets becomes fewer and fewer, as that industry becomes more dominated by the chain stores and the larger independents. Backward integration by some chains, in some areas, further limits the marketing channel for the dairy industry.

Under such circumstances, it can be expected that antitrust violations will occur. It is also to be expected that injury to competition should be easier to demonstrate in future cases. Moreover, the commerce requirements may not be as difficult to meet. Areas of distribution of major wholesale dairy plants have been expanding. Further, producer cooperatives have been joining in common marketing arrangements, so that raw milk supplies are now more frequently crossing state lines.

These facts, coupled with the obvious importance of the dairy industry to the general health and welfare of the country, indicate the necessity for an increased sense of vigilance in applying the antitrust laws to the dairy industry. State agencies most commonly attempt to regulate the dairy industry through price control. Such control is designed to maintain all existing dairy concerns in a static competitive condition. On the other hand, the antitrust laws can maintain a healthy competitive atmosphere within the dairy industry and insure the survival of the fit and viable independent dairies. The Commission is the only public agency which is disposed to perform this task on a broad scale, at the present time. Therefore, it is important that our efforts be continued on a selective basis.

The staff is currently in a better position to evaluate the merits of complaints received from the dairy industry. In the past, the issues have been clouded by the rapid rate of failures among small, primarily retail home delivery dairies. Although injury was apparent in connection with many such complaints, the causes were very difficult to pinpoint. Present complaints are being received from more substantial companies. Hopefully, the pattern of injury and causation will be more easily established.

PENDING MATTERS

The matters now pending at the precomplaint stage generally offer some chance for positive action. The following is a resume of the pending informal matters, their current status and their prospective merits. They are divided into three categories: (1) Those where complaint recommendations appear certain; (2) Those in which there is a substantial probability that closings will be recommended; and (3) Investigations which have not progressed to the point where an accurate prognosis can be made.

A. Complaints

1. *File No. 661 0093. Prairie Farms Dairy, Inc.*—This dairy sells in parts of five states and is one of the fastest growing cooperative-processors in the nation. Its sales have gone from \$15 million in 1964 to \$43 million in 1968. It appears that a secondary line section 2(a) case can be brought. 1,182 hours were spent in investigating the case. The investigation, however, was not completely adequate. Actual proof of sales between competing purchasers during representative time

periods have not been obtained. For this reason, the amount of sales involved in each of the several discriminations alleged cannot be ascertained. Erratic pricing, with spot discriminations to obtain key accounts, appears to be a contributing factor to the rapid growth of this regional cooperative and the concurrent increase in concentration within the five-state area where Prairie Farms operates. The proposed complaint would be expected to slow the rate of concentration in these markets and assist competing dairies and unfavored retailer-purchasers who have been affected by the alleged discriminations. It is estimated that the completion of the investigatory stage, plus preparation of complaint and trial of the case will require the expenditure of an additional 3800 man hours. (Slightly more than two man years). This effort would be substantially completed in FY 1970 and extend into FY 1971.

2. *File No. 681 0031. Borden.*—Borden is the second largest firm engaged in the dairy business in the U.S. Total net sales in 1968 were \$1.7 billion. Of this figure, 45% represent sales of dairy products.

This case involves annual net sales of over \$2 million worth of ice cream and other frozen dessert products in Arkansas and Texas. Investigation of the case required 1,264 man hours. Trial of the case will require approximately one more man year. The case was never assigned to the field. The preparation for trial and trial of this matter will thus require slightly less than two man years and should be completed sometime in FY 1971. The purpose of this matter is to attack the growing alliance between major dairies and major chains, which is foreclosing the independent dairies from a substantial portion of the retail outlets in the United States.

B. Closings

These cases will probably be closed :

1. *File No. 671 0005. Southland Corporation et al.*—This was an investigation into a private label agreement between Southland Corporation and Affiliated Food Stores, an affiliation of independent retail grocers primarily located within the State of Texas. Annual sales involved were approximately \$2 million. The attorney-examiner has returned the file with a recommendation for complaint, charging competing customer price discrimination with injury at the secondary level of competition. However, the investigation leaves much to be desired. Extensive re-investigation will be necessary if complaint is to issue. Proposed respondents have also brought forward some very damaging evidence of a meeting competition defense. Further, Southland now serves a minor portion of the requirements of the Affiliated stores, especially in Dallas where the original dairy applicant is located. This file is currently being analyzed and evaluated to determine whether it is worth saving. A recommendation is expected to be made within the near future. 1492 man hours have been expended in this matter to date. The completion of our evaluation and the closing should require an additional 100 hours, so that a little less than one man year will have been expended on this matter.

2. *File No. 681 0030. The Kroger Co.*—This investigation will probably be closed and combined with Borden, 681 0031. Kroger was the favored account, but information appears insufficient for a 2(f) charge. The sales figures and the factual background of this matter were related in connection with File No. 681 0031, Borden, above. The investigation was never sent to the field, 348 man hours were used.

C. Investigations where an accurate prognosis cannot yet be made

1. *File No. 671 0149. The Borden Company and A&P.*—This investigation is concerned with a private label agreement between Borden and the Chicago Unit of A&P. Total sales under the agreement are in excess of \$7.5 million annually. Savings to A&P under the agreement amount to more than \$800,000 annually. The competitive advantage gained by A&P over its unfavored competitors is thus quite substantial. Borden has cooperated in the investigation, but A&P has not, to the satisfaction of the Attorney-Adviser. A *subpoena duces tecum* against A&P was returned May 15, 1969. *Subpoenas ad testificandum* should be issued shortly. The evidence submitted by Borden indicates a strong possibility that A&P obtained a favored price from Borden through unfair methods of competition. If the evidence and testimony received from A&P does not destroy the present basis, it is expected that a recommendation for complaint will be made in this matter.

So far 647 man hours have been expended herein. It is estimated that an additional 1000 man hours will be required to complete the investigation. If com-

plaint results, approximately 1800 man hours more will be required. Thus, this matter may require a total of three man years to complete. Trial of the case probably could not start before FY 1971 and would probably extend into FY 1972.

2. *National Dairy Products Corporation and A&P, 661 0172.*—This file primarily involves a private label agreement between Sealtest and A&P in the Baltimore and Washington marketing areas. The contract involved 144 stores and sales of approximately \$6 million. Investigational hearings were held in November 1968. The results are being evaluated. 3,759 man hours have been expended. Any possible violations by Sealtest would be covered by the order in Docket No. 7018, which recently became final. The evidence of a 2(f) violation against A&P is very sketchy. The case would appear to be very difficult to make on its own merits. However, similar investigational hearings are being held in Chicago into an A&P-Borden private label agreement. (File No. 671 0249, above). Evidence received from Borden indicates some possibility of an antitrust violation. The Baltimore-Washington evidence will be re-examined in the light of the Chicago file to determine if it would be useful in bolstering possible charges in a prospective complaint based on the Chicago purchasing practices of A&P.

3. *Arden-Mayfair et al. File Nos. 671 0245-671 0249.*—This is an investigation of low cost sales of "fighting brands" in Whatcom County, Washington. The proposed charges include price discrimination and sales of milk at below cost prices. This case was inherited from an attorney who has left the Commission. The prognosis is unknown. The estimated completion date for the field investigation is June 15, 1969, according to the Progress Report of March 31, 1969. No recommendation was noted in the Progress Report. 590 man hours have already been devoted to this matter. Since the investigation is substantially completed, it should require only about one-third of a man year at the investigative stage.

Sales below cost or at unreasonably low prices have a tendency to eliminate or weaken independent competition and thus increase the concentration in a given dairy market area. The purpose of this investigation is to assist the local independent dairy competitors to survive, if they have in fact been the victims of unfair or discriminatory pricing practices.

4. *File No. 681 0137. Foremost-McKesson, Lucky Stores et al.* This investigation is two-fold. First it includes a milk requirements contract between Foremost and Lucky which is openly discriminatory. Over \$5 million in rebates are involved for a three year period. There are some commerce problems involved in such sales, however, as well as an alleged 2(b) defense based upon Lucky's projected milk costs out of a proposed dairy of its own. Secondly, this investigation includes an inquiry into the overall purchasing and sales practices of Lucky in the Sacramento, California area. Complaints, some of whom are large multi-store independents, allege that Lucky is selling below their costs to the injury of competition. It is inferred that Lucky's pricing practices are financed through exorbitant discounts exacted from Foremost and other suppliers. *Subpoenas duces tecum* have just been issued against Lucky and Foremost, returnable in mid-June. The prognosis is unknown in this case, but the principles involved are quite important since Lucky's retail discounting practices appear to be driving some very substantial independent grocers out of business. In this regard it should be noted that Lucky's total sales volume went over \$1 billion in 1968.

So far 749 man hours have been used in this investigation. 1000 more man hours will be needed to complete the investigation. If complaint results it is estimated that the preparation and trial of the case will require an additional 5400 man hours. Thus the investigation will require about one man year, during FY's 1970 and 1971 and the complaint and litigation will require an additional three man years beginning in FY 1971 and extending into FY 1973.

5. *File No. 691 0019. Borden et al.*—This file involves an investigation of the sales practices of Borden, Beatrice and Fairmont in the State of Oklahoma. A prior investigation had only recently been concluded in Oklahoma before the institution of the present file. However, there have been substantial new developments in the interim. The original investigation concerned itself with alleged local discriminatory practices by these companies, involving a few favored accounts. In the main, these sales involved locally produced and processed milk being sold at favored prices to certain local stores. The principal ground for a closing recommendation was lack of jurisdiction. There was also lack of proof of substantial injury to dairy competitors. However, in the summer of 1968, new developments occurred in major Oklahoma markets. These included the introduction of second, or "fighting" labels, and very low "limited service" pricing. Profit and loss state-

ments received from two large local independents, Page Dairy and Central Dairy, show dramatic changes in their profit structure. Central Dairy, with over \$8 million in sales, suffered an overall profit drop of about \$200,000 in fiscal 1968, putting it in the red for the first time in seven years. The 1968 report shows such losses in spite of an increase in sales volume. The evidence indicates that all three of the major dairies sell some milk into other states out of their Oklahoma plants. Further, some of their raw milk supplies may be coming in from out of state following a reorganization of producer co-ops in Central United States (Milk Producers, Inc.). Central Dairy, with over \$8 million in sales and a very successful past sales record, appears to be the type of local independent dairy that the Commission should be doing its utmost to save. Thus, there is ample reason for the institution of this investigation. The prognosis is unknown at this stage of the investigation. 530 man hours have been used so far. It will take a minimum of 500 more man hours to complete the investigation. Thus, the investigation of this matter should require a little over one-half man year to complete, and extend into early FY 1970.

6. *File No. 691 0053. Fairmont Foods Company.*—This investigation involves allegations that Fairmont has engaged in geographic price discrimination and sales below cost in the Cleveland, Ohio area to the injury of competition. Fairmont is the fifth largest dairy in the U.S. The complaining dairy, Hillside-Old Meadow, is a very substantial independent who lost a million dollar annual account (a cooperative group of stores) to Fairmont through the alleged discrimination. Fairmont's plan in Coshoctin, Ohio sells its milk and dairy products over a several state area. Applicant has filed a treble damage action against Fairmont. The field investigation has not yet reached the point where a prediction as to the final outcome can be made. 354 man hours have been expended on this matter to date. A minimum of 500 more man hours will be required to complete the investigative stage. Thus the investigation will require about one-half man year and extend into early FY 1970.

7. *File No. 691 0058. Gibson Products et al.*—This file involves an investigation of the milk sales practices of Gibson Discount Centers and its relationship with two dairy suppliers, Midwest Dairy of Ponca City, Oklahoma and Jere Dairy of Grand Prairie, Texas. Gibson is one of the fastest growing department store-retail grocery discount operations in the nation. Gibson stores in various locations in Texas and New Mexico have been selling milk at prices which are substantially below the normal market prices. Sometimes Gibson's retail prices are below the raw costs being paid by local dairies. Chain stores supplied by major interstate dairies are meeting Gibson's prices. Thus, local independent dairies are apparently being severely injured. Jere Dairy, although it is located in Texas, allegedly gets the major portion of its raw milk supply from out-of-state. Past experiences with Gibson have been with franchised operations, not owned and operated by Gibson itself. The present case appears to include several Gibson grocery stores which are owned and operated by Gibson. The ultimate recommendation in this matter is unknown as of this date. However, it is hoped that Gibson's retail sales practices will have sufficient interstate incidents for us to proceed, if it is found that it is engaging in "loss-leader" sales tactics to the injury of competition. The present estimated completion date is July 1, 1969. This investigation has thus far required 347 man hours and 500 more should be necessary for completion. Therefore, this investigation will require about one-half man year and extend into the first half of FY 1970.

Summary of pending seven-digit matters.—All of the above matters are a part of our industry wide efforts of combat rising concentration in the dairy industry. The majority of these matters involve private label agreements between major dairy corporations and major chains. Such contracts contribute to rising concentration ratios in two industries. They foreclose a substantial segment of the dairy marketing channel to independent dairy competition and they give the major chains a very potent financial club to use on their regional and independent competitors. The amount of sales and discounts involved in each of these private label agreements are quite substantial, ranging as high as \$7.5 million in annual sales, with discounts of \$800,000.

In the remaining matters listed above, the charges involved include geographic price discrimination and sales below cost. In each case the independent competitors affected appear to be quite substantial and worth saving.

Alternate Approaches.—The goals outlined above consist simply of industry wide-scrutiny of various acts and practices which are tending to eliminate the independent dairy competitors and which are, therefore, contributing to the rising concentration within the dairy industry. The principal alternative to the approach

now being used would be that of the rule-making procedure. Generally speaking, however, pricing guides or rules would not appear to offer a workable solution to the dairy industry. Regulations now existing at the state and local levels appear to have had a less than salutary effect.

It might be possible, however, to promulgate a rule which would assist in the pricing of private label. This is currently one of the main concerns of the dairy industry. Wholesale price differences between private label and vendor label are often far beyond any cost justifiable difference. Since consumer preference by brand or label is relatively small within the fluid milk industry, the price difference should not exceed the difference in costs (principally the elimination of a small advertising expense) by any great amount.

A hearing could be held into the maximum price differential that should be allowable on a per unit basis for private label fluid milk. The Commission could then issue a rule or guide establishing a standard price differential which could not be exceeded in the sale of private label milk, unless the seller could prove that an additional discount could be cost justified.

Prospective Commitments.—There is presently one matter pending in the corresponding stage which appears to involve a substantial antitrust problem. This matter involves Pet Incorporated, one of the three major processors of evaporated milk and Zausner Foods Corp. of Mountainside, New Jersey. The latter is a large raw milk broker and dairy products manufacturer. Zausner has supplied a major portion of the raw milk requirements to Pet's evaporated milk processing plant at Greensboro, Maryland for a number of years. Prior to November 1968, it also purchased private label evaporated milk at Pet's Greensboro dock, which it sold to various chains who were customers for Zausner's other products. The prices it paid Pet for this private label allowed it to barely compete for a portion of the Northeastern United States market. (This market is herein defined as including D.C., Maryland and Delaware on the south and extending through Pennsylvania and New York up through New England).

The principal competitors for the evaporated milk business of this market were the independent processors. Pet, Carnation and Borden have allegedly been rather small in private label evaporated milk sales in this area.

In October 1968, Pet and Zausner entered into a contract whereby Pet would process, can, label and package milk owned by Zausner at a stated price per case, with discounts if the production reached certain volume levels on an annual basis. The "service charge" assessed for this allowed Zausner to undersell the existing competition by 30 to 40c per case. Within a few months it is alleged that Zausner had cornered all but one major account in this market area. Independents such as Defiance, United and Westerville (all located in Ohio) were virtually foreclosed from the market, according to the allegations of complaints.

The possibility exists that Pet might be using Zausner as an instrumentality to eliminate competition from a market it desires to enter. If so, it can eventually raise its service charge to Zausner and move in at the old price level to capture the lion's share of the private label evaporated milk business throughout northeastern United States.

Under the circumstances, an investigation of this business relationship appears necessary. Accordingly, a request for investigation is being prepared. This preparation should be completed in early FY 1970. It is not possible at this time to estimate the man hours required for the investigation, since the manner and scope of the investigation have not yet been determined.

Conclusion.—According to the Food Commission, consumers spend 16% of their food budget for dairy products. Through investigations and trials in dairy matters, the Commission serves notice it will not tolerate rampant violations of the antitrust laws. Without the Commission's concern, the number of firms in this industry would rapidly decline to a level that would permit the few remaining firms to set prices almost at will.

MEMORANDUM

JUNE 18, 1969.

Subject: Publishing industry, File No. 651 0170, prestige paperback and hardback publishers.

To: Francis C. Mayer, Chief, Division of Discriminatory Practices.

From: Bernard M. Williamson, attorney, Division of Discriminatory Practices.

By Commission Minutes of May 27 and September 27, 1965, this Division undertook to formulate an informal procedure for assisting the 300-odd members of the hardback and prestige paperback publishing industry in eliminating prevalent violations of Section 2(d) on a voluntary basis.

By Commission Minute of June 12, 1967 the Commission adopted the undersigned's recommendation of June 5, 1967 that these matters be held in abeyance pending the decision of the Supreme Court in *Fred Meyer, Inc. et al.* After the Supreme Court's decision in the *Meyer* case the Commission undertook to formulate Guides for Advertising Allowances and Other Merchandising Payments and Services which became effective on June 1, 1969.

1. The industry involved is prestige paperback (retail price of \$1.00 or more) and the hardback publishing industry. There are approximately 300 publishers in the industry.

2. The volume of sales is substantial and believed to be in excess of ½ billion dollars a year.

3. Man hours invested from 1965 to date is less than 1,100 hours (11/18 of a man year).

4. This Division has recommended the issuance of approximately 50 6(b) questionnaires to representative members of the industry in late 1969 in an effort to determine whether their promotional and advertising allowance programs will conform to the Commission's new Guides. It is estimated that approximately an additional ½ man year may be required to process and analyze the 6(b) returns. If substantial compliance is shown then little further time expenditure should be required except in isolated cases or upon new complaint.

If, however, substantial non-compliance should result then substantial additional investigation and trial might become necessary to bring the industry into line.

5. Until answers are received and evaluated it is impossible to project an alternative possibility other than outright closing of the matter.

MEMORANDUM

JUNE 18, 1969.

Subject: Fiscal 1971 Budget—Commissioner Nicholson's Memorandum of June 10, 1969.

To: Director, Bureau of Restraint of Trade.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

As orally instructed by the Bureau on June 12, 1969, we have attempted to develop for this Division's current workload the kind of data requested by Commissioner Nicholson on the Merger Division's cases.

With respect to the cases currently in litigation, the data requested is fairly complete. (Appendix A, attached)

With regard to the other categories, including those currently being investigated, most of the data we have is available only in a somewhat fragmented form, as explained below.

In response to Commissioner Nicholson's memorandum, we have attempted to gather from the files of our individual attorneys the kind of data necessary to evaluate the individual files that make up the 15 major priority areas set forth in our previous budget submittal of April 15, 1969 (Ideas and Basic Plans for the Fiscal 1971 Budget), a copy of which is attached hereto as Appendix B. (One matter listed there, involving spices [1 attorney] has been closed; another matter, one involving a group of fiber-industry firms, has been opened at the direction of the Commission [$\frac{1}{2}$ man-year in 1970].) Many of these categories or major areas include not one but a number of cases and, in the aggregate, they cover a quite substantial part of the approximately 270 investigations (in some 120 separate 4-digit industries) we currently have under way.

A computer print-out or tab run of all our investigations, *arranged by SIC 4-digit industry number* (in ascending order) is attached hereto as Appendix C. This print-out gives the man-hours devoted to each case to date and, via additional entries we have typed onto it, certain other items of information from the 1963 Census data, including (a) the number of firms in the industry as a whole (see discussion below), (b) the sales volume of the industry as a whole (1963 data), and (c) the share of the industry's total sales held by the 4-largest firms.

The additional data requested by Commissioner Nicholson, particularly the sales volume of the individual respondents involved in our major case areas and the estimated man-years required to complete them, has been collected (where available) from the files of our individual attorneys but we have not had sufficient time to collate it into a form that would make a meaningful presentation. We secured a second print-out of our pending investigational files, this one grouped by assignments to individual attorneys, in order to permit the attorney most familiar with the case to supply this detailed data, namely, the sales volume of the respondent(s), the man-years required to complete the matter and the evaluation of it in terms of legal approaches and the like. This print-out, together with the responses of our individual attorneys, is available for examination, but we do not think it is sufficiently refined at the present time to be of much help either to the Bureau or the Commission. There has not been sufficient time to have the replies of the attorneys typed (most of it is in hand-written form), those replies have not been analyzed by the Division, and the file listings with their accompanying man-year estimates and evaluations *are not arranged into industry groupings*. To present this data in any meaningful form would probably require from four to six weeks, including the time required to collate the responses of the attorney and get them key-punched by our data processing unit, thus permitting a print-out of all the relevant data by industry groupings. As mentioned above, however, this raw data is available if the Commission desires to examine it. The processing can be completed and forwarded at a later date if desired.

It should be understood that the industry data entered by us on Appendix C is subject to a number of serious shortcomings and must accordingly be evaluated with some care. Its source is *Concentration Ratios in Manufacturing Industry, 1963*, Report of the Bureau of the Census for the Senate Antitrust & Monopoly Subcommittee, pp. 6-37 (89th Cong., 2d Sess.), and the Census "industry" definitions, while satisfactory in many cases, do not always correspond to the "relevant markets" generally revealed by more refined investigations. In particular, only *national* markets are considered in the Census figures, whereas in fact many markets are either regional or even local (city) in character, a circumstance that of course tends to greatly *understate* the true extent of the concentration in an industry. And of course any such difference in industry defini-

tions between those of the Census and those actually involved in our cases produces corresponding variations in sales figures and the like. Nevertheless, this is the best published data available for all manufacturing industries (no such data is available at all for non-manufacturing industries, e.g., retailing, wholesaling, services, etc.) and, in general, it is at least a helpful starting point in evaluating where an industry stands on the competitive-monopolistic spectrum.

In the aggregate, these appendices give, we believe, as complete a picture of the work of this Division as we are able to provide without some additional time to collect, analyze and process through our data processing system a considerable amount of additional information.

APPENDIX A

FORMAL MATTERS IN LITIGATION

This Division has four matters in adjudicative stages at the present time. They are as follows:

One matter is pending before the Commission for final decision and it is not anticipated that additional work by this Division will be necessary.

The second matter involves the food industry at the manufacturing level. Trial has been completed and the Initial Decision has been filed. The matter is now pending on appeal before the Commission. One company is involved with annual sales of \$20 million. It is not an industry-wide proceeding, although the Commission does have orders against six other companies in the industry.

The object of this proceeding is to lower prices on the food products involved in a substantial area of the United States. Estimated savings to the public from this proceeding, if successful, will be \$800,000 per year.

Estimated man hours to complete: 300

The third matter in adjudication involves one company producing organic chemicals. Only two companies are in the industry. Industry sales are approximately \$13 million.

It will take approximately one and one-half man years to complete the trial and appeal to the Commission on this matter. It is hoped the work of this Division will be completed in fiscal 1970; however, this depends upon delaying tactics of respondent.

The entire industry will be affected by this proceeding and it is anticipated that successful prosecution of this matter will result in new entrants and resultant lower prices. It is believed that the Commission's complaint and subsequent litigation thus far has resulted in a substantial price reduction on the relevant product.

The fourth proceeding involves one company with sales of relevant product of \$100 million per year. Respondent is a monopolist in the industry. It will take approximately 600 man hours to complete. This matter is presently involved in collateral litigation so that the amount of time to complete may well run into fiscal 1971.

The proceeding is directed at preventing respondent, a monopolist, from using its dominant position to injure small competitors in this declining industry.

APPENDIX B

APRIL 15, 1969.

Subject: Ideas and Basic Plans for the Fiscal 1971 Budget.

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

In accordance with the memorandum from the Chairman dated March 20, 1969 concerning budget justification and plans for fiscal 1971 this Division submits the following statistics, information and discussion.

As of the date of this memorandum, this Division is operating with twenty-nine (29) attorneys not including the Division Chief and two secretaries. Due to the loss of several senior attorneys, and the lack of experience of a substantial number of our staff, prime responsibility for the expected increased workload will fall into the hands of a relatively few senior attorneys, with the junior attorneys spread quite thin.

Additionally, as has happened before, it is expected that during fiscal 1971, more investigations will result in formal hearings that will require, *inter alia*, a significant shift in the assignment and the responsibility of other matters: and place an unusual burden on those attorneys not actually involved in formal hearings or consent negotiations.

In compiling the data outlined below, we have taken into consideration all matters that are now actually reaching formal recommendations, as well as all matters in the field or in our Division that in our best judgment will result in formal action. Naturally, the discussion does not include the dozens of informal or formal matters begun and processed daily that will be closed out prior to fiscal 1971; nor does this discussion include those many matters which, during fiscal 1971, at any one time will not involve a substantial commitment of manpower, but still, during the year consume hundreds of man hours. Additionally, we shall not discuss the dozens of matters that will be processed through our small business procedure both to obtain expeditious relief for taxpayers, but also to avoid the expense of protracted investigations.

The Chairman raised several serious questions in his memorandum that are not novel to this Division. Basically, these questions entail an effort to stop complete reliance on the "mail bag" for our workload; as well as an attempt at a more foresightful form of law enforcement. Although this Division can never justifiably modify, such less reject, the "mail bag" as a source of work for the Commission, it does consider additional techniques as valid means of searching out violations of the antitrust laws, given a sufficient budgetary base.

Essentially one of these techniques would be the establishment of a special group of Division attorneys, working with economists, who would examine, investigate, and/or hold hearings in different industries to determine whether anti-competitive practices exist.

For example, this Division regularly receives complaints from different franchisees of many franchise systems through the country. Some letters are simply private individualized controversies. Others, however, bear seriously on possible unfair practices applicable to many situations. If we had the money, and also the attorneys described above, we would quite independently study franchise qua franchising in the context of the antitrust laws. We conceivably could promulgate rules; give guidance to businessmen and; bring cases as a last resort.

This example not only answers the problem of the "mail bag", but also answers the other questions set forth in the Chairman's memorandum, i.e., what should we be doing that we are not doing, and what practices should we be looking into that we are not, if we had the money.

This Division would recommend similar action in several consumer purchasing areas—food, furniture and clothing among others. We have committed, and will continue to commit, substantial manpower in each of these areas. However, our activity is relatively piecemeal. Our Bureau of Economics has made significant studies in several of these areas. However, absent the money, manpower and planning to implement these studies with legal action where necessary, the studies for our purposes have very limited value.

In the above context then the following are the *major* projects this Division will commit its budget and manpower to in fiscal 1971. We have attempted to list them in order of economic priority, i.e., what acts and practices in what industries are having the most far reaching anti-competitive effects.

1. *Reciprocity*.—This Division presently has under investigation approximately twenty (20) formal matters involving the practice of reciprocity in many industries—chemicals, paper and paper products, auto parts, vending machines, dairy products, paint, petroleum and coal are among these. The anti-competitive effect of this practice is self-evident and we believe we are just beginning to expose the extent to which this practice is prevalent in our economy. (2 full-time and 3 part-time attorneys—\$39,000)

2. We are active in a number of areas in the retail and wholesale food industry and there is no question that fiscal 1971 will involve comparable commitments. The following are matters that we believe will require significant Division manpower in fiscal 1971.

(a) *Retail groceries*.—selling below cost, monopolization by several major retail chains (2 attorneys—\$26,000).

(b) *Asparagus*.—price fixing (1 attorney—\$13,000).

(c) *Beer*.—vertical price fixing (2 attorneys—\$26,000).

(d) *Spices*.—horizontal price fixing (1 attorney—\$13,000).

(e) *Soft Drinks*.—tying of soft drink syrups to free fountain equipment (2 attorneys—\$26,000).

3. *Gasoline*.—This Division, as in the past, is receiving literally dozens of complaints each month from retail gasoline dealers concerning numerous practices of the major gasoline producers. Additionally we have instituted some investigations for alleged price fixing, price discrimination and/or predatory pricing.

ing; and we believe these numbers on both the informal and formal level will increase as we go into fiscal 1971 (3 attorneys—\$39,000).

4. *Franchising*.—In addition to numerous informal matters being reviewed by this Division in the franchise field, the Division has under investigation major franchisers in the clothing and household appliances field for possible price fixing, allocations of customers and territories, as well as inducement of discriminatory prices for wholesalers supplying retail outlets. Literally hundreds of business concerns are involved in these practices. These matters are presently in the field and formal action is expected during fiscal 1971 (4 attorneys—\$52,000).

5. *Small Business*.—As in previous years, each attorney including the Division Chief is daily engaged in five-digit investigations referred to as our small business procedure. This procedure is proving its worth more and more each year in stopping antitrust violations in their incipiency as well as settling disputes between businessmen at a relatively nominal cost to the Commission and taxpayers. Since its inception, the matters being processed through this procedure have increased annually and the same increase is expected for fiscal 1971 (5 attorneys—\$65,000).

6. *Hearing Aids*.—In the past two years this Division has been receiving numerous complaints concerning the high as well as almost uniform cost of hearing aids and batteries in this country. Information received has finally given us a basis upon which to commence an industry-wide investigation of the retail pricing practices of hearing aid and battery manufacturers. Eleven (11) investigations have been instituted and indications are that formal action may well take place during fiscal 1971 (3 attorneys—\$39,000).

7. *Petroleum Coke*.—An in-depth investigation of the entire petroleum coke industry in the United States was recently completed by this Division. As a result, a formal complaint was recently forwarded to the Commission recommending issuance. Nine respondents are named, including several major oil companies, and charged with unreasonably long term supply contracts of petroleum coke in violation of Section 5 of the Federal Trade Commission Act. It must be assumed that formal litigation will carry this matter well into fiscal 1971 (2 attorneys—\$26,000).

8. *Office Equipment*.—This Division regularly receives complaints in the office equipment industry concerning tying arrangements, resale price maintenance and refusals to deal. The majority of these are processed by means of our small business procedure. Some have taken on such proportions however, that necessarily, seven-digit numbers were assigned and investigations are nearly completed. It is expected that a substantial allocation of manpower will be made to this industry in fiscal 1971. The practices include price fixing, tying arrangements and conspiracy to boycott (3 attorneys—\$39,000).

9. *Drugs*.—It was reported previously that this Division had devoted considerable effort in developing information on price fixing in the sale of quinidine. Although the Justice Department has decided to bring a Grand Jury proceeding against the companies involved, the Commission has retained civil jurisdiction and as a result this Division expects to bring formal action against the involved companies and individuals sometime during fiscal 1970. Said action would necessarily extend into fiscal 1971 and beyond (3 attorneys—\$39,000).

As in the past, this Division continues to receive complaints regarding activities in the drug industry that require a continuing surveillance. Accordingly, we always have the equivalent of one attorney functioning in said industry and there is no reason to assume that future requirements will be any different (1 attorney—\$13,000).

10. *Newspaper Industry*.—In accordance with Commission instructions, this Division initiated a full scale investigation of alleged discriminatory rate structures, advertising rates, and the practice of doubling billing in the newspaper industry. Twenty (20) companies are under investigation and these investigations are expected to be completed sometime during fiscal 1970 with formal action taking them into fiscal 1971.

In addition there are a number of other formal and informal matters being investigated in the newspaper and magazine advertising field that should be completed during fiscal 1970 with formal action taking them into fiscal 1971 (4 attorneys—\$52,000).

11. *TV Advertising*.—This Division in conjunction with the Bureau of Economics is presently studying alleged discriminatory advertising rates charged by the major TV networks throughout the country. Additionally, other discrim-

inatory practices have been uncovered that compound the seriousness of the practices involved. It is expected that this study will be completed sometime during fiscal 1970 and that recommendation of formal complaints will carry this matter well into fiscal 1971.

12. *Bus Tire Industry*.—Five (5) major tire manufacturers are presently under investigation for engaging in restrictive leasing arrangements of tires with bus companies. This investigation should be returned from the field in fiscal 1970 and formal action recommended for fiscal 1971 (2 attorneys—\$26,000).

13. *LP Gas Industry*.—This Division presently has under investigation 14 major oil companies for alleged price fixing, conspiracy to boycott and attempt to monopolize the industry in the sale of propane gas. Formal action is expected in fiscal 1971 (3 attorneys—\$39,000).

14. *Multi-Media Advertising*.—An investigation was recently begun by this Division into an alleged attempted monopolization by a major broadcasting and news complex in the Washington area. Essentially, the alleged practices involve the exclusion of other networks by use of multi-media power to capture advertising dollars in the area. It is our intention to work closely with the Bureau of Economics during the entire matter. It is expected that formal action will commence in fiscal 1971 (2 attorneys—\$26,000).

15. *Miscellaneous*.—Based upon our present estimations of completion time and availability of evidence in support of the charges under investigation, it is the judgment of this Division that the following matters will result in complaints that will require the assignment of significant manpower in each of the following matters in fiscal 1971. Naturally, if informal disposition is made of any or all of these matters this judgment will necessarily be changed.

(a) *Ready-mixed concrete*—sales below cost, attempted monopolization.

(b) *Farm Equipment*—resale price maintenance (2 attorneys—\$26,000).

(c) *Retail TV Sale*—resale price maintenance (2 attorneys—\$26,000).

(d) *Chemicals*—price fixing conspiracy, price discrimination, sales below cost, monopolization in the sale of propionic acid, and calcium and sodium propionates (2 attorneys—\$26,000).

(e) *Auto Parts*—several matters involving resale price maintenance, exclusive dealing, tying arrangements and price discrimination (2 attorneys—\$26,000).

(f) *Utilities*—Discriminatory pricing and promotional allowances, tying arrangements (2 attorneys—\$26,000).

(g) *Cosmetics*—resale price maintenance, price discrimination, customer restriction (2 attorneys—\$26,000).

(h) *Linen rentals*—price fixing, customer allocation (2 attorneys—\$26,000).

(i) *Footwear*—TBA arrangement between footwear manufacturer and retail store chains (2 attorneys—\$26,000).

(j) *Furniture and appliances*—resale price maintenance (2 attorneys—\$26,000).

We have for purposes of this report discussed what we consider will be the major activities of this Division for fiscal 1971. Of the 257 investigations for which we are now responsible, any one or any series of investigations obviously could develop into significant consumers of manpower; while any reduction in this number would, we feel, be quickly replaced by others.

We have also discussed what we believe this Division "ought" to be doing. Given adequate funds and manpower, we believe a combination of these forms of activity will more than fulfill our responsibilities in the enforcement of Section 5 of the Federal Trade Commission Act.

APPENDIX C

FORMAL AND INFORMAL MATTERS PENDING, THROUGH MAY 31, 1969

Ind. code	Proposed respondent	File No.	Number of firms	Sales, industry/respondent (thousands)	4-firm concentration (percent)
0133	Broiler chickens.				
1389	Oil and gas field services, n.e.c.				
	Halliburton Co. (man-hours worked/required, 114)...	6710275	1389	1	
1951	Small arms:				
	Ithaca Gun Co. Inc.	6910078	1951	1	
2032	Canned specialties (154)...			1, 169, 299	67
	Hammons Product Co., et al.	6810143	2032	1	
2036	Fresh or frozen packaged fish and seafoods:				
	Gortons of Gloucester Inc., (528) (man-hours worked/required, 770)...	6610001	2036	1	391, 174
2037	Frozen fruits, fruit juices, vegetables, and specials (566)...			1, 548, 663	25
	Mrs. Smith Pie Co. (man-hours worked/required, 186)...	6610049	2037		24
	Stouffer Foods Corp. (man-hours worked/required, 14)...	6710212	2037		
	General Foods Corp. (man-hours worked/required, 42)...	6710215	2037		
	Coca Cola Co. (man-hours worked/required, 8)...	6710217	2037	4	
2051	Bread and other bakery products, excluding cookies and crackers (4339)...			1	4, 505, 995
2071	Candy and other confectionery products:				23
	Bartons Candy Corp. (1142)...	6710087	2071	1	1, 454, 512
2037	Campbell Soup Co.	6710216	2037	1	15
2086	Bottled and canned soft drinks and carbonated water:				
	Coca-Cola Bottling Co. of Memphis (3569)...	6810100	2086	1	2, 120, 920
2807	Flavoring extracts and flavoring sirups, n.e.c.:				12
	Coco-Cola Co. et al (492)...	6610030	2087	1	729, 704
2084	Animal and marine fats and oils:				62
	Herman Isacs Inc. et al (516)...	6610195	2084	1	473, 993
2098	Macaroni, Spaghetti, Vermicelli, and noodles (207)...			222, 947	23
	Golden Grain Macaroni Co.	0108737	2098		
	Larosa V & Sons Inc.	6410164	2098		
	Western Globe Products Inc.	6410165	2098		
	California-Vulcon Macaroni Co.	6410166	2098		
	U.S. Macaroni Manufacturing Co. Inc.	6410167	2098	5	
2099	Food preparations, not elsewhere classified, (1,997)...			1, 797, 284	24
	Standard Brands Inc. et al	6110155	2099		
	General Foods Corp. (closed Sept. 15, 1967)...	6610065	2099		
	Sioux Honey Association Inc.	6710075	2099		
	General Foods Corp.	6810081	2099		
	General Mills Inc.	6810086	2099		
	Standard Brands Inc.	6810087	2099		
	National Biscuit Co.	6810088	2099		
	Kellogg Co.	6810089	2099		
	Southern Corp. Et al	6910076	2099		
	Pacific Molasses Co. Et al	6910095	2099	10	
2221	Broad woven fabric mills, man-made fiber and silk.				
2251	Womens hosiery, seamless and full fashioned:				
	Burlington Industries Inc. (353)...	6810130	2251	1	606, 560
2293	Paddings and upholstery filling:				34
	Allen Industries et al (168)...	6910098	2293	1	156, 539
2337	Womens, misses and juniors suits, skirts and coats (2,481)...				28
	Praetian Juniors Inc.	6710080	2337	1	1, 522, 725
2341	Womens, misses, childrens, and infants underwear and nighty (978)...				8
	Van Raalte Co. Inc.	6810129	2341	1	976, 108
2351	Millinery.				11
2361	Dresses, blouses, waists, and shirts (627):				
	R. L. Davis Manufacturing Co. Inc.	6910040	2361	1	443, 343
2499	Wood products, not elsewhere classified (2,818):				12
	International Balsa Corp. et al.	6810095	2499	1	785, 367
2512	Wood household furniture, upholstered (1,729):				14
	Drexel Enterprises, Inc.	6610149	2512	1	983, 204
2591	Venetian blinds and shades (696):				13
	Joanna Western Mills Co. et al.	6810060	2591	1	199, 552
2621	Papermills, except building paper mills (186):				37
	International Paper Co.	6610084	2621	1	
	Georgia Pacific Corp.	6910085	2621	2	3, 824, 915
2631	Paperboard mills (146):				26
	West Virginia Pulp & Paper Co.	6810097	2631	1	2, 315, 194
2645	Die cut paper and paperboard, and cardboard (370):				27
	Psychological Corp. et al.	6910008	2645	1	378, 332
2649	Converted paper and paperboard products, n.e.c. (570):				36
	S. E. & M. Vernon, Inc.	6610039	2649	1	591, 750
2653	Corrugated and solid fiber boxes (520):				
	Continental Can Co. (closed June 2, 1969)...	6610095	2653	1	2, 166, 137

Ind. code	Proposed respondent	File No.	Number of firms	Sales, industry/respondent (thousands)	4-firm concentration (percent)	
2654	Sanitary food containers (98):					
	Union Carbide Corp.	6610110	2654	1	905,931	52
2711	Newspapers: Publishing, publishing and printing (7,982):					
	Wall Street Journal	6610187	2711			15
	Alvin S. Singer	6710157	2711			
	Tribune Co.	6710192	2711			
	Chicago American Publishing Co.	6710193	2711			
	Field Enterprise, Inc.	6710194	2711			
	Forest City Publishing Co.	6710195	2711			
	E. W. Scripps Co.	6710196	2711			
	Hearst Corp.	6710197	2711			
	Los Angeles Times, et al.	6710198	2711			
	Times-Picayune Publishing Corp.	6710199	2711			
	News Syndicate Co., Inc.	6710200	2711			
	New York Times Co.	6710201	2711			
	Long Island Daily Press Publishing	6710202	2711			
	San Francisco Newspaper Printing Co.	6710203	2711			
	Tribune Publishing Co.	6710205	2711			
	Seattle Times Co.	6710206	2711			
	Washington Daily News Publishing Co.	6710207	2711			
	Evening Star Newspaper Co.	6710208	2711			
	New York Post, et al.	6710209	2711			
	Post-Intelligencer, et al.	6710210	2711			
	Washington Post Co., et al.	6710211	2711		4,483,592	
	Essex County Newspapers Inc. (closed May 21, 1969)	6710223	2711	22		15
2721	Periodicals: Publishing, Publishing and printing (2,562): Curtis Publishing Co.	6910044	2721	1	2,2295,716	28
2813	Industrial gases (104):					
	General Dynamics Liquid Carbonic	6410285	2813			
	Cardox Division of Chemetron, Inc.	6510102	2813	2	425,388	72
2819	Industrial inorganic chemicals, n.e.c. (404):					
	Anheuser-Busch Inc. et al.	6910028	2819	1	3,493,870	31
2821	Plastics materials, synthetic resins, and nonvulcaniza-					
	(391): L.H.P. Corp., et al.	6410254	2821	1	2,571,492	35
2833	Medicinal chemicals and botanical products (122):					
	Koppers Co., Inc.	0108755	2833		305,793	68
	Olin Mathieson Chemical Corp.	6610087	2833		305,793	68
	Occidental Petroleum Corp.	6910092	2833	3	305,793	68
2834	Pharmaceutical preparations (944): Parke Davis, et al.					
	F. R. Squibb & Sons, Inc.	6610082	2834			
	Special clean, polish, sanitation preparations, exclud-	6810059	2834	2	3,314,323	22
	ing soap.					
2844	Perfumes, cosmetics, and other toilet preparations (673):					
	Clairol, Inc.	6710098	2844			
	Holiday Magic, Inc.	6710190	2844			
	Neutrogena Corp.	6810058	2844			
	Bonne Bell, Inc.	6810079	2844	4	1,792,662	38
2851	Paints, varnishes, lacquers, enamels and allied					
	products (1,579): Sherwin Williams Co.	6910083	2851	1	2,456,361	23
2879	Fertilizers (144): California Chemical Co.	6610054	2879	1	869,213	34
2879	Agricultural pesticides and other agricultural chemi-					
	cals (241): Stauffer Chemical Co. et al.	6610037	2879	1	476,661	33
2893	Printing ink (216): Sun Chemical Corp.	6910075	2893	1	268,012	48
2899	Chemicals and chemical preparations, n.e.c. (1,312):					
	Celanese Corp. of America	6810104	2899	1	931,691	21
2911	Petroleum Refining (266):					
	Gulf Oil Corp. et al (3594)	6310267	2911			
	Gulf Oil Corp. et al (4925)	6610171	2911			
	Tyson Foods, Inc (4925)	6610189	2911			
	Continental Oil Co. et al.	6810005	2911			
	Hess Oil & Chemical Corp.	6810013	2911			
	Standard Oil Co. of Ohio	6810019	2911			
	Humble Oil & Refining Co. et al.	6810067	2911			
	Ray Oil Co. et al.	6810070	2911			
	Clark Oil & Refining Corp.	6910017	2911			
	APCO Oil Corp.	6910091	2911	11	16,496,896	34
3011	Tires and inner tubes (105):					
	Firestone Tire & Rubber Co.	6710007	3011			
	General Tire & Rubber Co.	6710008	3011			
	B. F. Goodrich Co.	6710009	3011			
	Goodyear Tire & Rubber Co.	67,0010	3011			
	United States Rubber Co.	6710011	3011			
	Firestone Tire & Rubber Co.	6910025	3011			
	J. N. Ceazan Co. et al.	6910045	3011	7	2,949,673	70

3021	Rubber footwear (44): Brown Shoe Co. et al	6810105	3021	1	354,239	62
3069	Fabricated Rubber Products, not elsewhere classified (1,046): Kendall Co., Bauer & Black Division	6810057 6810062	3069	2	2,597,999	23
3079	Gates Rubber Co.					
	Miscellaneous plastics products (4,101):					
	Koppers et al (4,101):	6410308	3079	2	3,165,440	8
3141	Footwear, except house slippers and rubber footwear (785):					
	Genesco Inc.	6810023	3141	1	2,251,132	25
3262	Vitreous china table and kitchen articles (26):					
	Frederick Lunning Co	6810142	3262	1	50,954	69
3273	Ready mixed concrete (3,999):					
	Ready Mix Concrete Co. et al	6610107	3273	1	2,292,504	4
3291	Abrasive products (340):					
	Carborundum Co.	691,0087	3291	1	704,212	58
3312	Blast furnaces including coke ovens, steel and roll mill.					
3321	Gray iron foundries (1,062):					
	Stockham Valves & Fittings	6710239	3321			
	Grinnell Corp.	6710240	3321	2	1,984,944	28
3421	Cutlery (156):					
	Gillette Co. et al.	6610008	3421	1	283,352	66
3494	Valves and pipe fittings, except plumbers, brass (508):					
	Iron Pipe Fittings & Unions Ind	6610170	3494	1	1,558,509	13
3519	Internal combustion engines, n.e.c. (120):					
	Kierhaefer Corp.	6410241	3519			
	Chrysler Corp	6410261	3519	2	1,473,574	49
3522	Farm machinery and equipment (1,481):					
	Gravely Tractors, Division of Studebaker	6510088	3522			
	International Harvester Co.	6810009	3522	2	2,842,243	43
3537	Industrial trucks, tractors, trailers, and stack (304):					
	Yale & Towne Inc.	6610007	3537	1	446,957	54
3559	Special industry machinery, n.e.c. (1,073):					
	Van Products Co.	6910048	3559	1	982,074	10
3562	Ball and roller bearings (93):					
	Fafnir Bearing Co.	6710219	3562	1	998,784	57
3566	Mechanical power transmission equipment excluding ball and R (498): Koppers Co., Inc.	6610067	3566	1	888,461	24
3573	Electronic computing equipment: Addo-X Inc., et al.	6910099	3573	1		
3579	Office machines, n.e.c. (158): Service Recorder Co.	6310126	3579	1	349,210	59
3581	Automatic merchandising machines (148): Automatic Canteen Co. of America	6510057	3581	1	238,000	55
3589	Service industry machines, n.e.c. (496): Scott & Fetzer Co.	6710082	3589	1	378,300	14
3611	Electric measuring instruments and test equipment (536): Hewlett-Packard Co.	6810024	3611	1	749,220	34
3633	Household laundry equipment (31): Maytag Co.	6810140	3633	1	760,171	78
3572	Typewriters (17): IBM	6910122		1	315,385	76
3634	Electric housewares and fans (286):					
	Sunbeam Corp.	6610096	3634			
	Dynamics Corp. of America	6910080	3634	2	850,281	41
3642	Lighting fixtures (1,203):					
	La-Z-Boy Chair Co.	6610060	2512			
	Tiffin Scenic Studios Inc.	6810138	3642	2	1,159,497	17
3651	Radio and television receiving sets, excluding communications (322):					
	V. M. Corp. et al.	6310120	3651			
	Ampex Corp	6610020	3651			
	KLH Research & Development et al.	6610112	3651			
	Magnavox Co.	6610127	3651			
	Martel Electronics	6637053	3651			
	Sylvania Electric Products Co. Inc.	6910084	3651	6	2,254,878	41
3652	Phonograph records (157):					
	Capitol Records Inc.	6110078	3652			
	Columbia Broadcasting System Inc.	6410008	4833			
	RCA Victor Records	6810117	3652			
	Garmisa Distributing Co. et al.	6910089	3652			
	Spartan Industries Inc. et al.	6910090	3652			
	American Broadcasting System	6910644	3652			
	Pickwick International Inc.	5910645	3652			
	Capitol Industries Inc.	6910646	3652			
	Columbia Broadcasting System	6910647	3652			
	Transamerica Corp.	6910648	3652	10	180,173	69
3679	Electronic components and accessories, n.e.c. (1,743):					
	Stancor Electronics Inc. et al	6510172	3679	1	2,332,215	13
3691	Storage batteries (183):					
	Moto-Truc Co.	6710150	3691			
	Otis Elevator Co.	6710151	3691			
	Eaton Yale & Towne	6710152	3691			
	Lewis-Shepard	6710153	3691			
	Raymond Corp.	6710154	3691			
	Clark Equipment Co.	6710155	3691			
	Allis Chalmers Inc.	6710156	3691	7	516,457	59

Ind. code	Proposed respondent	File No.		Num- ber of firms	Sales, industry/ respondent (thousands)	4-firm concentra- tion (percent)
3694	Electrical equipment for internal combustion engine (163):					
	General Motors.....	6710095	3694	1	900,663	69
3714 1	Motor vehicle parts and accessories (1,655):					
	National Wheel & Rim Association.....	6110824	3714			
	Chrysler Corp.....	6610120	3714			
	Ford Motor Co.....	6610121	3714			
	General Motors Corp.....	6610122	3714			
	International Harvester Co.....	6610123	3714			
	White Motor Corp.....	6610124	3714			
	Automotive Service Industry Association, et al.....	6710002	3714			
	Eskimo Radiator Manufacturing Co.....	6810017	3714			
	Arrow Armatures Co.....	6910004	3714			
	Maremont Corp.....	6910043	3714	10	12,345,630	79
3799	Transportation equipment, n.e.c. (507):					
	Vesely Co. (man-hours worked/required, 833).....	6610106	3799	1	167,375	14
3811	Engineering, laboratory, and scientific and research (571):					
	Curtiss Wright Corp.....	0108703	3811	1	553,920	29
3822	Automatic temperature controls (88):					
	Robertshaw Controls Co.....	6810105	3822	1	527,358	55
3842	Orthopedic, prosthetic, and surgical appliances (657):					
	Reylon, Inc. (2844).....	6310251	2844			
	Radioear Corp.....	6710269	3842			
	Telex Corp.....	6910029	3842			
	Siemens Medical of America, Inc.....	6910030	3842			
	Seeburg Corp.....	6910031	3842			
	Maico Hearing Instruments.....	6910032	3842			
	Beltone Electronics Corp.....	6910033	3842			
	Audivox, Inc.....	6910034	3842			
	Acousticon International.....	6910035	3842			
	Otarion Electronics, Inc.....	6910036	3842			
	Dahlberg Electronics, Inc.....	6910037	3842			
	Zenith Hearing Aid Sales Corp.....	6910038	3842	12	594,756	49
3861	Photographic equipment and supplies (499):					
	Xerox Corp.....	6510009	3861			
	SCM Corp.....	6510030	3861			
	Lanier Systems Co.....	6610056	3861			
	Savin Business Machines Corp.....	6910054	3861			
	Litton Industries, Inc.....	6910068	3861	5	1,851,213	63
3871	Watches, clocks, clockwork devices and parts (150):					
	Bulova Watch Co.....	6710270	3871	1	511,168	46
3931	Musical instruments (288): Chicago Musical Instru-					
	ment Co., et al.....	6910095	3931	1	314,407	38
3949	Sporting and athletic goods, n.e.c. (1,361): W. J. Voit					
	Rubber Corp.....	6510039	3949	1	704,718	37
3961	Costume Jewelry and costume novelties, except pr					
	(910): Coro, Inc.....	9610023	3961	1	380,478	17
3964	Needles, pins, hooks and eyes, and similar notions					
	(315): Talon, Inc., et al.....	6410016	3964	1	337,285	34
3999	Manufacturing industries, n.e.c. (1,479): Fur Dressers					
	Bureau of America, Inc.....	6910100	3999	1	458,471	13
4925	Mixed, manufacturing or liquid petroleum gas pro-					
	duction and/or distribution:					
	LP Gas Suppliers, Inc.....	6810115	4925			
	LP Gas Suppliers.....	6610171		2		
4931	Electric and other services combined: Virginia Electric					
	& Power Co.....	6610117	4931	1		
5012	Automobiles and other motor vehicles:					
	Fiat-Roosevelt, et al.....	6910081	5012	1		
5013	Automotive equipment:					
	Parts Inc.....	6810139	5013			
	Beck Distributing Corp., et al.....	6910016	5013	2		
5022	Drugs, drug proprietaries, and druggists, sundries:					
	National Association of Retail Druggists.....	6610034	5022			
	Yardley of London, Inc., et al.....	6610076	5022	2		
5043	Dairy products:					
5048	Fresh fruits and vegetables:					
	Andrus & Roberts Produce Co. et al.....	6510089	5048	1		

5049	Groceries and related products, n.e.c.:				
	R. W. Winchell Donut Supply Co.	6810039	5049	1	
5059	Farm products, raw materials, n.e.c.:				
	Aberdeen Tobacco Board of Trade	6910042	5059	1	
5065	Electronic parts and equipment:				
	Martel Electronics, Inc.	6810008	5065	1	
5082	Construction and mining machinery and equipment:				
	Dejur-Amsco Corp.	6510174	5082	1	
5087	Equipment and supplies for service establishment:				
	Keken Companies, Inc.	6710169	5087	1	
5091	Metals and minerals, n.e.c.:				
	Great Lakes Carbon Corp.	6510023	5091		
	Crystal Industries, Inc., et al.	6510164	5091	2	
5093	Scrap and waste materials:				
	Hugo Neu-Proler Co.	6610009	5093	1	
5095	Beer, wine, and distilled alcoholic beverages:				
	Beverage Distributors, Inc., et al.	6510159	5095	1	
5099	Wholesalers, n.e.c.:				
	West Coast Record Distributors	6610044	5099		
	Yamaha International Corp.	6710145	5099		
	American Toy Co., et al.	6810119	5099	3	
5311	Department stores:				
	Gold Bond Stamp Co.	6510132	5311		
	Leon Srago Associated Catalogues	6610029	5311	3	
5341	Automatic Merchandising Machine Operators:				
	Standard Oil Co. of Ohio	6510173	5341		
	Automatic Retailers of America	6610042	5341		
	Automatic Retailers of America et al.	6610080	5341	3	
5399	Miscellaneous general merchandise store: Gibson				
	Products Co.	6710229	5399	1	
5411	Grocery stores:				
	Food Fair Stores, Inc.	6710230	5411		
	Safeway et al.	6810053	5411		
	Quik Pik Food Stores, Inc.	6810071	5411		
	Kroger Co.	6910014	5411		
	Atlantic & Pacific Tea Co. et al.	6910079	5411	5	
5621	Women's ready-to-wear stores:				
	National Association of Women-Children Ap- parel Sale	0108691	5261		
	Mode-O-Day Frocks Co.	6610184	5621	2	
5732	Radio and television stores: Anderson-McConnell				
	Advertising Age	6810014	5732	1	
5733	Music stores:				
	Handelman Drug Co.	6410201	5733	1	
5999	Miscellaneous retail stores, n./e./c.: International				
	Brotherhood of Magic	6710231	5999	1	
6052	Foreign exchange establishments: American Express				
	Co.	6510140	6052	1	
7213	Linen supply and industrial laundries:				
	Mission Linen Supply et al.	6710016	7213		
	American Linen Supply Co., et al.	6710083	7213		
	Steiner American Corp., et al.	6710084	7213		
	Chalmette Linen Service et al.	6810108	7213	4	
7221	Photographic studios, including commercial photo:				
	Delmar Studios Inc., et al.	6910007	7221	1	
7311	Advertising agencies Premium Advertising Corp. et al.	6810099	7311	2	
7351	News syndicates: Washington Post Co.	6910093	7351	1	
7394	Equipment rental and leasing services:				
	A to Z Rental Inc.	6610125	7394	1	
7396	Trading stamp services:				
	Top Value Enterprise Inc.	6410226	7396	1	
7538	General automobile repair shops.				
7539	Automobile repair shops, n./e./c.:				
	Aamco Transmission Co.	6810141	7539	1	
7949	Amusement and recreation services, n./e./c.:				
	Wrather Corp.	6810076	7949	1	
8611	Business associations:				
	Wisconsin Men's Apparel Club et al.	6710250	8611		
	Ski Industries America	6810116	8611	2	
2911	Lubrication oil (266):				
	John Deere Co.	6910111		16,496,896	34
2241	Man made fibers (350):				
	Eastman Kodak Company, et al.	6910119		349,071	20
2644	Wall coverings (77):				
	Borden, Inc., et al.	6910112		36,548	33
4833	Television stations:				
	Columbia Broadcasting Co., et al.	6410008			

¹ 3714 not quoted; 3717 motor vehicles and parts used here.

MEMORANDUM

JUNE 20, 1969.

Subject: Response to Commissioner Nicholson's Memorandum of June 10, 1969,
"Budget Plans of the Bureau of Restraint of Trade for Fiscal 1971."
To: Commission.
From: Bureau of Restraint of Trade.

This memorandum will undertake to relate the efforts of each of the divisions of this Bureau to what the Bureau conceives to be its overall objectives in response to Commissioner Nicholson's memorandum of June 10, 1969.

In evaluating the projects in which the divisions of this Bureau are engaged and/or propose to be engaged in fiscal 1971, and in order to make judgments or choices as to the relative merits of the divisional budget requests, which must include both project and non-project manpower commitments, the Bureau has little alternative but to apply essentially the same concepts with respect to its responsibilities and objectives as in the past. We realize that workload and economic demands require a shifting of emphasis and manpower from time to time where the need is considered greatest, and this has been and will continue to be done.

Fundamental differences in concept and approach may well result in different "evaluation" judgments as between members of the Commission and this Bureau, and, indeed, between the Bureau and its individual divisions.

We are reluctant to involve this memorandum with statements of Bureau position which are not the specific subject of Commission request or which may themselves involve propositions beyond the scope of this memorandum. We believe, however, that at least some statement of basic concepts are relevant here, if for no other purposes than to provide the Commission with specific propositions for review which will enable it to guide the Bureau with appropriate direction at this time.

This Bureau proceeds on the assumption that it constitutes an enforcement unit within the Commission with its primary responsibility in the enforcement of those laws prohibiting unfair methods of competition involving trade restraining acts or practices, which Congress has directed this Agency to enforce. Simply stated, we conceive that, to the extent available resources permit, it is the mission as well as the duty of this Bureau to enforce the laws within the Commission's jurisdiction in each area of responsibility assigned to it by the Commission.

Each of these areas of responsibility involves trade restraints which, we believe, are of particular significance to overall antitrust and trade regulation enforcement. It is our understanding, in the absence of Commission instructions to the contrary, that it is the Bureau's mission to maintain substantial and effective efforts in each of these areas of responsibility.

It is essentially for this reason that in past Bureau submittals we have recommended a reasonable balance in the allocations of manpower among the several divisions on the basis of the manpower needs relevant to each division's area of enforcement. Since the responsibilities of each division in its area of enforcement far exceed the manpower allocations which may be made on the basis of realistic expectations, we have not recommended the disproportionate allocation of manpower to one division, or to one area of responsibility, on a basis which will seriously impair the ability of other divisions, or the Bureau, to function effectively in even other area of enforcement responsibility.

The increasing acceleration of the merger movement within the economy in recent years, for example, increases the need for additional attorneys in that Division. Some transfers of personnel from other divisions and from other bureaus to ease this crisis are being made. This does not mean, however, that the rate or significance of trade law violations otherwise, are to any extent abating. On the contrary, even antimerger enforcement itself may incline companies to other anticompetitive measures. Enforcement actions against mergers in the dairy and allied grocery products industries, as an illustration, appear to have increased traffic on other roads which lead to concentration. Discriminations in price relative to the supply of food products to major chain purchasers, the effect of which is to squeeze out smaller competitors in either the primary or secondary levels of trade, move in precisely the same direction. A balanced enforcement program is, in the Bureau's view, not only warranted but essential.

The problems of *non-competition* in already highly concentrated industries certainly merit the Commission's attention and study. The problems in many other industries, however, where practices exist which, in general course, can

operate to ultimately produce additional and more widespread concentration, should not be neglected in the process. General enforcement remains urgently needed in each area of our responsibility.

The Bureau realizes, of course, that only a relatively small and selective coverage can be provided with respect to discriminatory practices generally, and with respect to the bulk of general trade restraint matters. However, substantial manpower must be committed to hand such matters, even on a minimum scale. It is the Bureau's view that a significant prophylactic effect, promoting general compliance with the law, is generated by selective consideration of existing anticompetitive practices at a variety of marketing levels and in a spectrum of industries.

"Evaluations" as to the relative merits of the budget requests of the several divisions as an integral part of the overall Bureau effort, are influenced by the foregoing considerations. For one thing, preventive measures are hard to equate with corrective measures. Further, a single evaluation basis for project and non-project work commitments between divisions, in the form of a constant or consistent common denominator, is not available. The "value" factors are often different in their application to the work commitments of the various divisions.

The Division of Accounting is essentially a service division, whose manpower needs are related to the nature and volume of the work of the enforcement divisions.

The basic manpower needs of the Division of Compliance are similarly related to the work results of the enforcement divisions. With the professional personnel assigned the Division of Compliance being as limited as it is, little more can be accomplished than the effectuation of compliance with the Commission's current orders as they become final. Section 7 orders, individually, require the greatest work commitment, but Section 2 Clayton Act orders and Section 5 FTC Act orders also require substantial manpower assignment. If the Commission's orders are to be made effective, the Compliance Division must at least obtain sufficient information as to the nature and extent of initial compliance as will provide reasonable assurance to the Commission with respect to the effectiveness of each such order. This initial responsibility, however, represents the primary workload of the Division, and leaves too little of its staff available for its other responsibilities. In fact this is the most seriously understaffed division of the Bureau at this time.

On occasion, satisfactory reports of compliance cannot be secured by means of correspondence. Field investigations are then necessary to determine the nature and extent of initial compliance. Such investigations add to the backlog of matters in the field and compete for available manpower. The value or significance of compliance investigations may not be limited to the nature of the practices which originally grounded the order, however. A further consideration, involving the necessity to maintain enforcement integrity with respect to Commission orders, is also presented.

Manifestly, the significance of some matters within the jurisdiction of the Compliance Division, exceed that of others. We regard compliance with the outstanding TBA orders, dairy industry orders, and pending civil penalty actions, as constituting the division's highest priority matters.

The enforcement activities of the other three divisions of the Bureau are based upon their individual expertise, experience and enforcement concepts. Such activities are, of course, subject to the direction first of the Bureau and ultimately of the Commission. Such activities may be expanded, contracted or redirected as required. The Bureau regards the activities of these three divisions as interdependent and complementary. The information submitted by each of these divisions is necessarily addressed essentially to its own area of enforcement. The Bureau has reviewed this material from the point of view of the extent to which contributions are made to the Bureau's overall effort.

As appears from a review of the material submitted by the enforcement divisions, some confusion of terms is indicated, between the concept of inter-project "evaluation" on the one hand, and "selection of alternatives" on the other.

Each of the divisions, except General Trade Restraints, assumed that choices between "alternative" courses of action contemplated *procedural* choices only, e.g., consent orders versus litigation, or, a case-by-case approach versus industry-wide enforcement-policy declarations, etc. The Division of General Trade Restraints, on the other hand, in its memorandum responding to requests for further information from Commissioner Jones, advances a proposal to proceed on a broad front against concentrated industries, on the basis of existing struc-

ture, oligopoly power distribution and non-competitive price levels. In discussing its proposal, the Division provides its evaluation formula for alternative choices between concentrated industries against which to proceed. Its evaluation method would measure public interest by quantifying, in terms of dollar amounts, the difference between so-called monopoly-level prices and a lower competitive-level of prices.

Where acts, practices or methods of competition are the basis for a proceeding, however, other methods of evaluation frequently must be used. To "nip in the bud" a potentially dangerous trade restraining practice, has merit not reasonably quantifiable by any method which we are able to suggest. Proceedings which eliminate practices which have the tendency to destroy competition require different bases for evaluation. Cases supported by evidence disclosing clear violations of law must be evaluated differently than first impression cases grounded exclusively on economic theory.

In discussing planning procedures, proposals for the re-casting of antitrust enforcement and associated matters, the Division of General Trade Restraints provides the Commission copies of certain memoranda as appendices. The Bureau approves development of new processes and approaches as advanced by Division of General Trade Restraints, but has not concurred in the specific recommendations or reasoning of that Division. To indicate the Bureau's position with respect to them, we are forwarding herewith memoranda by the Bureau on these matters. These are attached as Appendix 1 through Appendix 4. The recommended breakfast cereal investigation is still under review at Bureau level and when forwarded will include the Bureau's evaluation.

Each of the divisions of the Bureau has made an intensive and sincere effort to supply all of the information requested and in the form believed to be desired. The burden of attempting to assemble and present this volume of information in so short a time has been considerable. It is hoped that the extreme expedition with which the task has been done has not resulted in too great a cost in clarity of exposition or completeness.

The areas of activity which the Bureau considers of greatest significance, analyzed in some detail within the several divisional memorandum-reports, are evaluated from the point of view of overall Bureau effort. In order of priority they are as follows:

1. *Grocery Products*, involving Section 7 and Section 2 Clayton Act applications and Section 5 of the FTC Act. Associated matters, with various sub-industry breakdown, are active in each enforcement division. We will always be as active in this field as we have manpower to commit, and it still won't be enough.

2. *Automotive Parts*, involving Section 7 and Section 2 Clayton Act applications and Section 5 of the FTC Act. Each of the enforcement divisions is substantially committed, and will be for as long as we can foresee.

3. *Apparel*, involving Section 7 and Section 2 of Clayton Act and Section 5 of the FTC Act. Mergers and containment practices by manufacturers of synthetic and natural fibers present the most significant problems.

4. *Compliance with TBA orders*, under Section 5 of the FTC Act, is considered of great importance and should be vigorously supported.

5. *Special Studies and Activities*, including Section 7 Conglomerate Merger Study, the study of high concentration industries, the Pre-Merger Notification Program, and the implementation of outstanding enforcement policy statements. These will be active in both fiscal 1970 and 1971.

6. *Reciprocity*, a practice cutting across industry lines in both Section 5 and Section 7. Consideration of reciprocity is currently active and promises to become more so in future years.

7. *Lumber and Building Supplies* under Section 7. The rash of acquisitions among manufacturers of such vital products as construction materials creates a threat to the public interest which the Bureau regards as of great importance.

8. *Hearing Aid Industry* under Section 5. The thrust of priorities in this industry, affecting the consumer group least able to pay, provides it with great public interest, and represents, by example, the concern of the Commission with consumer oriented restraint of trade matters.

9. *Cement Industry* under Section 7. This is an area in which the Commission is already deeply committed. At least through fiscal 1971 its priority must remain high.

10. *LP-Gas Industry* involves both Section 5 and Section 2 and will require considerable manpower commitments.

11. *Publishing Industry* involves Section 2.

12. *Newspaper and TV Advertising* involves Section 5.

APPENDIX 1

Subject: Memorandum of March 25, 1969, from Chief Division of General Trade Restraints.

To: John N. Wheelock, Executive Director.

From: Cecil G. Miles, Director, Bureau of Restraints of Trade.

With your transmittal slip of March 27, 1969, you referred to me "for recommendation" a memorandum of March 25, 1969, addressed to you by Mr. Rufus Wilson, Chief, Division of General Trade Restraints of this Bureau, commenting on the memorandum by Mr. John Hurley of January 3, 1969 on Planning New Investigations.

Your reference included the transmittal slip to you of March 26, 1969 from Mr. Hurley suggesting, among other things, that it be determined whether or not Mr. Wilson's memorandum represents the Bureau's position. Mr. Wilson's memorandum is an extremely well-written, instructive and useful paper, but it does not represent the Bureau's position. Our position with respect to Mr. Hurley's memorandum of January 3, 1969 is set out in some detail in our memorandum to you of February 4, 1969.

We also transmitted with our memorandum of February 4, comments by each of the enforcement divisions of this Bureau concerning Mr. Hurley's memorandum of January 3. In order to highlight their reactions, I am quoting below a short excerpt from the comments by each of them:

Division of Compliance: "While I recognize the desirability of applying, as a matter of effective planning, a rationalized distinction between the investment concept and operational planning, I must confess that I find Mr. Hurley's memorandum to contain certain questionable premises."

Division of Mergers: "The problems involved in determining alternative courses of action, using the tools of factoring out costs, gauging benefits, and assessing ultimate advantages or disadvantages, are not practical within this Division unless there is a great deal more background, or intelligence information available for accomplishing this type of appraisal."

Division of General Trade Restraints: "Certainly it can be said that our investigational planning is not as ethereal as the recommendations in the subject memorandum."

Division of Discriminatory Practices: "We doubt that this proposal, as it relates to investigations of non-competitive industries, has general application to all of the Divisions in the Bureau of Restraint of Trade."

The following excerpt from our memorandum of February 4, which is amplified by detailed discussion therein, fairly reflects, we believe, the Bureau's basic position, then and now, with respect to Mr. Hurley's memorandum of January 3:

"The Bureau has heretofore submitted for Commission consideration a proposed planning and priorities program. That proposed program incorporates concepts both of interproject evaluation and choice alternatives in the institution of Bureau investigations. Insofar as the memorandum by Mr. Hurley advocates use of these concepts and insofar as definitions of terms and citations of general economic and planning principles are concerned, we have no quarrel with it. However, Mr. Hurley assumes a one-dimensional objective with respect to institution of investigations by this Bureau with which we cannot agree. Accordingly, the suggestions incorporated in this latest memorandum, as well as those contained in his earlier memorandum of August 27, 1968, appear to us to have little, if any, practical application."

At my request, Mr. Bartley T. Garvey, the Program Officer for this Bureau, studied Mr. Wilson's memorandum, and has submitted to me his memorandum of April 3, 1969, commenting with respect thereto. I am in agreement with the comments contained in Mr. Garvey's memorandum, and it is transmitted herewith.

APPENDIX 2

MEMORANDUM

APRIL 3, 1969.

Subject: Mr. Wilson's memorandum of March 25, 1969.

To: Cecil G. Miles, Director, Wilmer L. Tinley, Assistant Director, Bureau of Restraint of Trade.

From: Bartley T. Garvey, program officer, Bureau of Restraint of Trade.

Mr. Hurley suggests that comments be provided in response to his query as to whether Mr. Wilson's memorandum of March 25, 1969, concerning "Planning New Investigations," represents the Bureau's position. As for my own position, I would comment as follows:

I consider the Wilson memorandum an extremely well-written, instructive and useful paper. I don't agree with its conclusions, but I have no quarrel with most of its substance.

It is, as a matter of fact, a much more articulate, knowledgeable and better oriented version of what Mr. Hurley himself has been endeavoring to propound in the course of several memoranda on this same subject, heretofore submitted through Mr. Wheelock to this Bureau.

One of the members of Mr. Wilson's staff, Mr. Charles Mueller, some time ago evidenced considerable interest in the matter of the essentially monopolistic characteristics of the breakfast cereal industry as providing a challenging example of a "non-competitive" industry. I told him that a recommendation for investigation of this industry, as a pilot proposition, to determine whether Section 5 of the F.T.C. Act could be found broad enough to successfully challenge such non-competitive practices, would be enthusiastically supported at least by me. I believe that it is both appropriate and desirable that Section 5 should be thus tested.

The conclusion that a separate office should be set-up forthwith to initiate such "structural" cases, however, I consider premature and presently unwarranted. Even less do I agree to Mr. Hurley's earlier proposal that the principal manpower of the Bureau of Restraint of Trade be shunted to such activity.

These proposals, I think, assume that if a little medicine appears efficacious for a particular malady, a great deal will surely result in instant health. We still have a great deal of *anti-competitive* virus extant, however, and no sure cure of the malady of *non-competition* is in context here, only experimental treatment. In over-committing manpower to a course of action that may well prove fruitless, other areas, where actual beneficial results can continue to be achieved, have to be abandoned.

I would like to see a suitable *test case* brought, challenging under Section 5 of the F.T.C. Act, oligopolistic practices which are non-collusive in the traditional sense, but which, because antithetical to competitive processes, need remedy, by containment of the major industry members relative to promotional or other practices foreclosing new entry, or by divestiture.

If successful in such a test case, a major manpower commitment to this area might well be justified. Until then, a major commitment of manpower, without any present assurance of initial success, appears to me a very injudicious course.

As to the second aspect of the proposal (also in line, I believe, with Mr. Hurley's own thinking) identification and analysis of certain structural characteristics which might disclose violation-prone industries, is recommended. Here again, I have no quarrel with the concept in appropriate application, but do not endorse the conclusion reached.

Certainly valuable contributions to planning can be provided in recommendations for high priority projects through apprehension and analysis of economic forces which may exist within an industry conducive to anti-competitive practices, such as price-fixing. Until a date of further development of the art, however, I would not recommend that the Commission issue price fixing "guides" or price fixing "enforcement policy statements" based exclusively on the inferences of such data. The distinction between collusion-prone high-concentration industries, and high-concentration industries whose members need not affirmatively conspire in order to minimize effective price competition, is not sufficiently clear, as I see it, to so predetermine areas of enforcement action. Conclusions so reached relative to discriminatory practices or exclusive dealing, would seem to me even less certain.

The last conclusion in Mr. Wilson's memorandum, is to the effect that the Commission, with the aid of an adequately staffed and competent planning office might itself initially determine the broad areas of economic study and enforcement action to which the agency's resources should be committed. I would endorse this suggestion.

I believe, in line with the above suggestion, that the Bureau of Restraint of Trade should remain strictly *enforcement oriented* and committed to some degree of enforcement responsibility with respect to *all* of the statutes Congress has been fit to empower the agency to administer in the antitrust and trade regulation field. To this end, in addition, within-bureau planning remains as an imperative because in each statutory area we are undermanned. The Bureau's responsibilities also include the need for as wide as possible a dispersion of enforcement attention throughout the economy, attention to incipient restraints which may be costly if permitted further to develop, and at least selective consideration of individual complaints of law violation whether from Congressional sources or otherwise.

APPENDIX 3

Subject: Comments on Hurley Memorandum of January 7, 1969.
 To: John N. Wheelock, Executive Director.
 From: Bureau of Restraint of Trade.

Under date of January 7, 1969, you forwarded "for study and consideration," a memorandum dated January 3, 1969, by John J. Hurley, Economist, Office of Program Review.

Each of the enforcement Divisions of the Bureau has reviewed that memorandum, I am attaching their individual comments for your information.

The Bureau has heretofore submitted for Commission consideration a proposed planning and priorities program. That proposed program incorporates concepts both of interproject evaluation and choice alternatives in the institution of Bureau investigations. Insofar as the memorandum by Mr. Hurley advocates use of these concepts and insofar as definitions of terms and citations of general economic and planning principles are concerned, we have no quarrel with it. However, Mr. Hurley assumes a one-dimensional objective with respect to institution of investigations by this Bureau with which we cannot agree. Accordingly, the suggestions incorporated in this latest memorandum, as well as those contained in his earlier memorandum of August 27, 1968, appear to us to have little, if any, practical application.

It would be a simple matter indeed to allocate the Bureau's limited resources in arithmetic proportion and without regard to possible law violation, to investigation of selected major industries "... that are reaching or have attained a state of oligopoly in which a few large sellers are rivals."¹ Alternatively, were our mandate no broader, the Bureau's resources might easily be apportioned between industries and major individual producers "... primarily on the size of the industry, the level of industry concentration and the size of the proposed respondent(s). In this approach complaint letters are relegated to a supplementary role in launching antitrust action."² Again, the Bureau might divide its resources among each of "... the five most promising areas of non-competition to investigate."³

We agree that factors such as these have a place in the planning of this Bureau. We cannot agree, however, that they, in any manner or form, constitute planning. Bureau planning, as we see it, must accommodate within the compass of its limited resources, not one, but several areas of responsibility. Among them are some, apparently not contemplated by Mr. Hurley, such as: enforcement responsibility with respect to specific statutes, the Robinson-Patman Act for example;⁴ responsibility to seek out and deter anti-competitive practices at stages of development *before* they reach Sherman Act proportions;⁵ a responsibility of surveillance;⁶ a responsibility to reasonably accommodate requests for action from Congressional and other official sources; and, a responsibility, to some degree at least, specifically to countenance and consider the applications and complaints of the business community disclosing violations of those laws assigned by Congress for enforcement by this agency.

The heretofore submitted proposed planning program for this Bureau seeks to accommodate each of the foregoing areas of responsibility. Absent specific Commission direction to the contrary, we believe the Bureau's planning must. For this reason, perhaps, or because certain changes in methods and procedures were also recommended in the Bureau's proposed planning program, the proposal may be viewed in some quarters as still too "outer directed," and, in others, as too radical a departure from the "old" system.

We are seeking improvements in the Bureau planning. We are seeking also improvements in efficiency through recommended changes in methods and procedures. We find little practical assistance or enlightenment in Mr. Hurley's comments or suggestions in this regard.

¹ Hurley memorandum of Aug. 27, 1968, page 2, last para.

² *Ibid.*, page 1, last para.

³ Hurley memorandum of Jan. 3, 1969, page 4, last para.

⁴ In Section 2 Clayton Act secondary-line cases industry concentration is a matter of little direct concern. With respect to the application of the Robinson-Patman Act to "non-competitive" industries, see comments Division of Discriminatory Practices memorandum attached, page 3.

⁵ "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices which, when full-blown, would violate these Acts. . . ." *F.T.C. v. Motion Picture Adv. Service Co.*, 344 U.S. 392 (1953).

⁶ Section 5(6) of the Commission's organic Act states: "The Commission is hereby empowered and directed to prevent . . . unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Directing attention to Mr. Hurley's specific recommendations, we would comment as follows:

1. With respect to formulas for quantifying the "value" of proposed investigational projects, referred to as "... the point where economics can make a contribution to improved decision making on new resource involvements," we are apprehensive that the process itself would occasion substantial additional resource involvements.⁷ Computations by economists measuring the "costs" of monopoly pricing, or the equating of industry concentration with competitive pricing in terms of the cost to consumers or to the economy, are useful antitrust tools. Other bases for quantifying antitrust values may also conceivably be formulated on the basis of behavioral studies of particular practices in particular industries. We fail to perceive, however, how a determination of *whether to initiate* a particular investigation can logically be made to rest upon the basis of information that is available only *after* investigation.

2. With respect to Mr. Hurley's approach to selection of "alternatives," we have more than one difficulty.

First, we believe that any consideration of alternative courses of action assumes practical relevancy in the first instance, only with respect to alternatives consonant with a given objective; e.g., under Section 7, which mergers should be investigated? and, again, under Section 2(a) of the Act, which areas of indicated violation should be investigated? The extent of the resource commitment which should be assigned within particular statutory sections presents a separate value judgment. Accordingly, the "gains" produced by the expenditure of resources necessary to undertake an economic study of the effects of the granting of patent monopolies of members of the drug industry, to cite Mr. Hurley's illustration, are not the same kind of "gains" produced by agency action looking to re-creation of competition eliminated through a price fixing conspiracy by members of the plywood industry. The applicable objectives are different.

Next, in the process of selecting alternative courses of action, it becomes apparent that the selection perspective varies with the known universe of alternatives. The Division of Mergers, over a given period, for example, has a substantially complete universe of mergers (at least larger mergers) under consideration. The Division of Discriminatory Practices, on the other hand, has available to it only an incomplete universe of investigative alternatives, limited, for the most part, to information secured in past investigations, testimony in legal proceedings, and information from the business community, largely in the form of applications for complaint. Robinson-Patman investigations, accordingly, frequently must include, in process, separate inquiry on the question of the relative significance of that particular investigation.

Finally, an essential consideration in selecting alternative courses of action, in our view, in justification of any new proposed course, weighed against existing assignments. We believe that some process of selective substitution is called for. We do not find that Mr. Hurley's generalizations on this subject are equated with the problems of actual investigational project selection.

3. Should the Bureau's proposed planning program be approved, the regular quarterly workload report showing "Highlights" for the current and ensuing quarters, would, we believe, provide the principal information recommended for submission in the form of separate "planning" reports by Mr. Hurley. We accordingly do not feel that a separate quarterly "planning" report is needed.

4. Mr. Hurley's recommendation with respect to matters to be included within a suggested 30-day report to the Commission, in our view, inappropriately assumes a Bureau commitment to areas of economic study beyond the proper office of this Bureau. This Bureau's responsibility to conduct economic behavioral studies, appears to us to attach only as a matter of special Commission assignment. We certainly do not view it as a Bureau prerogative available, at the Bureau's option, as a displacing alternative to law enforcement. Areas of existing monopoly, without unlawful monopolization, and existing oligopoly, without collusion, may very well comprise Mr. Hurley's target of "the five most promising areas of non-competition to investigate." Studies involving conglomerate mergers, the department store industry or the electrical supply industry, however, might serve as illustrations of Commission assignments to the Bureau which are not specifically enforcement oriented, but which must, when so directed, be fitted within the Bureau's planning program.

⁷ The Division of Mergers states in this regard: "Our very limited manpower resources makes such a complicated requirement . . . impractical for such a small operation."

Taking into account the foregoing areas of disagreement with Mr. Hurley, we endorse the proposition that new investigative projects should be initiated on the basis of a careful evaluation of alternatives, whether such investigations are the subject of complaint letters or not, and that a process of continuous reappraisal of projects should be made operative to successively cull out matters of lesser import. This concept is reflected in the program which has been proposed by this Bureau.

Respectfully submitted,

BARTLEY T. GARVEY,
Program Officer, Bureau of Restraint of Trade.

APPENDIX 4 (SUBMITTED DECEMBER 24, 1968)

BUREAU OF RESTRAINT OF TRADE PLANNING AND PRIORITIES PROGRAM

The greatest criticism of the Bureau's over-all operation appears to be that it relies too heavily on the receipt of applications for complaint as a basis for affirmative action. With the exception of the Division of Mergers, the operation of which is essentially guided by considerations as to the comparative economic significance of particular acquisitions and mergers out of a known universe of major acquisitions, the Bureau allegedly frequently fails to adequately relate its activities to areas of indicated greatest anti-trust need. Although some violations of law within the responsibility of this Bureau manifest the kind of predatory action, competitive pressure or economic impact, that can be expected to result in applications to the Commission for corrective action, other areas of possibly greater anti-trust significance, do not. The anti-trust problems presented in the instance of high concentration industries, for example, characterized by administered pricing and power to effectively control production, normally do not result in applications for complaint from the business community. An effective close-knit conspiracy, even if its existence is otherwise suspected of indicated, frequently requires some inter-conspiratorial breakdown occasioning a direct "leak", in order that the Bureau may be formally apprised as to its existence through applications for complaint. Sometimes, also, specific complaints of law violation fail to disclose overriding anti-competitive practices within an industry. The greatest current project planning need, accordingly, is in Commission initiated projects separate and distinct from projects growing out of routinely received applications for complaint.

A planning study with respect to high concentration industries was undertaken by the Bureau of Economics pursuant to Commission direction dated August 9, 1968. In addition, however, the experience and expertise residing in the Divisions should otherwise provide considerable insight into anti-trust problem areas that merit Commission attention; and, merit attention to a degree beyond that of many matters received in regular course requiring substantial manpower commitment.

At meetings of the Bureau Priorities Committee (discussed below) recommendations and suggestions as to new significant areas for economic study or investigation looking to corrective action, will be expected. Increased selectivity in initiating new matters should specifically include consideration of matters other than those prompted by applications for complaint.

SCREENING AND PRIORITY EVALUATION BY DIVISIONS INITIATING INVESTIGATIONS IN THE FIELD

The following procedures are recommended for improved selectivity in initiation of investigations in the field. They will apply primarily to the Divisions of General Trade Restraints and Discriminatory Practices. The Division of Mergers' Screening procedures will continue, although recommended priorities; hereafter, will be reviewed by the Priorities Committee. Otherwise, that Division's screening operation will not be altered. The compliance Division's investigation in the field will be subject to priority designation, but not to the screening and evaluation criteria applicable to de novo matters. The existence itself, of a Commission order, can be considered to bespeak the economic need and public interest involved in seeing to it that compliance with the terms of such order is a justified undertaking.

The Office of the Director and the Division Chiefs, at the outset, will have to designate and agree upon a tentative beginning allocation for each Division, as to the time and manpower allocation between priority and non-priority matters.

Merely as a matter of a starting premise, it might be suggested that the Division of General Trade Restraints seek to establish a proportion of 40% work-commitment to priority matters with 60% on non-priority matters; Discriminatory Practices, 50% on priority matters and 50% on non-priority matters; Compliance, 75% on priority matters and 25% on non-priority matters; and Mergers, 90% on priority matters. These percentages are, of course, arbitrary figures suggested merely on the basis of apparent current operations.

Increased selectivity in screening and identification of high priority matters are closely related processes.

There follows suggested procedures for use within the Divisions originating investigations, prior to consideration by the Priorities Committee.

A *Priority Evaluation Statement* (PES), will be prepared for each currently unassigned formal investigation in the field, and for each formal investigation in the field hereafter recommended. It will be in addition to, and not merely an incorporation within, the memorandum initiating formal investigation. With respect to formal investigations hereafter recommended, the PES will be prepared *prior* to preparation of the memorandum to the Bureau of Field Operations requesting investigation in the field. The PES will be as short as completeness will allow but should not exceed two (2) pages in any but the most unusual circumstances.

A PES will *not* be prepared relative to all applications for complaint, but only as to those matters which the assigned attorney has a real and reasonable basis for conclusion that the matter warrants formal investigation, and is subject to review by the Division Chief. The Division Chief will satisfy himself both as to the responsiveness of the PES to *each* of the listed criteria (Appendix A) and the soundness of the basis for arriving at each such evaluation judgement, through discussion with the assigned attorney. The Division Chief will determine, in the light of the Division's other commitments, whether the matter in his judgement is of such merit as to warrant docketing as a formal investigation in the field. If not, other appropriate disposition will be directed by him, such as: (1) that the assigned attorney secure further relevant evaluation information from the applicant, or from other sources; (2) that an appropriate field office be contacted, through the Bureau of Field Operations, to determine if professional field personnel, free of priority assignment, may be made available to secure further evaluation information on an informal basis; (3) that the matter be disposed of within the Division on an informal or "Small Business" basis; or (4) that the matter be suspended, for possible future consolidation with other related matters, or closed.

The Division Chief, if concurring with the recommendation for field investigation, will assign a tentative priority designation, subject to review by the Bureau Priorities Committee. The priority designation may be one of the following: (1) First Priority by Commission Direction (if applicable); (2) (Divisional) First Priority; (3) (Divisional) Second Priority; or (4) Routine.

The memorandum to the Bureau of Field Operations requesting field investigation will *not* be prepared by the assigned attorney until *after* priority evaluation concurrence by the Bureau Priorities Committee.

The Priorities Committee will evaluate the priority recommendation on the basis of the PES, existing Commission programs, and the overall plans and projects of the Bureau. If the Office of the Director concurs in the priority designation of the Division, or after agreement as to assignment of different priority, the matter will be transmitted to the Bureau of Field Operations.

ASSIGNMENT OF PRIORITIES

In assignment of priorities under the new Bureau planning program, it should be noted in particular, that initiation of a "priority" field investigation¹ by the Divisions of General Trade Restraints, Discriminatory Practices or Compliance, will, in normal circumstances, cause the *suspension* of another investigation in the field, theretofore initiated by that Division, to permit work on the priority matter on an expedite basis.

The reason for employment of this procedure is to specifically provide machinery which will require reevaluation of the importance and comparative significance of work assignments pending in the field, and which will, in operation, weed out the less significant matters.

Increased selectivity in docketing investigations, by itself, will not affect back-logs in the field, nor will it insure, with any degree of immediacy, that the greatest emphasis is, or will be, attended the most significant matters. Therefore, the assignment of priorities has been set up so as to directly effect an *attrition* of less important matters.

It is intended that priorities will not only be assigned—they will be effectuated. Priority matters, in the restraint of trade area, will be subjected to controls so as to insure that they will in fact be done first. They will not, for example, be permitted to be delayed by investigational back-logs in the field. Matters twice suspended to permit investigation of higher priority matters will be returned to the originating Division for re-evaluation and closing or such other disposition as may be warranted.

Determination of priorities will have to be accomplished in two different steps. Priorities with respect to certain pending Division-oriented matters will have to be assigned retroactively, in order to gain some immediacy in effectuating overall priorities. This will be undertaken as soon as practicable. Otherwise, priorities will be determined by a Priorities Committee *as investigations are initiated*. This will be undertaken at once.

PRIORITIES COMMITTEE

A Priorities Committee will become operative immediately. It will function under the Bureau Director. The Committee will consist of representatives of the Office of the Director, (i.e. the Screening and Program Officers, the Director or Assistant Director) and the Chiefs of each Division.² At the outset the Committee will meet every second Monday, at 9:30 a.m., beginning Monday. The frequency and dates of meetings may thereafter be adjusted as needs warrant.

On the Wednesday preceding each meeting, the Bureau's Program Officer will be supplied Priority Evaluation Statements from each Division with respect to: (1) Each matter to be proposed at the next meeting as a "first" or "second" priority investigation in the field; (2) Each seven-digit investigation proposed for initiation within the Division itself; (3) Any matter proposed for change in previously assigned priority (including, if appropriate, the upgrading of a matter initially carrying a "Routine" designation).

Copies of Priority Evaluation Statements will be circulated to other Division Chiefs, as appropriate, through the Program Officer. For purposes of Priority Committee review, each Division Chief will be prepared to report briefly as to the disposition of applications for complaint received since the preceding meeting and to identify and briefly report all matters proposed for formal investigation in the field. Each Division Chief will additionally be prepared to discuss each matter recommended by him for "first" or "second" priority assignment and his reasons therefor. After discussion by the Committee, a determination will be made by the Bureau Director, or his representative, with respect to each matter proposed for formal investigation as to whether the matter should be: (1) further supported by valuation data to be secured by the Division; or (2) docketed as a formal field investigation; and, (3) if so, the priority classification to be designated.³ Priority recommendations will be reviewed with respect to seven-digit investigations initiated within the Divisions. Proposed priority designation changes will also be considered.

Priority Assignment Re Pending Matters: The Priorities Committee designation of priorities for matters initiated from this date forward, will need priority assignment supplementation in two areas: First, with respect to seven-digit investigations currently pending unassigned in the field; and, Second, as to pending matters handled primarily or exclusively within the Divisions.⁴ Included also within this second category are matters pending in the field which are extensions or supplements to matters which already are in the nature of Division commitments (as where the practices of four companies, for example, are closely inter-associated, and complaints have issued against two of them while the other two are still under investigation in the field).

1. With respect to matters pending unassigned in the field, these will be identified, as of the date of approval of this phase of the priority program, and

¹ I.e., a designation other than "Routine."

² With the exception of the Chief of the Division of Accounting.

³ If a priority other than "Routine" is assigned, the procedures described below under "Correlation With the Bureau of Field Operations" will be followed. See also, Appendix B.

⁴ I.e., all Division of Merger investigations.

each affected Division will recommend priority designations for each such matter.⁵

Priorities as to these matters will be determined through the Priorities Committee in the same manner as with initial recommendations for field investigation.

2. With respect to pending seven-digit investigations within the Divisions, or field investigations whose priority classification can be shown to be directly related to significant matters currently pending within the Divisions, the following procedures, if and when approved, will apply.

Merger Division: Division of Mergers' investigations currently pending may all be considered as "priority" investigations for purposes of initial correlation of Bureau priorities. Designated *degrees* of priority for such investigations, however, will assist in setting up evaluation relationships as regards the work of the other Divisions and will provide a useful beginning point for subsequent priority determinations. Accordingly, the Division of Mergers will classify each of its pending investigations successively in order to importance, by industry, supplying, in addition, a brief statement as to the Section 7 significance of each industry in accordance with the Merger Screening Criteria, a copy of which is attached as Appendix C.

Other Divisions: The Division of General Trade Restraints, Discriminatory Practices and Compliance will review their files so as to enable each such Division to identify each pending investigation in the field which, in their judgment, warrants a classification of "first" or "second" priority, because of specific Commission directive, the relationship of such investigation to a pending Division project of major significance, or other over-riding consideration. Any such pending investigational matter, if the Priorities Committee assents to "first" or "second" priority designation, will be removed from the category of matters directly subject to suspension. Each such matter will be identified in a report to the Priorities Committee with a brief statement explaining the basis for each recommended priority classification.

MATTERS NOT SUBJECT TO PRIORITY PROCEDURES

Routine Divisional work assignments, assistance in preparation of advisory opinions, non-case duties, special projects, etc., together with informal and "Small Business" inquiries, remain among the matters *not* subject to the proposed formal priority assignment procedures. Of course, conduct of such work-assignments will be according to practical priorities, applied according to the best judgment of each Division Chief, and will be handled in a sufficiently flexible manner as to accommodate the demands of matters of designated priority, in the case of conflict.

CORRELATION WITH BUREAU OF FIELD OPERATIONS

In the instance of all priority assignments (i.e., other than "Routine") the Director of Field Operations will forward a copy of the PES to each Field Office so located as to be able to accommodate the investigation,⁶ advising them as to the approximate manpower commitment involved. Each Field Office so served will promptly review with its assigned Field Office attorney, all matters currently under investigation, previously initiated by the Division initiating the pending priority investigation. The Attorney in Charge of each such Field Office will thereupon directly advise the Director, Bureau of Field Operations by telephone as to their recommendation, based on the investigational data secured to date, for suspension of a matter, or matters, to accommodate the priority assignment. The Director, Bureau of Field Operations will tentatively select a matter, or matters, for suspension on the basis of the Field Office recommendations, and notify the Office of the Director, Bureau of Restraint of Trade and the originating Division, as to his recommendation for suspension. If the Chief of the originating Division does not concur as to the recommended suspension, he must elect another matter theretofore initiated by his Division, for suspension. In the possible eventuality that the Bureau of Field Operations and the originating Division jointly recommend to the Office of the Director, Bureau of Restraint of

⁵ It is not contemplated that the files of such cases need be returned from the Field Offices for this purpose, but merely that the Divisions involved draft Priority Evaluation Statements from their own records, for submission to the Priorities Committee.

⁶ It is contemplated that this will involve a minimum of three most proximate Field Offices, but in no event will be restricted to one.

Trade, that no matter initiated by that Division justifies suspension to accommodate the new priority investigation, in the public interest, the Bureau of Field Operations may, on the basis of investigational developments, propose a matter, or matters, initiated by another Division, for suspension. After appropriate review and conference with the Chief of such other Division, a formal determination as to suspension will be made by the Office of the Director, Bureau of Restraint of Trade.

The Director of Field Operations will promptly notify the Field Office, or Offices, with respect to any investigations formally designated for suspension, and will appropriately forward the initiating memorandum and files of the priority investigation.

Each Field Office with a matter formally designated for suspension, will prepare a Suspension Memorandum, noting the fact of suspension and the basis therefor; covering therein each of the criteria elements listed in the attached Appendix B. Suspension memoranda should be complete but brief, and should not exceed 5 pages. Copies of the Suspension Memorandum will be forwarded to (1) The Director, Bureau of Field Operations; (2) the Office of the Director, Bureau of Restraint of Trade; (3) the Division initiating the new priority investigation; and (4) the Division whose matter was suspended, if a different Division.

Suspended matters will be re-activated as soon as the superseding priority investigation is completed. Matters twice suspended to permit investigation of higher priority matters will be returned to the originating Division for re-evaluation, closing or such other disposition as may be warranted.

Priorities based upon Priority Evaluation Statements may be given a different priority at any time that circumstances warrant. Recommendations for priority changes may originate from any Office within the Bureau of Field Operations or the Director of that Bureau, or from the initiating Division of the Bureau of Restraint of Trade. Concurrence of the Office of the Director, Bureau of Restraint of Trade, must be secured. Differences between Bureaus as to priorities or suspensions which cannot be resolved, if such should occur, will be submitted to the Commission Program Officer for resolution.

A recommended change in priority will be supported by a memorandum covering each of the criteria elements applicable to a Suspension Memorandum (see attached Appendix B).

Continuous appraisal and re-evaluation of the projects and work commitments in Restraint of Trade matters, will require the specific obligation at all work levels, in both the Bureau of Restraint of Trade and the Bureau of Field Operations, to work and think in terms of work-project effectiveness and for inter-bureau coordination of effort to that end. The principal responsibilities of the Bureau of Field Operations will be to ascertain, secure and develop the facts supporting priority evaluations as to each investigation in the field, in terms of the nature, extent and duration of practices under inquiry, their competitive effects and the economic significance or impact of their continuation, together with the probability of establishing a basis for and the indicated best means for, effective corrective action by the Commission.

The affected Divisions of the Bureau of Restraint of Trade are to see to it that they are kept currently advised on all developments in the field on priority matters. Divisional attorneys, assigned priority matters, for example, are responsible for ascertainment that all desired avenues of investigation are being pursued; and that all needed coverage is made, while the investigation is still in the field.

Means, other than case-by-case litigation, for securing effective corrective action, should be considered and evaluated, if such means are presented, or as they may be revealed or suggested during the course of the investigation.

Close cooperation in utilization of compulsory processes, the securing of assistance from the Division of Accounting or from other Bureaus of the Commission are responsibilities of the Divisional attorney, when and if, during the course of the priority investigation, such need should arise.

APPENDIX A

CRITERIA ELEMENTS

1. *The substantiality of the unlawful acts or practices alleged* (i.e., the nature of the alleged law violation or violations; to extensiveness of alleged occurrence; the geographic area or areas involved; the indicated number of markets or businesses affected; the reported period of practice duration; etc.);

2. *The relevance of the market structure involved* (i.e., the significance of the acts or practices alleged in the light of the number, nature, size or market positions of those reportedly involved, including the alleged law violator, or violators, and the customers or competitors affected; the existence of vertically integrated participants; the existence of oligopoly or significant market control by any participating or affected parties; etc.) and

3. *The significance of the industry or of the commodity involved, or, alternatively, the significance of the economic or social environment in which the alleged violation occurs* (i.e., an evaluation of the indicated impact of the alleged act or practice noting the greater social-economic significance, for example, of a conspiracy to fix the price of fluid milk, than would normally apply with respect to a conspiracy to fix the price of home photographic film; the indicated urgency for corrective action as a result of particularly critical economic or marketing conditions, etc.).

APPENDIX B

CRITERIA ELEMENTS

1. The substantiality of the unlawful acts or practices alleged;
2. The relevance of market structure;
3. The significance of the industry or of the commodity involved, or, alternatively, the significance of the economic or social environment in which the alleged violation occurs;
4. The indicated probability that corrective action can be sustained, on the basis of jurisdictional facts already adduced, or on the merits;
5. Ameliorating economic or competitive developments subsequent to initiation of investigations; and
6. Time and manpower involvement out of proportion to the merit of other factors considered.

APPENDIX C

CRITERIA USED IN SELECTING MERGER DIVISION CASES FOR INVESTIGATION

A careful but flexible selection procedure is followed in choosing those acquisitions and mergers which will be investigated in depth. Broadly speaking, the preliminary screening process involves analyzing mergers and acquisitions in the context of the industry or industries involved, the structure of the industry and the competitive consequences reasonably likely to result from the merger or acquisition. The specific criteria used include:

1. **Market Share.** How large is the acquisition sales-wise? What shares of the market are being combined?

2. **Concentration.** What is the concentration ratio of the industry? Is concentration likely to be increased or deconcentration prevented as a result of the merger?

3. **Product Markets.** Is the merger occurring in an industry which directly affects consumers such as food, housing and apparel? A high priority is given to mergers in these industries. Also, is a basic industry involved such as steel, petroleum, chemicals or textiles where a significant merger may cause adverse competitive repercussions in related industries?

4. **Geographic Market.** Preference is given to those mergers and acquisitions involving the broadest geographic market.

5. ***Per se* Violations.** Where it appears that a *per se* violation of Section 7 is involved, initiation of an investigation is mandatory in carrying out the Commission's enforcement responsibility.

6. **Developing the Law.** An effort is made to select mergers and acquisitions which will test and develop new theories of merger enforcement, some of which have been successfully developed in the past or which may require further testing. These include use of reciprocal power, elimination of potential entry, increasing barriers to entry, and utilization of financial dominance or the "deep pocket" as well as newer untested and untried economic principles.

7. **Enforcement Policy Statements.** The Commission issues merger enforcement policy statements for particular industries from time to time. This Division is obligated to be prepared to institute investigations in implementation of these policy statements.

The foregoing are the general criteria used in the selectivity process. Depending on the particular circumstances of the merger or acquisition involved, certain of these criteria may be more significant in some cases than in others. A concerted effort is made to use all these criteria to the fullest extent possible in charting the course of investigations and in utilizing the funds and professional manpower allocated to this Division.

FEDERAL TRADE COMMISSION

COMMISSION MINUTES OF JULY 21, 1969

Special matter: *Proposed Budget Requests for Fiscal Year 1971*

The Commission, in company with the Comptroller, considered the proposed budget requests for fiscal 1971, as submitted by the Chairman with special matter circulation of July 8, 1969.

Mr. Dixon moved that the Bureau of Restraint of Trade be allocated an additional 67 professional and 31 clerical personnel. Mr. MacIntyre seconded the motion. The motion was lost for want of a majority.

On substitute motion of Miss Jones as amended by Mr. Nicholson, the Commission approved the allocation of 37 professional and 16 supporting clerical positions to the Bureau of Restraint of Trade, with the understanding that allocations to specific positions would be considered after the staff budget justification submission.

Commissioners Dixon and MacIntyre voted in the affirmative as to the foregoing action, but would have preferred the Chairman's motion. Mr. Elman voted in the affirmative only for the reason that it would prevent the request from being increased.

Chairman Dixon moved that the Bureau of Deceptive Practices be allocated an additional 88 professional and 44 clerical personnel. The motion lost for want of a second.

On substitute motion of Mr. Nicholson, the Commission approved the allocation of an additional 75 professional and 36 clerical personnel, without specific allocation to Divisions.

Mr. Elman voted in the negative as to the foregoing action.

On motion of Mr. Nixon, the Bureau of Field Operations was allocated an additional 100 professional and 35 clerical personnel. As to the foregoing action, Mr. Elman voted in the negative and Mr. Nicholson reserved his vote.

On motion of Miss Jones, as amended by Mr. Nicholson, it was directed that three disparate field offices be given investigational authority to operate without instructions from headquarters in investigating cases to see how it works, that another three field offices be given like authority but confining themselves to deceptive practices cases. This should be pursued as a pilot study for six months and a report of the results, including the effect on morale and output, be made to the Commission thereafter. The selected field offices were authorized to deal directly with the operating bureau insofar as discussing investigational procedure.

As to the foregoing action, Mr. Dixon voted in the negative and Mr. MacIntyre abstained. The motion carried.

On motion of Mr. Nicholson, the Commission approved the allocation of two additional professional personnel each to the Divisions of Industry Guides and Trade Regulation Rules in the Bureau of Industry Guidance, and two clerical positions.

Mr. Elman voted in the negative as to the foregoing action.

During discussion, Mr. Elman moved that the Bureau of Industry Guidance be abolished. The motion was lost for want of a second.

As a substitute motion by Miss Jones, the Office of Program Review was directed to submit a report to the Commission by September 1, 1969, of programs and techniques by which the Bureau of Industry Guidance's basic function might be accomplished in lieu of its present exclusive concern with drafting and administering guides, rules and advisory opinions.

Mr. Nicholson seconded the above motion and Mr. Elman voted in the affirmative. Commissioners Dixon and MacIntyre voted in the negative for the reason that it would be more orderly to undertake such action after a new Chairman has been designated.

On motion of Mr. Dixon, the Bureau of Economics was allocated an additional 40 professional and 22 clerical personnel for Fiscal 1971.

Chairman Dixon moved that the Bureau of Textiles and Furs be allocated an additional 28 professional and 10 clerical personnel. The motion lost for want of a second.

As a substitute motion, Mr. MacIntyre moved that the professional staff, including inspectors, be increased to 40 with the understanding that the major part of that increase is to be allocated to the enforcement of the Flammable Fabrics Act, as amended December 14, 1967, plus supporting personnel. The motion lost for want of a second.

Mr. MacIntyre then seconded the motion made by Mr. Dixon. The motion was lost for want of a majority.

All motions respecting personnel for the Bureau of Textiles and Furs having failed, there was no increase in the allocation of personnel to this Bureau.

For the minute record, Mr. Nicholson stated that in Fiscal 1970 there was a substantial increase in the Bureau of Textiles and Furs for enforcement of Rule 36 under the Rules and Regulations of the Wool Products Labeling Act and for enforcement of the new Flammable Fabrics Act, and it was his opinion that in view of the holding with respect to Rule 36 the Bureau had adequate personnel to enforce the laws with which it is charged.

On motion of Mr. Elman, the Bureau of Textiles and Furs was instructed that with respect to the funds appropriated for Fiscal 1970, the Bureau give the highest priority to enforcement of the Flammable Fabrics Act and that it make whatever administrative and personnel changes necessary in order to ensure that the Flammable Fabrics Act is effectively administered in the public interest.

On motion of Miss Jones, the Bureau was further instructed to report to the Commission by September 1, 1969 on the advantages and disadvantages of appointing a special individual charged solely with the responsibility of supervising the enforcement of the Flammable Fabrics Act.

Mr. MacIntyre moved that the Commission, as a matter of policy, make clear in its instructions to the staff that they no longer submit assurances of voluntary compliance in the matter of violations of the Flammable Fabrics Act, but at the least secure proposals for cease and desist orders. The motion was lost for want of a second.

On motion of Mr. Dixon, the Commission approved the allocation of an additional six professional and three clerical positions to the Office of the General Counsel.

Subject to further consideration by the Chairman, the increases in allocation of personnel for the Offices of the Secretary, Program Review, Administration and Comptroller, as submitted in the proposed budget request for Fiscal 1971, were approved.

The Commission's budget request for Fiscal 1971, as submitted by the Chairman with the changes noted above, was approved.

Commissioner Elman requested that his position be shown on the minutes and in the request to the Bureau of Budget as follows: "Commissioner Elman does not support an increase in the Commission's budget so long as it remains under present management. In his view, the manifest failures and deficiencies in the Commission's performance would not be removed by increasing its appropriation; indeed, they would only be magnified. Doubling the Commission's budget, in itself, would only double the Commission's problems. More money, in itself, would mean more waste, more inefficiency, more aimlessness, more delays, more dissipation of resources on relatively insignificant matters, more jobs (especially in the higher pay brackets) filled by incompetent personnel. A fundamentally restructured, and reorganized Commission could use all the funds now appropriated, and more; but a substantial increase in the budget should not precede but follow, and be part of, the necessary and long overdue process of reconstruction."

After further discussion, Mr. Nicholson moved that each of the Commissioners designate one person from his/her office to operate as a committee on behalf of the Commission until September 1, 1969, and to prepare a report then on all pending matters in all Bureaus and Divisions as to what the cases are, what do they provide, how old are they, and with recommendations for closing, continuing, etc. The motion lost for want of a second.

On substitute motion of Mr. Elman, the Directors of the Bureaus of Deceptive Practices and Restraint of Trade were instructed to submit a report to the Commission by September 1, 1969 which lists every seven digit file matter which is more than one year old in the case of Deceptive Practices and more than 18 months old in the case of Restraint of Trade, and in each of these matters submit a recommendation for its disposition, or if unable to make such recommendation, to make an explanation as to why a recommendation cannot be made for its disposition. They were further instructed to submit a report on the number of seven digit cases in each Bureau that are less than one year or 18 months old, respectively.

As to the foregoing action, Commissioners Jones and Nicholson voted in the affirmative, Mr. Dixon voted in the affirmative with the understanding that this action is going to take considerable time and the Commission partly shares the responsibility for the use of that time, and Mr. MacIntyre reserved his vote.

MEMORANDUM

OCTOBER 3, 1968.

Subject: Efficiency and control of bureau operations at the Commission.
 To: Charles A. Sweeny, Program Review Officer.
 From: John J. Hurley, Economist.

We will assume that the amount of the Commission's total budget has been determined. The problem is: How can we use these resources efficiently?

There is within government, unlike the business sector, neither a price mechanism to show the cheapest way to do public functions nor competitive forces to compel the government to carry out each function at minimum cost. Applying cost reduction methods to an agency's operations is not the answer, because cost-reduction may only involve cutting the costs of existing investigations and other projects that should not have been started in the first place.

In these circumstances what can be done to promote efficiency at the Commission? The instant memorandum considers possible ways to make good use, including the best use, of available Commission resources (which is what efficiency means). In two previous memoranda (August 27 and September 18), I developed some principles of program planning and the value of industry analysis as a prerequisite to opening new investigations.

Approaches

There are two main approaches to achieve more efficiency in Commission production:

—Improve the institutional arrangements within the Commission for deciding which investigations to start. This step can include centralizing in the executive office the apparatus of decision making for determining whether to invest resources in new investigations.

—Attempt to improve the bureaus' understanding of the nature of the problem of efficient use of bureau resources.

Something can be accomplished by this approach alone. If the bureaus—per instructions by the Executive Director—would *array alternatives*—alternatives new investigations competing for the same bureau manpower—and the bureaus then applied sound criteria (e.g., size of proposed respondent) in choosing the most efficient alternatives, then decisions are likely to be improved in terms of initiating more significant investigations. Exploratory legal-economic analyses by the bureaus of industries—the habitat of competition and monopoly—must be at the core of planning alternative new investigations.

The operating units, such as the Divisions of Trade Restraints and Discriminatory Practices as well as the Deceptive Practice's Divisions, have been and will be unable to plan and function efficiently (by coming up with appropriate alternative investigations for comparison by the bureau head and the Commission) as long as the divisions remain substantially tied to the "mailbag" as the predominant (if not exclusive) source of their new investigations. Reacting to complaint letters by these divisions inherently cannot provide choice of alternative projects for the bureau director and the Commission; the only option under the entrenched *modus operandi* is to investigate or not to look into a particular outside complaint.

In short, the prevailing reactive law enforcement procedures in the legal bureaus practically rules out planning what should be done on a rational basis. Rational planning would involve surveying the universe of industries and choosing new investigations according to a logical set of rules that include costing alternatives and using quantitative tests of preferredness (such as industry size) for launching investigations.

As evidenced by recent budget justifications, the indicated operating divisions seem unwilling or unable to plan. It has been argued by some staff that a division's resources cannot be allocated to planned examination of priority industries while a "fire" (allegedly reflected by a complaint letter) is raging somewhere. The economic error in such a contention is the faulty premise that a complaint letter reports an anticompetitive fire that the staff must put out. As I have stressed in previous reports, the probabilities are that the complaint letter comes from a competitive industry with an abundance of firms eager to complain to us of a competitor's slightest transgression. By contrast, when was the last time that Bethlehem Steel Corporation complained to the Commission about U.S. Steel's market power or pricing tactics? The "mailbag" enforcement policy, moreover, limits the number and type of *structural* investigations and cases (mergers and monopolization) that might be brought to the Commission's attention, since

that policy tends to bind bureau resources to relatively minor behavioral problems (e.g., alleged market sharing by local magazine wholesalers).

Efficiency Elements

In wanting efficiency we have to deal with how to get the strongest stream of Commission commitments. The essential thing—from an economic concept of efficiency—is that each bureau and the Commission be in a position to compare relevant alternatives from among proposed investigations in view of what each alternative can do. The practical aim is to show that some course of action A is better than some alternative course of action B.

The economic way of looking at efficiency considers alternative policies and the gains and costs (total costs) of each. Costs also include the approximate value of alternatives that must be sacrificed by taking a given course of action. Also, only future-incurred costs are relevant, not sunk or past costs.

The Priorities Approach

Requiring the bureaus to report topside periodically their priority investigations (proposed and actual) would be a planning move in the right direction. The desirable bureau investigations would be ranked according to their importance and urgency, and the executive and program review officers would at least know about them (which it seems is not now the case). However, the listing of priorities reveals nothing about how much should be spent on particular investigations and why. If the Commission is deciding what to do with each bureau's budget requests, it faces a problem of allocation and priority lists do not solve the problem.

Proposals

To improve upon the described situation :

1. Since the enforcement bureaus have made minimal headway in planning, the opening of all investigations should be decided in the front office—that is, by the Executive Director with the counsel of the Program Review Officer. The Executive Director and his staff can better take a Commission-wide point of view and trace the full consequences of resource investment decisions on the over-all operations of the Commission. Even General Motors' Divisions, which do their own buying and selling, are not autonomous in decisions requiring major capital expenditures. But the Commission's Bureaus appear to have sufficient autonomy to commit their resources to new investigations without appraising alternatives.

2. To determine what bureau resources are used efficiently, all bureau memoranda and other communications addressed to the Commission should clear through the Executive Director. Under present procedures bureau-recommended courses of action can arrive at the table on the Chairman's "blind side". In addition, much of the bureaus' proposals could use further gestation but instead divert the Commission's time from policy issues and from what must be done to establish an order of Commission priorities. The new procedure would also free the Chairman for more time to give the Commission a sense of direction, to determine public needs, and to seek better ways to realize them.

3. The bureaus should be allotted about 40 hours to make preliminary inquiries, not just the 8 hours at present. This reform would allow bureaus the time to determine the size of the proposed respondent and the structure of the relevant market, as well as time to contact the firm to be investigated and some third parties. This new step would cut down on the number of insignificant investigations formally started and piled on backlog.

4. To clear the bureaus' decks for more important planned investigations—along with comparisons of specific alternatives—bureau directors should be authorized to close all pending investigations over two years old, if in their judgment the prospect for a complaint recommendation in the matter within sixty days appears unlikely. Bureau heads would make summary reports to the Commission on the reasons for the closing actions.

OCTOBER 24, 1968.

Subject: Criteria for opening Deceptive Practice Investigations; Preliminary Contact of Possible Proposed Respondents.

To: Commission.

From: Frank C. Hale, Director,
Bureau of Deceptive Practices.

This is in response to the Commission's memorandum of September 26, 1968 directing Bureau of Deceptive Practices to submit recommendations in accordance with a memorandum of Commissioner Jones' dated September 20, 1968.

In her memorandum, Commissioner Jones has raised the question whether there are sufficient guidelines to assist the staff in its discharge of the authority delegated by the Commission to open investigations. Commissioner Jones also asked that the staff give its views on the possibility of having expanded authority to make preliminary inquiries before opening formal investigational files.

In raising the question about criteria, Commissioner Jones touched upon a subject which we realize has vexed the Commission throughout its history, but especially in recent years as the demand upon our manpower and other resources has increased with a proliferation of consumer goods and services offered to a rapidly expanding population. We are very much aware, in the Bureau of Deceptive Practices, of the absolute need for criteria at staff level to assist the Commission in husbanding its resources to the end that only the most meaningful undertakings in deceptive practice matters will be essayed, in the national interest. Some positive steps have been taken to recognize the fact that some very real criteria should govern us in opening investigations, and to be guided by them.

We are therefore happy for the opportunity, thus provided, to inform the Commission of certain developments in this connection in the functioning of the Bureau of Deceptive Practices that have occurred in the past year. We believe that what we have been and are doing is in keeping with the obvious intent and spirit of the Commission's directive.

CRITERIA

Perhaps as a first matter, the setting out of some background information on the subject of criteria, or lack thereof, formerly used in opening deceptive practices investigations would be in order.

Prior to passage of the Wheeler-Lea amendment to the Federal Trade Commission Act there was, it seems safe to say, a single simple criterion used in determining that a "deceptive practice" investigation should be initiated: was there indication that an unfair method of competition had been engaged in. The injunction of Section 5 was taken quite literally; an unfair method of competition was a thing to be stopped. And an "unfair practice" (although not a term in vogue prior to Wheeler-Lea) was deemed unfairly competitive.¹

For a period of years prior to 1929, the Chief Examiner was solely delegated authority by the Commission to open investigations. If any criteria in addition to the element of unfair competition governed him in his decisions they are unknown.

Following the completion of investigation, the Chief Examiner recommended to the Commission that a given matter be closed, or that complaint issue, or that the matter be referred to the Chief Trial Examiner for negotiation of a stipulation (if negotiation failed complaint would issue).

Presumably there were criteria the Chief Examiner observed in recommending stipulation rather than issuance of complaint but, again, if there were, they are not known to have been formalized. The point made here is that after full-blown field investigations had been completed, conclusions were reached in many instances that for one or more reasons the violations were not deemed of sufficient gravity to warrant litigation unless the proposed respondents resisted the authority of the Commission. If carefully considered criteria had been the order of the day, many matters which perhaps even then would have been considered *de minimis* would not have been gone into, with consequent better utilization of resources.

By 1929 the dissemination of false advertising had reached a volume such that the Commission deemed advisable the creation of a special unit to treat exclusively with those matters. This unit was the Special Board of Investigation. The Board was composed of three senior attorneys headed by a "chairman", with

¹ Until Raladam, 283 US 643.

supporting legal and secretarial staff. The function of the Special Board was to conduct investigations into false advertising matters *by correspondence* and conferences in Washington, (as distinguished from the Chief Examiner's method of investigation conducted by an attorney-examiner from one of the field offices), and to negotiate stipulations without reference to the Chief Trial Examiner.

The Commission delegated authority to the Special Board to initiate investigations, but if such delegation included instructions to observe criteria none are known to have been formalized.

The Special Board must have observed some self-imposed criteria, for it is known that they voted (each using a different color ink) on the question to open or not to open an investigation; but again there was, so far as is known, no formalization of criteria.

The Special Board, following the 1938 amendment, was succeeded by the Radio and Periodical Division. Staffed largely with recent law school graduates, and with access to a newly-created Medical Advisory Division, heavy emphasis was placed on opening investigations in drug and cosmetic advertising matters and, to a lesser degree, in matters involving therapeutic devices and food. Fresh and disturbing in the minds of all involved was knowledge that women had been killed by use of permanent wave solutions and emmenagogues indiscriminately advertised and sold to them. With monitoring in depth, provided the new Division through an avalanche of radio commercial continuities, magazines and newspapers, there came an intensified awareness that there were such things as a new potentially carcinogenic drug known as "hormone" which was available in "bust developers" discreetly advertised in the better women's magazines and not so discreetly in other publications read by them; that toothpaste incapable of curing pyorrhea was advertised as doing just that; that use of laxatives was, at least impliedly, recommended for constipation accompanied by abdominal pain and which, if the pain was symptomatic of an inflamed appendix could cause serious complications and even death.

Without formalization, a new criterion was recognized as justification for opening cases: danger to or impairment of the public health.

With continued monitoring of publications the realization grew that particular segments of the consumer population needed a special degree of protection. It was found for example that poor, semi-literate groups were being encouraged to believe that their purchase of dream books and lucky candles would bring them material and social success, that older persons in the inevitably declining period of their lives were being assured that therapeutically worthless (essentially harmless) concoctions would restore youthful physical and mental vigor, that trusting children were being led to believe that fabulous money-making opportunities lay in their sale of flower seeds and christmas cards. Thus, another criterion was recognized: that there are segments of consumers who warrant our special care.

Following the Second World War, a succession of reorganizations occurred. The Chief Examiner's office was abolished: deceptive practice investigations and restraint of trade investigations were made the responsibilities of separate bureaus; chiefs of divisions, directors of offices, chief project attorneys, directors of bureaus, variously were responsible for opening investigations. One effort to meet the need for establishment of criteria was the creation, in the late 1940's of a Planning Council. This group was largely governed in its recommendations that investigations be initiated by the relationship of a proposed respondent to one or more of ten major industries. Beginning with the reorganization of 1961, the responsibility for recommending the opening of investigations became that of staff attorneys in the Bureau's divisions. Having recommended investigation, they were expected to pursue the matter through its investigational development to its disposition within the Commission including litigation. Unquestionably, all of these various decision makers had to have had their own set of ground rules for starting cases.

The recent Director of the Bureau of Deceptive Practices and now Program Review Officer, Charles A. Sweeny, long had realized the imperativeness of criteria for opening investigations. Over a year ago, with a background of having been a staff attorney on the Old Special Board, the Radio and Periodical Division and the Division of Stipulations, an Assistant Chief Examiner, Chief of the Division of Food and Drug Advertising, and finally Bureau Director, Mr. Sweeny recorded his views on the subject. He stated that in measuring the public interest reflected by the mandatory and discretionary areas of our concern as a basis for allocations of resources, the following were to be among the factors for consideration:

1. Does the practice complained of indicate that there is danger to the public health or safety?

2. What are the indicated numbers of consumers adversely affected?

3. Is there a particular segment of consumer population affected, perhaps deserving a special degree of protection: the poor, the elderly, the retired?

4. What is the materiality of a deceptive statement in the context of the total promotional approach: did the statement, alone or substantially contributorily, actually constitute the real inducement to buy?

5. What is the nature of the deceptive practice: did it constitute an outright fraud or did it concern a worthwhile (albeit misrepresented) product or service?

6. What is the amount or degree of loss suffered by the consumer: is he out of pocket a few cents, or has he mortgaged his home with the potential of foreclosure?

7. What is the economic magnitude of a given industry engaging in a complained of practice?

8. Are there honest competitors to protect?

9. Is there a fair prospect of success if we must litigate: is the alleged unfair practice, for example, reasonably clearcut, or does it present a controversial scientific issue?

10. All factors considered, is the matter one to which we can commit manpower and other resources in the light of current priorities?

While these criteria were being used and separately and variously interpreted, it became clear that there was a need for consistent interpretation through an office having primary responsibility for consistent application from the Bureau's viewpoint of Division priorities.

With the Chairman's approval, in June, 1967 there was created in the office of the Bureau Director the position of Legal Adviser for Screening and Planning. In essence, the job of the Legal Adviser was to see initially all the incoming mail except Congressionals; to develop and improve channels of communication with Government and other agencies and groups including consumer groups; to discern patterns of deceptive practices existing throughout the country and emerging legal problems, advising the Director thereof and recommending the nature and form of appropriate action in those areas appearing most to warrant concentrated attention; to be of material assistance to the Director in planning the Bureau's work; to assist the Director in the preparation of the budget. Subsequently, the Legal Adviser was designated Program Officer for the Bureau, with responsibility for preparing the Bureau's PPB documents. Still more recently, he has been assigned supervision of the Monitoring Unit.

Evaluation and planning with regard to the opening of investigations proceeds as follows. All incoming letters of complaint, after record search, are received by the Legal Adviser for Screening and Planning. Those relating to pending matters are referred to the attorneys to whom the matters are assigned for appropriate disposition. The remaining are evaluated and disposed of by the Legal Adviser and those assisting him. Newly appointed attorneys are being used in this work at the present time and such use constitutes an important part of the Bureau's training program. (Much of the incoming mail, however, can be appropriately handled by competent correspondence clerks with minimum supervision, and effort is now being made to recruit a number of correspondence clerks).

To simplify and expedite disposition of the incoming mail, a series of form letters have been prepared and an automatic typewriter is being used. Letters which in the opinion of the Legal Adviser do not require further action in the Bureau are disposed of over his own signature. These letters include those which are appropriate for consideration by another government agency or another bureau of the Commission, those in which the requisite degree of public interest or commerce is obviously lacking, etc.

Letters which in his opinion present facts indicating a clear need for the opening of a case, or which should receive further attention, or concerning which he is uncertain of the appropriate disposition, or for any other reason should be called to the attention of the Bureau Director, are referred to the Director by brief memorandum with recommendation. When the Bureau Director concurs in review that a matter should be accorded further attention he so notes on the memo and forwards it to the appropriate division for action. In his consideration of such matters the Bureau Director discusses the more questionable at regular conferences of the division chiefs so as to have the benefit of their accumulated expertise.

Central to the successful achievement of substantially all the objectives envisioned by the creation of the Legal Adviser's position is the matter of recognizing that there are indeed criteria that should be utilized in weighing the pros and cons to the opening of an investigation, and adherence to such standards to the fullest extent possible.

Accordingly, the former Director and the Legal Adviser for Screening and Planning began the use of the criteria set out above, and the criteria were adopted by the present Director and continue to serve to the present as guides for beginning new investigations.

The value of careful selectivity of matters to investigate was graphically shown by certain statistics available at the end of Fiscal 1968. With considerably fewer personnel evaluating the complaints appearing in incoming correspondence, over 400 more such preliminary matters were disposed of than in the prior year, and 388 investigations were initiated compared with 666 in the prior year. This greater selectivity in turn permitted staff concentration on disposition of investigations, many started a number of years ago and which for a variety of reasons, had not been completed. On January 1, 1968 there were 1245 investigations pending in the Bureau. By the end of the following June the caseload had been reduced to 1076. It now appears that the caseload approaches manageable limits, the attainment of such goal being one that we realize has been of considerable concern to the Commission. Continued careful selection of matters to investigate will be required to maintain these caseload limits.

PRELIMINARY INQUIRIES CONDUCTED AS AN ACCESSORY TO THE USE OF CRITERIA IN STARTING CASES

Many complaint letters simply do not contain sufficient information to allow the formation of a judgment that a full investigation is warranted. Certain preliminary steps are now routinely taken by the Legal Adviser for Screening and Planning which provide some help. For example, if a complaint on its face seems to have some merit, and a scientific question is presented, the Chief of the Division of Scientific Opinions is requested to give his views as to the validity of the complaint and the seriousness of the practice. As another example, unless a possible proposed respondent has a recognizable name representing a sizeable operation, and a newly complained of practice appears questionable, a Dun and Bradstreet report is obtained in order to determine volume of business and location and size of the geographical area in which the possible proposed respondent does business. If it appears that an applicant may have a justifiable complaint but has not stated facts essential to a considered evaluation of the matter, we do not now hesitate at the Screening and Planning level, in acknowledging receipt of his complaint, to ask the applicant to furnish additional information.

In a relatively few instances a decision as to whether a matter meets our criteria for investigation is not possible in the absence of a contact with the proposed respondent. The Bureau has, therefore, on occasion in carefully selected instances, written to possible proposed respondents for the purpose of clarifying what is ordinarily a simple, single point but critical to the question of whether an investigation should be opened. For example, a complaint was received from an official of the Columbus (Ohio) Milk Council stating that an advertisement published by The Cereal Institute in the *Journal of the American Home Economics Association* was deceptive in presenting a chart comparison of the nutrients in some other foods (including milk).

Screening and Planning conferred with Division of Scientific Opinions. That Division was of the opinion that the advertising was misleading. However, the Division further advised, if the advertisement complained of appeared only in publications like the *Journal of the American Home Economics Association*, the likelihood of deception would be remote because subscribers are home economists, nutritionists, and others working in specialized fields who are knowledgeable in such matters. If, on the other hand, the comparison chart was appearing in publications having general readership, the Division said, its dissemination should be stopped.

Accordingly, we sent a letter to the Cereal Institute advising it that we were interested in determining whether its chart might be misrepresenting the comparison of nutrients, and asked to be furnished with a schedule of the publications in which the chart had been published in the past year.

Whenever such a contact is made with a possible proposed respondent, it is particularly advised that the inquiry is not to be interpreted to mean that a formal investigation of its practices has been initiated.

The above has been a confined reply to the Commission's directive of September 26, 1968. Because both the use of the criteria discussed and the limited making of preliminary contacts with possible proposed respondents, can so substantially contribute to the development of truly aggressive planning, the following additional thoughts with respect to the Bureau's planning, much of it constituting a broad outline of intent, are respectfully offered.

Development of a planned program for the Bureau is based essentially on the following concepts:

1. A system for accumulating more comprehensive information concerning existing practices subject to regulation by the Commission.
2. Organization of such information in meaningful form.
3. Continuing evaluation of this incoming flow of information and of the Commission's pending workload, permitting
4. Selection of those areas of greater public interest to which the Commission should devote its limited resources.

The logical first step is that of organizing the information presently available and now flowing in, by computerizing all such data. It is hoped that such computerizing can be started within the next 30 days. When a letter of complaint is received there will be extracted and fed into the bank a variety of data, such as the industry involved (Standard Industrial Classification), Census Bureau coding of categories of products within the industry, the practice involved, and the identity of the proposed respondent. From the date of receipt of the complaint, additional data will be fed into the bank, until final disposition of the matter.

It will be possible to thus detect potential consumer problems, identify all information received during any desired period of time relating to any industry, product or practice, or combination thereof. This information can then be assigned to an attorney for preliminary evaluation. When it appears warranted he can build on this data, by developing important related factors, such as the economic magnitude of the problem, the type and number of consumers adversely affected, etc. He will then draft a report detailing the public interest factors, estimating the amount of manpower which would be required to effect correction and recommending the type of procedure which would seem to offer greatest promise of effective correction.

Data will be available respecting the amount of manpower being expended on pending matters. The Commission can know, for example, how much time is being devoted to enforcement of its guidance program, or any one particular guide.

Informed determinations will be possible, among the alternatives thus presented, as to what new projects should be initiated, and as to those pending, which might be abandoned or intensified, or a change in direction adopted.

As rapidly as more information can be absorbed, to the extent of the limited capability of the computer equipment, our intelligence network will be materially expanded. The field offices will be encouraged to seek out and feed into the bank more intelligence about practices in their respective areas. We will initiate or increase our liaison with other government agencies and with consumer oriented groups in order to tap these sources fully. The Assistant General Counsel for Federal-State Cooperation will participate. The monitoring of advertising will be keyed in.

As we have said, much of these conclusory remarks constitutes a broad outline of intent. Initial steps have been taken to implement our plans. At least several months must pass before the program can be in full operation but, given adequate support in personnel, our hopes are high that, with the fruition of these plans, the Commission's important mission to protect consumers and businessmen from the effects of deceptive practices will have taken a giant step forward.

MEMORANDUM

NOVEMBER 6, 1968.

Subject: The need and basis for the bureaus to plan by specific objectives along industry and product lines.
 To: Charles A. Sweeny
 Program Review Officer
 From: John J. Hurley, Economist

PROBLEM AND APPROACH

What should each bureau and division in the Commission be doing and how much? Carefully worked out industry-oriented objectives by the bureaus could narrow the non-competitive and deceptive target areas and improve program planning.

Accordingly, this memorandum deals with why each bureau and division should develop specific objectives—that include aims in primary product lines—for use as guides to bureau decisions on what new investigations to start and on whether to move or displace old investigations. This report will also apply the described goal-getting process to planning a deceptive practices project that encompasses the nation's largest national advertisers.

COMMISSION AND BUREAU OBJECTIVES

It is not a fundamental objective of the Commission to propose having so many attorneys in restraint of trade work and so many inspectors policing wool and fur labeling. The real Commission objectives are maintaining open and fair competition in the economy's unregulated sectors, and providing maximum consumer protection in the market place. Within these basic policy objectives the Commission has a number of "missions", including the dismantlement of unlawful mergers and the prevention of unfair and deceptive practices.

To think out more specific objectives at the bureau (and division) level is not an easy job. Nevertheless, the bureaus should be requested to do so and to prepare formalized statements of their missions as a means to give an overall sense of purpose to what they are doing. Generally, a bureau's objective should be an explicit guide to action that considers subprogram costs and relates to the broader Commission objectives. The statement of bureau objectives should, of course, go beyond paraphrasing the relevant laws. The next step requires that the bureau, in consultation with the divisions, define the range of activities on an industry basis which would be used to achieve the bureau objectives.

USES OF BUREAU OBJECTIVES¹

What tangible results could the enforcement bureaus come up with by giving some thought and time to clarifying and stating their objectives? There can be two gains from this effort:

First, the most significant use of objectives would be in bureau planning, since a hierarchy of objectives—bureau and division aims that include goals for strengthening competition in key industries—can facilitate analyzing and choosing alternative courses of action (which is the essence of planning). The process of exploring alternative subprograms to reach bureau objectives covers three main issues—how important is the proposed project, what will it cost, and what good will it do.

Second, efficiency in Commission output involves producing a desired result

¹There are objectives within objectives in the process of deriving specific aims from broader goals. See Granger, *The Hierarchy of Objectives*, 42 Harv. Bus. Rev. 63 (May/June, 1964).

at the lowest cost. Thus, we cannot consider the question of Commission efficiency without taking into account a range of objectives. Specific objectives can tell us in what new directions Commission activities should be moving. For example, the Bureau of Restraint of Trade could aim to block mergers in the high-profit drug industry which give large firms advertising and promotional advantages over smaller competitors.

OBJECTIVES AND PLANNING

The Commission's basic policy objective is to discover and correct those trade practices that, if continued, can be expected to injure or destroy competition or otherwise harm the public. The most effective way to reach this objective is to ascertain such practices in their incipency and stop them. This action requires a searching out by the bureaus of those industries, product lines, and areas in the economy in which competition is most seriously threatened, and then to allocate manpower and assign priorities for the attention of appropriate divisions.

Assigning priorities depends generally on the bureau's use of such quantitative criteria as the relative significance of the affected industry to the economy and the size and number of firms involved. Then, in the second instance, qualitative and subjective criteria would be applied, such as the relative severity of the trade practice being used and the danger to public health or safety of the practice.

In this planning approach the bureaus' own internal investigations and studies—based on Commission public hearings, Congressional reports, the economic bureau's analyses, and (secondarily) data supplied by complaining parties—would identify priority industries and product markets which should receive attention. After these industries are pinpointed, the bureau would then move into the area of case selection. However, under existing bureau procedures for starting investigations, the cart (case selection) is usually put before the horse (industry selection). What sometimes passes as an "industry approach" at the bureau level actually amounts to an afterthought in which several firms doing the same unlawful practice are added to the case so as not to single out one respondent unfairly for prosecution.

APPLYING THE PLANNING CONCEPT

To illustrate planning by objectives in an industry framework, we can take the deceptive practices field and set as a main bureau objective the elimination of false advertising and marketing deceptions in the primary product lines produced by the nation's 100 largest advertisers. The premise of this approach is that large corporations with substantial advertising power can work greater injury to competition and to consumers than their smaller rivals. Another valid hypothesis of the plan is that heavy advertising encourages high economic concentration in mass-produced consumer goods, and by deterring new competition permits higher prices and profits.²

The foundation for planning a new project in the deceptive practices field is provided in Table 1, which shows the advertising expenditures of the 100 largest advertisers during the first six months of 1968. These advertisers will probably spend over \$3 billion on advertising in 1968 or about one-fifth of the \$17 billion total advertising outlays.³ On this basis, roughly 20 percent of the Commission's resources in deceptive practices might be assigned to the surveillance and investigation of deceptives employed by these large corporations.

² Doyle, *Economic Aspects of Advertising: A Survey*, The Economic Journal at 570 (September, 1968). In the cigarette industry the domination of a few large firms has been preserved largely because of the power of advertising.

³ *The Statistical Abstract of the United States* (1968) tabulates estimated advertising expenditure by years.

TABLE 1.—TOP 100 ADVERTISERS IN 4 MEDIA, 1ST HALF OF 1968

[From Advertising Age, Sept. 23, 1968]

Company	Total expenditure	Magazines	Newspaper supplements	Network television	Spot television
1. Procter & Gamble Co.	\$93,699,377	\$6,711,063	\$170,914	\$52,288,500	\$39,528,900
2. General Foods Corp.	53,158,573	2,439,000	1,202,733	23,088,800	26,423,000
3. Bristol-Myers Co.	52,952,582	12,854,249	441,733	25,585,100	14,071,500
4. General Motors Corp.	52,851,066	23,310,493	1,556,573	20,610,500	7,373,5000
5. Colgate-Palmolive Co.	41,929,581	5,414,615	189,566	20,689,100	15,636,300
6. American Home Products Corp.	34,381,888	3,165,177	101,511	22,950,700	8,164,500
7. R. J. Reynolds Tobacco Co.	32,707,467	4,376,532	76,435	22,498,800	5,755,700
8. American Tobacco Co.	32,210,530	6,269,394	28,336	14,191,000	11,721,800
9. Sterling Drug, Inc.	27,998,485	3,827,956	545,229	18,806,700	4,818,600
10. Lever Brothers Co.	26,775,698	1,932,440	95,258	14,784,900	9,963,100
11. Ford Motor Co.	24,706,995	10,833,695		10,484,700	3,383,600
12. Warner-Lambert Pharmaceutical Co.	22,862,557	1,003,693	4,764	14,221,600	7,632,500
13. Coca-Cola Co.	22,149,292	1,825,197	157,695	4,191,800	15,974,600
14. Philip Morris, Inc.	22,087,263	2,622,823	202,540	14,151,800	4,110,100
15. General Mills, Inc.	21,735,643	2,372,010	463,633	12,442,300	6,457,700
16. Gillette Co.	20,353,242	1,000,056	8,586	14,256,100	5,088,500
17. Chrysler Corp.	19,593,075	8,439,945	180,330	9,988,800	934,000
18. National Dairy Products Corp.	18,091,018	4,928,708	73,510	6,604,200	6,484,600
19. Liggett & Myers, Inc.	16,604,787	3,932,593	32,894	10,377,300	2,262,000
20. Miles Laboratories, Inc.	16,370,327	1,052,027		11,192,700	4,125,600
21. Lorillard Corp.	16,363,179	119,499	2,793,880	11,423,600	2,026,200
22. Kellogg Co.	16,170,779	569,563	195,516	10,074,000	5,331,700
23. American Telephone & Telegraph Co.	15,573,587	5,671,048	161,339	6,079,500	3,661,700
24. S. C. Johnson & Son, Inc.	14,852,688	45,288		12,942,200	1,865,200
25. Brown & Williamson Tobacco Corp.	14,647,221	1,899,922		11,558,600	1,188,600
26. Carnation Co.	13,679,558	1,343,128	125,230	9,045,600	3,165,600
27. Alberto-Culver Co.	13,633,971	626,619	128,852	5,604,200	7,274,300
28. Campbell Soup Co.	13,422,870	4,127,470		4,428,900	4,866,500
29. Pepsico, Inc.	13,058,217	640,417		6,051,500	6,366,300
30. Sears, Roebuck & Co.	12,254,089	4,736,289		2,352,100	5,165,700
31. Continental Baking Co., Inc.	12,181,023	1,451,823		217,600	10,511,600
32. National Biscuit Co.	11,791,422	2,691,594	15,128	5,908,100	3,176,600
33. William Wrigley, Jr., Co.	11,661,974	364,374			11,297,600
34. Corn Products Co.	11,380,083	3,041,915	202,873	2,472,000	5,663,300
35. Distillers Corp.-Sagrams, Ltd.	10,595,320	10,118,255	82,365		394,700
36. J. B. Williams Co., Inc.	10,317,829	1,131,829		9,002,000	184,000
37. Standard Brands, Inc.	10,317,799	2,637,723	269,376	3,381,300	4,029,400
38. Shell Oil Co.	10,195,892	779,402	122,590	4,106,300	5,187,600
39. Eastman Kodak Co.	10,015,855	3,301,203	222,647	6,122,500	369,500
40. Quaker Oats Co.	9,782,727	573,622	42,405	4,642,800	4,523,900
41. Radio Corp. of America	9,221,272	4,523,839	150,833	3,431,400	1,115,200
42. Plough, Inc.	8,941,275	1,241,875		5,475,100	2,224,300
43. Block Drug Co., Inc.	8,941,137	938,077	29,260	6,841,600	1,132,200
44. Rapid-American Corp.	8,920,109	550,767	39,042	8,307,600	22,700
45. Ralston Purina Co.	8,633,271	716,762	127,309	3,843,600	3,945,600
46. Armour & Co.	8,477,710	1,108,743	150,067	5,105,000	2,113,900
47. General Electric Co.	8,405,838	5,021,638		2,935,400	448,800
48. Johnson & Johnson	8,319,196	1,694,459	123,237	2,319,400	4,182,100
49. Pillsbury Co.	8,315,951	697,458	102,993	3,455,100	4,060,400
50. Norwich Pharmaceutical Co.	7,919,609	556,794	96,515	4,971,200	2,295,100
51. Jos. Schlitz Brewing Co.	7,421,473	417,073		2,096,600	4,907,800
52. United Air Lines, Inc.	7,397,660	1,356,260		2,823,800	3,217,600
53. Borden, Inc.	7,048,101	764,168	90,433	1,942,200	4,251,300
54. American Motors Corp.	6,954,440	2,068,100	84,440	3,144,500	1,657,400
55. Carter-Wallace, Inc.	6,696,100	20,600		3,831,300	2,844,200
56. Hunt Foods & Industries, Inc.	6,604,854	1,379,055	4,699	2,509,400	2,711,700
57. Scott Paper Co.	6,466,846	1,306,897	264,649	629,800	4,265,500
58. American Cyanamid Co.	6,416,534	1,703,454	39,980	4,125,700	547,400
59. Noxell Corp.	6,407,412	691,834	1,278	3,807,400	1,906,900
60. Chesebrough-Ponds, Inc.	6,298,971	983,271		2,296,500	3,019,200
61. Beatrice Foods Co.	6,244,165	296,297	6,868	3,356,200	2,584,800
62. Nestle Co., Inc.	6,207,370	452,226	34,344	2,308,900	3,411,900
63. Chas. Pfizer & Co., Inc.	6,197,816	1,515,516		3,514,100	1,168,200
64. Richardson-Merrell, Inc.	6,064,490	166,090		3,582,800	2,315,600
65. Polaroid Corp.	5,990,124	2,207,924		3,777,900	4,300
66. Smith, Kline & French Labs.	5,963,136	921,136		3,782,700	1,259,300
67. Gulf Oil Corp.	5,952,238	305,834	109,104	5,088,300	449,000
68. Revlon, Inc.	5,912,527	3,854,220	13,007	788,500	1,256,800
69. Goodyear Tire & Rubber Co.	5,890,412	2,871,912		2,618,800	399,700
70. Mars, Inc.	5,884,868	63,042	110,526	2,319,800	3,391,500
71. Volkswagen of America, Inc.	5,725,723	2,046,123		3,021,200	658,400
72. Trans World Airlines, Inc.	5,698,072	2,204,768	10,304	1,574,400	1,908,600
73. Seven-Up Co.	5,624,574	87,756	141,218	1,205,000	4,190,600
74. Anheuser-Busch, Inc.	5,472,005	2,078,805		2,017,200	1,376,000
75. American Can Co.	5,381,743	352,499	43,044	11,900	4,974,300
76. H. J. Heinz Co.	5,299,654	210,882	44,772	2,208,600	2,835,400
77. Union Carbide Corp.	5,056,297	649,211	8,586	4,050,900	347,600
78. Standard Oil Co. of Indiana	4,907,306	867,306		1,611,100	2,428,900
79. Westinghouse Electric Corp.	4,903,862	1,026,262		3,775,200	102,400

80. E. I. Du Pont de Nemours & Co., Inc.	4,843,166	1,757,714	269,552	2,484,500	331,400
81. Uniroyal, Inc.	4,722,372	1,596,884	49,988	786,300	2,289,200
82. Squibb Beech-Nut, Inc.	4,687,309	795,409		614,800	3,277,100
83. Firestone Tire & Rubber Co.	4,658,977	2,243,177		1,301,900	1,113,900
84. Kimberly-Clark Corp.	4,437,371	2,037,682	518,989	487,400	1,393,300
85. Armstrong Cork Co.	4,432,160	2,159,560		2,178,800	93,800
86. Royal Crown Cola Co.	4,408,800	24,300		1,366,000	3,018,500
87. W. R. Grace & Co.	4,316,527	1,011,225	7,002	2,035,600	1,262,700
88. Avon Products, Inc.	4,310,879	816,079			3,494,800
89. Pan American World Airways, Inc.	4,303,750	1,245,050		1,473,100	1,590,600
90. Standard Oil Co. of New Jersey	4,271,750	1,558,050		1,287,500	1,496,200
91. Beecham Group, Ltd.	4,239,679	3,379		4,025,400	210,900
92. Dow Chemical Co.	4,196,175	1,100,911	40,064	1,801,800	1,253,400
93. Pabst Brewing Co.	4,183,425	825		1,541,500	2,611,100
94. General Telephone & Electronics Corp.	4,149,498	1,076,293		2,040,800	1,032,400
95. McDonalds Corp.	4,146,219	644,319		2,119,400	1,352,500
96. Heublein, Inc.	3,999,803	1,579,946	66,557	886,200	1,467,100
97. Columbia Broadcasting System, Inc.	3,978,935	3,790,404	4,131		184,400
98. American Airlines, Inc.	3,641,287	1,053,891	20,996	1,332,100	1,434,300
99. Reynolds Metals Co.	3,835,474	693,384	34,190	2,283,000	821,900
100. Andrew Jergens Co.	3,768,816	928,307	21,109	1,911,700	907,700
Total	1,262,036,948	231,273,381	12,753,567	615,285,100	402,724,900

Source: PIB leading national advertisers.

As shown in Table 2, at the end of fiscal 1968 there were only 50 Commission proceedings pending (Sec. 5, Deceptive Practices) against firms that rank among the 100 largest advertisers. These investigations involved almost one-fourth (24) of these large advertisers and accounted for merely 4 percent of the 1,400 total proceedings in deceptive practices then outstanding. The deceptive practices bureau could properly focus more resources (about five times as much as now) to cover the practices of the nation's largest advertisers. As an alternative, why not divide up the 100 top advertisers and assign them among the bureau's attorneys.

TABLE 2.—PENDING PROCEEDINGS AT THE END OF FISCAL 1968 IN DECEPTIVE PRACTICES INVOLVING PROPOSED RESPONDENTS RANKED WITHIN THE NATION'S 100 LARGEST ADVERTISERS

[Dollars in millions]

Rank	Company	Advertising expenditures 1st half 1968	Pending deceptive practices investigations
1	Procter & Gamble Co.	\$98.7	2
4	General Motors Corp.	52.9	4
5	Colgate-Palmolive Co.	41.9	5
6	American Home Products Corp.	34.4	1
8	American Tobacco Co.	32.2	2
9	Sterling Drug, Inc.	28.0	1
11	Ford Motor Co.	24.7	5
14	Philip Morris, Inc.	22.1	1
17	Chrysler Corp.	19.6	4
30	Sears, Roebuck & Co.	12.3	5
37	Standard Brands, Inc.	10.3	1
38	Shell Oil Co.	10.2	1
41	Radio Corp. of America	9.2	1
43	Block Drug Co., Inc.	8.9	1
47	General Electric Co.	8.4	2
54	American Motors Corp.	7.0	3
57	Scott Paper & Co.	6.5	1
69	Goodyear Tire & Rubber Co.	5.9	2
71	Volkswagen of America, Inc.	5.7	1
77	Union Carbide Corp.	5.1	1
81	Uniroyal, Inc.	4.7	1
83	Firestone Tire & Rubber Co.	4.7	3
84	Kimberly-Clark Corp.	4.4	1
99	Reynolds Metals Co.	3.8	1
Total proceedings pending June 30, 1968			50

Source: Advertising Age, Sept. 23, 1968; FTC Division of Data Processing, alphabetical listing of formal and informal matters pending June 30, 1968.

Table 3 shows the total sales and principal 4-digit S.I.C. industries of the 25 largest advertiser. The table could be used by the bureau as a planning device to determine the product lines of the top national advertisers in which to institute

new investigations. (The primary products of the entire 100 largest advertisers can be obtained from each firm's listing in *Dun & Bradstreet's Million Dollar Directory*, 1968.) The single largest product group represented among the 25 advertising leaders was perfumes, cosmetics, and other toilet preparations (S.I.C. Industry No. 2844) which eight of these firms produced.

TABLE 3.—ANNUAL SALES AND S.I.C. INDUSTRIES OF THE NATION'S 25 LARGEST ADVERTISERS

Ad rank	Company	Sales (millions)	Principal S.I.C. industries					
1.	Procter & Gamble Co.	\$2,243	2,841	2,843	2,045	2,844	2,842	2,096
2.	General Foods Corp.	1,651	2,041	2,099	2,037	2,042	2,026	2,036
3.	Bristol-Myers Co.	1,468	2,844	2,834				
4.	General Motors Corp.	20,209	3,519	3,634	3,711	3,631	3,741	3,722
5.	Colgate-Palmolive Co.	862	2,844	2,841	2,834	2,842		
6.	American Home Products Corp.	751	2,087	2,831	2,833	2,842	2,098	2,834
7.	R. J. Reynolds Tobacco Co.	1,004	5,059	2,111	3,497	2,131		
8.	American Tobacco Co.	1,428	2,131	2,111	2,121			
9.	Sterling Drug, Inc.	303	2,815	2,834	2,833	2,844		
10.	Lever Bros. Co.—Sub. of Unilever		2,844	2,099	2,841	3,991	2,096	
11.	Ford Motor Co.	12,240	3,722	3,711	1,931	3,522		
12.	Warner-Lambert Phar. Co.	600	2,073	2,834	2,844			
13.	Coca-Cola Co.	864	2,087					
14.	Philip Morris, Inc.	773	2,111	2,844	3,421	2,131	2,073	2,841
15.	General Mills, Inc.	525	2,092	2,821	2,041	3,662	2,043	
16.	Gillette Co.	396	3,841	3,951	3,421	3,079	2,844	
17.	Chrysler Corp.	5,649	3,711					
18.	National Dairy Product Corp.	2,252	2,025	2,023	2,021	2,024	2,024	2,022
19.	Liggett & Myers, Inc.	577	2,085	2,131	2,111	2,042	2,141	2,121
20.	Miles Labs, Inc.	166	2,831	2,834	3,841	2,818		
21.	Lorillard Corp.	497	2,131	2,111	2,121			
22.	Kellogg Co.	366	2,043	2,042				
23.	American T. & T. Co.	12,138	4,811					
24.	S. C. Johnson & Son, Inc.	(1)	2,842	2,899				
25.	Brown & Williamson Tobacco Co.	600	2,111	2,131				

¹ Not available.

Source: Advertising Age, Sept. 23, 1968, for listing of top 100 advertisers; sales and S.I.C. industries of the 25 largest advertisers from *Dun & Bradstreet Million Dollar Directory*, 1968.

The thrust of this type of planned investigation might also focus on consumer goods industries that have a high advertising-to-sales ratio and/or experienced a substantial decline (over 25%) in the number of firms in the industry during the past decade. These target industries include cereals, cigarettes, pharmaceuticals, soft drinks, beer, liquor, and detergents, among others.

CONCLUSION AND RECOMMENDATION

This paper stressed two main points that would contribute to more effective planning:

The bureaus should be advised to plan primarily by industry-centered objectives. This course could improve planning by the bureaus and allow some systematic comparison of results achieved by the divisions with the bureau goals. Using an outlined work plan, bureau heads might establish an understanding with division chiefs on a set of goals to be accomplished and on ways to judge division results.

Planning by objectives in the deceptive practices field could involve increased allocation of manpower surveillance to the principal product lines of the 100 largest national advertisers, and such a shift in resources is recommended.

MEMORANDUM

DECEMBER 24, 1968.

Subject: Recommendation for approval of proposed planning and priorities program for the Bureau of Restraint of Trade.

To: Commission.

Via: Executive Director.

From: Bureau of Restraint of Trade.

Forwarded herewith is a detailed development of the planning and priorities program for the Bureau of Restraint of Trade, outlined in the FY 1970 Budget Justification to the Bureau of the Budget.

The program represents an essential first step to further management improvement, looking to more effective planning, clarification of objectives and a streamlining of operational procedures and methods. The proposed program affects long-standing procedures and, to some extent, the prerogatives of the Bureau's enforcement divisions as well as investigations within the jurisdiction of the Bureau of Field Operations. It is not generally approved or endorsed at staff level.

Notwithstanding the principal reaction to recommended procedural innovations as "too much" by affected staff units, we are equally concerned with the possible contrary evaluation of the program as "not enough." The program seeks essentially to insure that work priorities are developed, coordinated and adjusted according to uniform procedures and pursuant to close controls. We believe this to be a sound first objective. We have considerable apprehension, however, that significantly more sweeping procedural changes at this time might affect assimilability and prove seriously disruptive. Suggestions for alternative procedures or improvements in the proposed program consistent with these objectives have not, as a general matter, been forthcoming from the affected staff units.

The priorities program was reviewed by the chiefs of each of the enforcement divisions of the Bureau of Restraint of Trade¹ and by the Acting Director of the Bureau of Field Operations. Informational copies have also been supplied Mr. Berryman Davis, Legal Adviser, Bureau of Deceptive Practices, and Mr. Charles Sweeny, Commission Program Review Officer.

The most basic criticisms and objections to the proposed program by various affected staff units are in brief, as follows:

The Bureau's Division of Mergers generally approved the program² but indicated apprehension lest Section 7 investigations be delayed pending meetings of the Priorities Committee. It has been agreed in this regard that Section 7 investigations under the program be cleared directly with the Office of the Bureau Director, as necessary, on an ad hoc basis.

The Division of Compliance advanced a variety of objections.³ For example, that division complains at some length of field investigation bottlenecks, citing a number of compliance cases pending unassigned or unworked upon in the field for periods exceeding two and one-half years. The procedures which it opposes, however, are designed to insure expeditious handling of important investigations in the field with selective attrition of less important matters. The Compliance Division also argues that to make a selective alternative choice "... would be unfortunate if low priority matters approaching maturity or conclusion in the field were to be suspended at such juncture so as not to permit an informed resolution of the case." We are satisfied that the proposed procedures are sufficiently flexible to avoid results of the sort thus suggested.

The Division of General Trade Restraints endorsed the priorities aspect of the proposed program⁴ but because that division has been satisfied with its liaison and coordination with the field organization, disapproves as unnecessary any formalized "superstructure" calculated to effect selective substitution of higher for lower priority matters in this field.

The Division of Discriminatory Practices registered objection to any allocation of priorities, on the theory that if preliminary screening is efficient, priorities

¹ Attached as Appendix 1 to the proposed program, Memorandum to Division Chiefs dated September 24, 1968, includes comments on memorandum by Mr. Hurley, Office of Program Review, dated August 27, 1968.

² Attached as Appendix 2 to the proposed program, Division of Mergers' comments dated October 3, 1968.

³ Attached as Appendix 3 to the proposed program, Division of Compliance's comments dated October 3, 1968, with responsive commentary on points raised.

⁴ Attached as Appendix 4 to the proposed program, Division of General Trade Restraints' comments dated October 15, 1968.

are unnecessary. This division also disapproves of "... the meetings, the preparation of Priority Evaluation Statements and other interoffice memorandums proposed."⁵ The recommended preparation of a statement specifically confined to case evaluation elements to permit priority judgments with respect to recommended investigations before preparation of the detailed memorandum initiating investigation, does require, unfortunately, some extra work at the outset. We believe such a procedure will provide significant man-hour savings in the long run, however.

The most emphatic objection to the Bureau of Restraint of Trade's proposed program was presented by the Bureau of Field Operations.⁶ The principal criticisms by that Bureau relate to the proposed procedure and method for selective substitution of high for low priority cases. These are opposed as (a) contravening the existing organizational structure; (b) not necessary because of the effectiveness of present Bureau of Field Operations' performance; and, (c) not practical because the field office will not be able to apply the indicated evaluation criteria unless an investigation were so near completion as to render suspension unwarranted. Of these, (c) requires special comment. It is acknowledged that currently cases are not infrequently investigated with so circumscribed a view to the acts and practices of proposed respondent, that the relationship of that respondent's practices to industry practices, the form of remedy most suitable industry-wise and the overall relative significance of matters under investigation remain unconsidered until the last stages of investigation. The alternative procedure proposed would provide the field office at the outset with an outline of the factors posited as the basis for priority designation, to be verified, amplified or corrected as a first responsibility of the investigation. Accordingly, the proposed procedure for reevaluation of cases in the field, once operative, should be practicable both as to method and investigational development sequence.

It is recognized that any priorities program by this or another Bureau which seeks to maintain control over priorities, including the relative expedition of handling and the primacy of one project over another, must to some extent compromise the exclusivity of jurisdiction of the Bureau of Field Operations over matters being investigated in the field. It is believed that the proposed program permits such control with a minimum of interference with the Bureau of Field Operations' current procedures.

The Bureau of Deceptive Practices and the Bureau of Field Operations both indicated apprehension that a formal priorities plan by this Bureau would adversely affect Deceptive Practices and other non-Restraint of Trade investigations in the field. It is not our intention that field investigations initiated by other Bureaus be affected at all. It is anticipated that the investigative work of the various Bureaus will continue to be satisfactorily coordinated by the Bureau of Field Operations.

Because various references are made in the attached material to memorandums by the Executive Director and by John J. Hurley, Economist, Office of Program Review, concerning "Planning," dated respectively September 18, 1968 and August 27, 1968, copies are attached (Appendix 7).

It is recommended that the proposed planning and priorities program be approved by the Commission for implementation forthwith.

BUREAU OF RESTRAINT OF TRADE PLANNING AND PRIORITIES PROGRAM

The greatest criticism of the Bureau's over-all operation appears to be that it relies too heavily on the receipt of applications for complaint as a basis for affirmative action. With the exception of the Division of Mergers, the operation of which is essentially guided by considerations as to the comparative economic significance of particular acquisitions and mergers out of a known universe of major acquisitions, the Bureau allegedly frequently fails to adequately relate its activities to areas of indicated greatest anti-trust need. Although some violations of law within the responsibility of this Bureau manifest the kind of predatory action, competitive pressure or economic impact, that can be expected to result in applications to the Commission for corrective action, other areas of possibly greater anti-trust significance, do not. The anti-trust problems presented in the instance of high concentration industries, for example, characterized by

⁵ Attached as Appendix 5 to the proposed program, Division of Discriminatory Practices' comments dated November 4, 1968.

⁶ Attached as Appendix 6 to the proposed program, Bureau of Field Operations' comments dated October 8, 1968, with responsive commentary on points raised.

administered pricing and power to effectively control production, normally do not result in applications for complaint from the business community. An effective close-knit conspiracy, even if its existence is otherwise suspected or indicated, frequently requires some inter-conspiratorial breakdown occasioning a direct "leak," in order that the Bureau may be formally apprised as to its existence through applications for complaint. Sometimes, also, specific complaints of law violation fail to discuss overriding anti-competitive practices within an industry. The greatest current project planning need, accordingly, is in Commission initiated projects separate and distinct from projects growing out of routinely received applications for complaint.

A planning study with respect to high concentration industries was undertaken by the Bureau of Economics pursuant to Commission direction dated August 9, 1968. In addition, however, the experience and expertise residing in the Divisions should otherwise provide considerable insight into anti-trust problem areas that merit Commission attention; and, merit attention to a degree beyond that of many matters received in regular course requiring substantial manpower commitment.

At meetings of the Bureau Priorities Committee (discussed below) recommendations and suggestions as to new significant areas for economic study or investigation looking to corrective action, will be expected. Increased selectivity in initiating new matters should specifically include consideration of matters other than those prompted by applications for complaint.

SCREENING AND PRIORITY EVALUATION BY DIVISIONS INITIATING INVESTIGATIONS IN THE FIELD

The following procedures are recommended for improved selectivity in initiation of investigations in the field. They will apply primarily to the Divisions of General Trade Restraints and Discriminatory Practices. The Division of Mergers' screening procedures will continue, although recommended priorities, hereafter, will be reviewed by the Priorities Committee. Otherwise, that Division's screening operation will not be altered. The Compliance Division's investigation in the field will be subject to priority designation, but not to the screening and evaluation criteria applicable to de novo matters. The existence itself, of a Commission order, can be considered to bespeak the economic need and public interest involved in seeing to it that compliance with the terms of such order is a justified undertaking.

The Office of the Director and the Division Chiefs, at the outset, will have to designate and agree upon a tentative beginning allocation for each Division, as to the time and manpower allocation between priority and non-priority matters. Merely as a matter of a starting premise, it might be suggested that the Division of General Trade Restraints seek to establish a proportion of 40% work-commitment to priority matters with 60% on non-priority matters; Discriminatory Practices, 50% on priority matters and 50% on non-priority matters; Compliance, 75% on priority matters and 25% on non-priority matters; and Mergers, 90% on priority matters. These percentages are, of course, arbitrary figures suggested merely on the basis of apparent current operations.

Increased selectivity in screening and identification of high priority matters are closely related processes. There follows suggested procedures for use within the Divisions originating investigations, prior to consideration by the Priorities Committee.

A *Priority Evaluation Statement* (PES), will be prepared for each currently unassigned formal investigation in the field, and for each formal investigation in the field hereafter recommended. It will be in addition to, and not merely an incorporation within the memorandum initiating formal investigation. With respect to formal investigations hereafter recommended, the PES will be prepared *prior* to preparation of the memorandum to the Bureau of Field Operations requesting investigation in the field. The PES will be as short as completeness will allow but should not exceed two (2) pages in any but the most unusual circumstances.

A PES will *not* be prepared relative to all applications for complaint, but only as to those matters which the assigned attorney has a real and reasonable basis for conclusion that the matter warrants formal investigation, and is subject to review by the Division Chief. The Division Chief will satisfy himself both as to the responsiveness of the PES to *each* of the listed criteria (Appendix A)

and the soundness of the basis for arriving at each such evaluation judgment, through discussion with the assigned attorney. The Division Chief will determine, in the light of the Division's other commitments, whether the matter in his judgement is of such merit as to warrant docketing as a formal investigation in the field. If not, other appropriate disposition will be directly by him, such as: (1) that the assigned attorney secure further relevant evaluation information from the applicant, or from other sources; (2) that an appropriate field office be contacted, through the Bureau of Field Operations, to determine if professional field personnel, free of priority assignment, may be made available to secure further evaluation information on an informal basis; (3) that the matter be disposed of within the Division on an informal or "Small Business" basis; or (4) that the matter be suspended, for possible future consolidation with other related matters, or closed.

The Division Chief, if concurring with the recommendation for field investigation, will assign a tentative priority designation, subject to review by the Bureau Priorities Committee. The priority designation may be one of the following: (1) First Priority by Commission Direction (if applicable); (2) (Divisional) First Priority; (3) (Divisional) Second Priority; or (4) Routine.

The memorandum to the Bureau of Field Operations requesting field investigation will *not* be prepared by the assigned attorney until *after* priority evaluation concurrence by the Bureau Priorities Committee.

The Priorities Committee will evaluate the priority recommendation on the basis of the PES, existing Commission programs, and the overall plans and projects of the Bureau. If the Office of the Director concurs in the priority designation of the Division, or after agreement as to assignment of different priority, the matter will be transmitted to the Bureau of Field Operations.

ASSIGNMENT OF PRIORITIES

In assignment of priorities under the new Bureau planning program, it should be noted in particular, that initiation of a "priority" field investigation¹ by the Divisions of General Trade Restraints, Discriminatory Practices or Compliance, will, in normal circumstances, cause the *suspension* of another investigation in the field, theretofore initiated by that Division, to permit work on the priority matter on an expedite basis.

The reason for employment of this procedure is to specifically provide machinery which will require reevaluation of the importance and comparative significance of work assignments pending in the field, and which will, in operation, weed out the less significant matters.

Increased selectivity in docketing investigations, by itself, will not affect back-logs in the field, nor will it insure, with any degree of immediacy, that the greatest emphasis is, or will be, attended the most significant matters. Therefore, the assignment of priorities has been set up so as to directly effect an attrition of less important matters.

It is intended that priorities will not only be assigned—they will be effectuated. Priority matters, in the restraint of trade area, will be subjected to controls so as to insure that they will in fact be done *first*. They will not, for example be permitted to be delayed by investigational back-logs in the field. Matters twice suspended to permit investigation of higher priority matters will be returned to the originating Division for re-evaluation and closing or such other disposition as may be warranted.

Determination of priorities will have to be accomplished in two different steps. Priorities with respect to certain pending Division-oriented matters will have to be assigned retroactively, in order to gain some immediacy in effectuating overall priorities. This will be undertaken as soon as practicable. Otherwise, priorities will be determined by a Priorities Committee *as investigations are initiated*. This will be undertaken at once.

PRIORITIES COMMITTEE

A Priorities Committee will become operative immediately. It will function under the Bureau Director. The Committee will consist of representatives of the Office of the Director. (i.e., the Screening and Program Officers, the Director or Assistant Director) and the Chiefs of each Division.² At the outset the Com-

¹ i.e., a designation other than "Routine."

² With the exception of the Chief of the Division of Accounting

mittee will meet every second Monday, at 9:30 a.m., beginning Monday, ———. The frequency and dates of meetings may thereafter be adjusted as needs warrant.

On the Wednesday preceding each meeting, the Bureau's Program Officer will be supplied Priority Evaluation Statements, from each Division with respect to: (1) Each matter to be proposed at the next meeting as a "first" or "second" priority investigation in the field; (2) Each seven-digit investigation proposed for initiation within the Division itself; (3) Any matter proposed for change in previously assigned priority (including, if appropriate, the up-grading of a matter initially carrying a "Routine" designation).

Copies of Priority Evaluation Statements will be circulated to other Division Chiefs, as appropriate, through the Program Officer. For purposes of Priority Committee review, each Division Chief will be prepared to report briefly as to the disposition of applications for complaint received since the preceding meeting and to identify and briefly report upon all matters proposed for formal investigation in the field. Each Division Chief will additionally be prepared to discuss each matter recommended by him for "first" or "second" priority assignment and his reasons therefor. After discussion by the Committee, a determination will be made by the Bureau Director, or his representative, with respect to each matter proposed for formal investigation as to whether the matter should be: (1) further supported by valuation data to be secured by the Division; or (2) docketed as a formal field investigation; and, (3) if so, the priority classification to be designated.³ Priority recommendations will be reviewed with respect to seven-digit investigations initiated within the Divisions. Proposed priority designation changes will also be considered.

Priority Assignment Re Pending Matters: The Priorities Committee designation of priorities for matters initiated from this date forward, will need priority assignment supplementation in two areas: First, with respect to seven-digit investigations currently pending unassigned in the field; and, Second, as to pending matters handled primarily or exclusively within the Divisions.⁴ Included also within this second category are matters pending in the field which are extensions or supplements to matters which already are in the nature of Division commitments (as where the practices of four companies, for example, are closely inter-associated, and complaints have issued against two of them while the other two are still under investigation in the field).

1. With respect to matters pending unassigned in the field, these will be identified, as of the date of approval of this phase of the priority program, and each affected Division will recommend priority designations for each such matter.⁵

Priorities as to these matters will be determined through the Priorities Committee in the same manner as with initial recommendations for field investigation.

2. With respect to pending seven-digit investigations within the Division, or field investigations whose priority classification can be shown to be directly related to significant matters currently pending within the Divisions, the following procedures, if and when approved, will apply.

Merger Division: Division of Mergers' investigations currently pending may all be considered as "priority" investigations for purposes of initial correlation of Bureau priorities. Designated *degrees* of priority for such investigations, however, will assist in setting up evaluation relationships as regards the work of the other Divisions and will provide a useful beginning point for subsequent priority determinations. Accordingly, the Division of Mergers will classify each of its pending investigations successively in order of importance, by industry, supplying, in addition, a brief statement as to the Section 7 significance of each such industry in accordance with the Merger Screening Criteria, a copy of which is attached as Appendix C.

Other Divisions: The Division of General Trade Restraints, Discriminatory Practices and Compliance will review their files so as to enable each such Division to identify each pending investigation in the field which, in their judgment, warrants a classification of "first" or "second" priority, because of specific Commission directive, the relationship of such investigation to a pending Divi-

³ If a priority other than "Routine" is assigned, the procedures described below under "Correlation With the Bureau of Field Operations" will be followed. See also, Appendix B.

⁴ I.e., all Division of Merger investigations.

⁵ It is not contemplated that the files of such cases need be returned from the Field Offices for this purpose, but merely that the Divisions involved draft Priority Evaluation Statements from their own records, for submission to the Priorities Committee.

sion project of major significance, or other over-riding consideration. Any such pending investigational matter, if the Priorities Committee assents to "first" or "second" priority designation, will be removed from the category of matters directly subject to suspension. Each such matter will be identified in a report to the Priorities Committee with a brief statement explaining the basis for each recommended priority classification.

MATTERS NOT SUBJECT TO PRIORITY PROCEDURES

Routine Divisional work assignments, assistance in preparation of advisory opinions, non-case duties, special projects, etc., together with informal and "Small Business" inquiries, remain among the matters *not* subject to the proposed formal priority assignment procedure. Of course, conduct of such work-assignments will be according to practical priorities, applied according to the best judgment of each Division Chief, and will be handled in a sufficiently flexible manner as to accommodate the demands of matters of designated priority, in the case of conflict.

CORRELATION WITH BUREAU OF FIELD OPERATIONS

In the instance of all priority assignments (i.e., other than "Routine") the Director of Field Operations will forward a copy of the PES to each Field Office so located as to be able to accommodate the investigation,⁶ advising them as to the approximate manpower commitment involved. Each Field Office so served will promptly review with its assigned Field Office attorney, all matters currently under investigation, previously initiated by the Division initiating the pending priority investigation. The Attorney in Charge of each such Field Office will thereupon directly advise the Director, Bureau of Field Operations by telephone as to their recommendation, based on the investigational data secured to date, for suspension of a matter, or matters, to accommodate the priority assignment. The Director, Bureau of Field Operations will tentatively select a matter, or matters, for suspension on the basis of the Field Office recommendations, and notify the Office of the Director, Bureau of Restraint of Trade and the originating Division, as to his recommendation for suspension. If the Chief of the originating Division does not concur as to the recommended suspension, he must elect another matter theretofore initiated by his Division, for suspension. In the possible eventuality that the Bureau of Field Operations and the originating Division jointly recommend to the Office of the Director, Bureau of Restraint of Trade, that no matter initiated by that Division justifies suspension to accommodate the new priority investigation, in the public interest, the Bureau of Field Operations may, on the basis of investigational developments, propose a matter, or matters, initiated by another Division, for suspension. After appropriate review and conference with the Chief of such other Division, a formal determination as to suspension will be made by the Office of the Director, Bureau of Restraint of Trade.

The Director of Field Operations will promptly notify the Field Office, or Offices, with respect to any investigations formally designated for suspension, and will appropriately forward the initiating memorandum and files of the priority investigation.

Each Field Office with a matter formally designated for suspension, will prepare a Suspension Memorandum, noting the fact of suspension and the basis therefor: covering therein each of the criteria elements listed in the attached Appendix B. Suspension memoranda should be complete but brief, and should not exceed 5 pages. Copies of the Suspension Memorandum will be forwarded to (1) The Director, Bureau of Field Operations; (2) the Office of the Director, Bureau of Restraint of Trade; (3) the Division initiating the new priority investigation; and (4) the Division whose matter was suspended, if a different Division.

Suspended matters will be re-activated as soon as the superseding priority investigation is completed. Matters twice suspended to permit investigation of higher priority matters will be returned to the originating Division for re-evaluation, closing or such other disposition as may be warranted.

Priorities based upon Priority Evaluation Statements may be given a different priority at any time that circumstances warrant. Recommendations for priority

⁶It is contemplated that this will involve a minimum of three most proximate Field Offices, but in no event will be restricted to one.

changes may originate from any Office within the Bureau of Field Operations or the Director of that Bureau, or from the initiating Division of the Bureau of Restraint of Trade. Concurrence of the Office of the Director, Bureau of Restraint of Trade, must be secured. Differences between Bureaus as to priorities or suspensions which cannot be resolved, if such should occur, will be submitted to the Commission Program Officer for resolution.

A recommended change in priority will be supported by a memorandum covering each of the criteria elements applicable to a Suspension Memorandum (see attached Appendix B).

Continuous appraisal and re-evaluation of the projects and work commitments in Restraint of Trade matters, will require the specific obligation at all work levels, in both the Bureau of Restraint of Trade and the Bureau of Field Operations, to work and think in terms of work-project effectiveness and for inter-bureau coordination of effort to that end. The principal responsibilities of the Bureau of Field Operations will be to ascertain, secure and develop the facts supporting priority evaluations as to each investigation in the field, in terms of the nature, extent and duration of practices under inquiry, their competitive effects and the economic significance or impact of their continuation, together with the probability of establishing a basis for and the indicated best means for, effective corrective action by the Commission.

The affected Divisions of the Bureau of Restraint of Trade are to see to it that they are kept currently advised on all developments in the field on priority matters. Divisional attorneys, assigned priority matters, for example, are responsible for ascertainment that all desired avenues of investigation are being pursued; and that all needed coverage is made, while the investigation is still in the field.

Means, other than case-by-case litigation, for securing effective corrective action, should be considered and evaluated, if such means are presented, or as they may be revealed or suggested during the course of the investigation. Close cooperation in utilization of compulsory processes, the securing of assistance from the Division of Accounting or from other Bureaus of the Commission are responsibilities of the Divisional attorney, when and if, during the course of the priority investigation, such need should arise.

APPENDIX A

CRITERIA ELEMENTS

1. *The substantiality of the unlawful acts or practices alleged* (i.e., the nature of the alleged law violation or violations; the extensiveness of alleged occurrence; the geographic area or areas involved; the indicated number of markets or businesses affected; the reported period of practice duration; etc.) ;

2. *The relevance of the market structure involved* (i.e., the significance of the acts or practices alleged in the light of the number, nature, size or market positions of those reportedly involved, including the alleged law violator, or violators, and the customers or competitors affected; the existence of vertically integrated participants; the existence of oligopoly or significant market control by any participating or affected parties; etc.) ; and

3. *The significance of the industry or of the commodity involved, or, alternatively, the significance of the economic or social environment in which the alleged violation occurs* (i.e., an evaluation of the indicated impact of the alleged act or practice noting the greater social-economic significance, for example, of a conspiracy to fix the price of fluid milk, than would normally apply with respect to a conspiracy to fix the price of home photographic film; the indicated urgency for corrective action as a result of particularly critical economic or marketing conditions, etc.).

APPENDIX B

CRITERIA ELEMENTS

1. The substantiality of the unlawful acts or practices alleged ;

2. The relevance of market structure ;

3. The significance of the industry or of the commodity involved, or, alternatively, the significance of the economic or social environment in which the alleged violation occurs ;

4. The indicated probability that corrective action can be sustained, on the basis of jurisdictional facts already adduced, or on the merits ;

5. Ameliorating economic or competitive developments subsequent to initiation of investigations; and

6. Time and manpower involvement out of proportion to the merit of other factors considered.

APPENDIX C

CRITERIA USED IN SELECTING MERGER DIVISION CASES FOR INVESTIGATION

A careful but flexible selection procedure is followed in choosing those acquisitions and mergers which will be investigated in depth. Broadly speaking, the preliminary screening process involves analyzing mergers and acquisitions in the context of the industry or industries involved, the structure of the industry and the competitive consequences reasonably likely to result from the merger or acquisition. The specific criteria used include:

1. Market Share. How large is the acquisition sales-wise? What shares of the market are being combined?

2. Concentration. What is the concentration ratio of the industry? Is concentration likely to be increased or deconcentration prevented as a result of the merger?

3. Product Markets. Is the merger occurring in an industry which directly affects consumers such as food, housing and apparel? A high priority is given to mergers in these industries. Also, is a basic industry involved such as steel, petroleum, chemicals or textiles where a significant merger may cause adverse competitive repercussions in related industries?

4. Geographic Market. Preference is given to those mergers and acquisitions involving the broadest geographic market.

5. *Per se* Violations. Where it appears that a *per se* violation of Section 7 is involved, initiation of an investigation is mandatory in carrying out the Commission's enforcement responsibility.

6. Developing the Law. An effort is made to select mergers and acquisitions which will test and develop new theories of merger enforcement, some of which have been successfully developed in the past or which may require further testing. These include use of reciprocal power, elimination of potential entry, increasing barriers to entry, and utilization of financial dominance of the "deep pocket" as well as newer untested and untried economic principals.

7. Enforcement Policy Statements. The Commission issues merger enforcement policy statements for particular industries from time to time. This Division is obligated to be prepared to institute investigations in implementation of these policy statements.

The foregoing are the general criteria used in the selectivity process. Depending on the particular circumstances of the merger or acquisition involved, certain of these criteria may be more significant in some cases than in others. A concerted effort is made to use all these criteria to the fullest extent possible in charting the course of investigations and in utilizing the funds and professional manpower allocated to this Division.

FURTHER ATTACHMENTS

Appendix 1: Memorandum to Division Chiefs dated September 24, 1968, including comments on memorandum by Mr. Hurley, Office of Program Review, dated August 27, 1968.

Appendix 2: Division of Mergers' comments dated October 3, 1968.

Appendix 3: Division of Compliance's comments dated October 3, 1968, with responsive commentary.

Appendix 4: Division of General Trade Restraints' comments dated October 15, 1968.

Appendix 5: Division of Discriminatory Practices' comments dated November 4, 1968.

Appendix 6: Bureau of Field Operations' comments dated October 8, 1968, with responsive commentary.

Appendix 7: Memorandums by the Executive Director and by John J. Hurley, Economist, Office of Program Review, concerning "Planning," dated respectively September 18, 1968 and August 27, 1968.

SEPTEMBER 24, 1968.

Subject: Proposed Planning and Priorities Program for Bureau of Restraint of Trade.

To: Division Chiefs.

From: Bartley T. Garvey, Program Officer, Bureau of Restraint of Trade.

Attached herewith for your careful review and comment is the proposed Planning and Priorities Program for the Bureau of Restraint of Trade. Please give this matter your immediate attention and provide me with your comments, in writing, as soon as possible.

Reference is made to the memorandum by Mr. Hurley, Office of Program Review, dated August 27, 1968. The directional emphasis of Mr. Hurley's memorandum is such as to bring into issue the extent that letters of complaint, seeking corrective action relative to indicated violations of the statutes administered through this Bureau, should be permitted consideration as initiating factors in instituting investigations.

As is reflected in our proposed Planning and Priorities Program, we have included, in integral part, the approaches discussed by Mr. Hurley. However, we do not propose procedures which disregard letters of complaint, out of hand, as Mr. Hurley's memorandum might possibly be construed to urge. The informational sources referenced by Mr. Hurley can be employed with advantage in the Bureau's proposed priorities program, however, and we endorse them.

The proposed Bureau program recognizes that the enforcement responsibilities of this Bureau should specifically *not* be confined nor limited to the subject matters of complaint letters. The proposed Planning and Priorities program recognizes also, that the Commission has been specifically assigned responsibility for enforcement of the Federal Trade Commission Act, as well as enforcement responsibility under the Clayton Act as amended. The Federal Trade Commission's responsibility to conduct pure economic studies, as we see it, is a responsibility in addition to, not as a displacing alternative to, law enforcement.

The "pole" position of "over" regarding letters of complaint, as an initiating factor in instituting investigations, appears to us a hardly less balanced basis for fulfilling our statutory responsibilities, than the "pole" position of "disregarding" letters of complaint.

Mr. Hurley states: "Planning new and significant investigations by the Bureau of Restraint of Trade, irrespective of complaint letters, should cover industries that are reaching or have attained a state of oligopoly in which a few large sellers are rivals." We assume that Mr. Hurley means that such studies should be *included* in the Bureau's program and not that such investigations should be undertaken to the exclusion of law enforcement. Assuming that this is the point Mr. Hurley makes, we concur.

Mr. Hurley also states: "The decision to start a new investigation would be based primarily on the size of the industry, the level of industry concentration and the size of the proposed respondent(s). In this approach complaint letters are relegated to a supplementary role in launching antitrust action." Again, we assume that, except in the instance of pure economic studies, indeed valuable though not enforcement oriented, as with informational studies with respect to oligopolistic industries. Mr. Hurley would not argue, we trust, that we should *avoid initially* seeking information indicating a probable, or at least a possible violation of some law administered by the Commission, in initiating industry investigations.

The significance of industry concentration, and concentration trends, in Section 7 Clayton Act enforcement, is manifest. In Section 2 enforcement, the element of industry concentration is not ordinarily of critical significance, although considerations of size and vertical integration may be important. The suggestion that enforcement of laws administered through this Bureau should be by rigid "concentration" or "size" formula, forgets, we believe, the nature of some aspects of our enforcement mandate. We do not subscribe to the proposition, for example, that industries of less than \$100 million should *never* be protected from price discrimination or predatory practices even though an oligopolistic situation has not as yet developed within the industry. The proposition advanced by Mr. Hurley, that local price wars are a "surface indicia of non-competition," is a

little hard to follow, but we would agree with him if what he means is that the existence of local price wars frequently does not present a phenomenon of major anti-competitive significance.

Accordingly, we believe the attached proposed Planning and Priorities Program is consistent with our understanding of the essential thrust of Mr. Hurley's memorandum. For example, his closing statement in the section referencing restraint of trade matters is directly applicable to our proposed priorities evaluation process. "New antitrust investigations of proposed respondents with . . . substantial assets and sales should usually take precedence over new actions against firms within the smaller asset size categories."

APPENDIX 2

OCTOBER 3, 1968.

Subject: Proposed Planning and Priorities Program.

To: Bartley T. Garvey, Program Officer, Bureau of Restraint of Trade.

From: William J. Boyd, Jr., Chief, Division of Mergers.

Reference is made to your memorandum of September 24, subject as above. This Division is in full accord with the comments contained therein with respect to a proper balance between the weight to be given to letters of complaint *vis a vis* economic studies and guidelines, as proper criteria for use in opening formal investigative files. Complaints are rarely the moving factor in a decision to open a merger investigation; however, they often substantiate staff estimates relating to probable adverse effects of a merger, and are given considerable weight in that regard.

The comments in your memorandum constitute in our judgment an appropriate response for the Bureau of Restraint of Trade to the Hurley memorandum.

Hereinbelow we set forth our comments with respect to your memorandum outlining and describing the proposed planning and priorities program for this Bureau.

1. *General*: It is felt that the Division of Mergers is an exception to many of the issues raised with respect to investigational priorities, due to the fact that we do not normally use the Field Offices, but rather conduct our own staff investigations. Therefore, the work overload in the Field Offices does not substantially affect this Division in its Planning and Priorities Program, which is handled internally between the Division and the Bureau of Restraint of Trade.

2. *Priority Assignments*: Your memorandum singles out the Division of Mergers for special treatment in this respect when it provides that pending merger investigations will be considered "priority," and will be classified in order of importance by industry, according to criteria set forth in Appendix C. This list will be furnished at an early date.

3. *Priority Evaluation Statements*: This Division can comply with the priority assignment requirements, as indicated above, but it appears impractical to suspend the opening of new merger investigations until they may be presented to the Priorities Committee for approval at its monthly meeting. Time is of the essence in merger enforcement work, and it has always been standard operating procedure for the Division to challenge apparent violations of Section 7 without delay. Our premise is that Congress has given the Commission a mandate to enforce the statute, and this responsibility has priority over and above any economic studies and guidelines purporting to establish investigative criteria. It is felt that the Division of Mergers should be permitted to open an investigation upon authority of the Chief, with approval of the Bureau Director. The action would then be reported at the next regular Priorities Committee meeting for ratification, or modification. It is my understanding from our verbal discussions that this procedure will be permissible. This will preclude a potential 30-day delay in the opening of merger investigations.

APPENDIX 3

MEMORANDUM

OCTOBER 3, 1968.

Subject: Proposed planning and priorities program for Bureau of Restraint of Trade.

To: Program Officer, Bureau of Restraint of Trade.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

My comments with respect to the memorandum of the Program Officer, dated September 24, 1968, are made hereinafter in chronological order in relation to the identified pages and paragraphs of said memorandum.

I. PAGE 3, PARAGRAPH 1

A PES will be prepared for each currently unassigned formal investigation in the field.

The difficulty in ascertaining whether or not a case is in fact unassigned once it hits the field office is not an easy one. Defining the word "unassigned" as including matters which, while nominally assigned to an attorney but have not been worked on, is the key to this problem. For example, American Greetings Corp., D. 5982, was sent to the field in January 1966, assigned to an attorney in April 1966. No work has been reported on this case to date. The IBM records so indicate. A similar problem is presented, by way of illustration, in the Chicago Office with the Republic Molding Company, C-212, matter. It went to the field in April 1966, and was assigned upon receipt to an attorney who, as of August 16, 1968, reported to this office, upon inquiry, that no work had been performed on this matter, despite the fact that an estimated completion date of September 30, 1968 was indicated on the July 1968 progress report. Kay Windsor Frocks, Inc., D. 5735, went to Boston and was assigned in July 1966. Forty-six hours were reported after March 1968. Thus the "assignment" of matters by field offices is frequently a subterfuge for no action.

From the standpoint of this Division, the ascertainment of whether or not something is in fact unassigned is not insurmountable but will necessitate, in my opinion, direct inquiry to the various field offices involved with respect to some cases.

With respect to some other matters, of course, the task is not of moment because they are reflected on the last progress report as remaining unassigned, as for example, Tyrex, Inc., C-713, which went to the field in May 1967 and is to date unassigned, and Kaiser-Jeep Corp., C-739, which went to the field in March 1966 and was recently shifted to another field office. I believe it is an undesirable practice for a field office to assign a case to an attorney knowing that the attorney will not get to that particular matter for some indefinite period of time. This practice should be corrected from the standpoint of the Bureau of Field Operations. Moreover, as illustrated by the estimated completion date game as perfected by the field offices, e.g., Republic Molding Company case aforementioned, the fact of nominal assignment, coupled with no work being done, still creates in the illogical process of events no impediment to estimating completion dates. One other aspect of the handling of investigations by the Bureau of Field Operations warrants comment also and that is the consistent practice, in many instances, of shifting the estimated date of completion back a month as each progress report is received from the field. We have a pilot chart illustrative of this practice, if of interest. The particular problem with this shifting is that it does not permit, from my standpoint, the proper scheduling in this Division of investigations about to be completed in the field office. This is particularly important in view of the Commission direction that where matters are returned with affirmative recommendations that an initial scheduling of these matters be effectuated at the Division level within 30 days from receipt of the files from the field.

II. PAGE 3, PARAGRAPH 2

On page 3, in paragraph 2, it is stated, inter alia, that the Division Chief's deliberations may include whether an appropriate field office is to be contacted, through the Bureau of Field Operations, to determine if field personnel free of priority assignment may be made available to secure "further evaluation of information on an informal basis." I am not clear as to whether or not the ascertainment of the availability of such personnel is intended to mean that such personnel will make the "further evaluation" call or whether or not with the determination of availability there will be a memorandum to the field, via channels, requesting the further evaluation calls.

III. PAGE 4, PARAGRAPH 3

It is stated that the assignment of priorities will in normal circumstances cause the suspension of another investigation in the field theretofore initiated by the cognizant Division. I find this concept to be extremely illusory and of suspect practicality. If, for example, all probative facts indicate the advisability of sending a case to the Falls Church Office designated (Divisional) First Priority, and the previously assigned matter bearing equivalent priority is 50% complete in the field [a factor which only the field office can fully and fairly evaluate], I question the desirability of suspending case No. 1, because of the

need to implement case No. 2. It may be that case No. 1 was undermanned in relation to the needs of such case; it may also be that in unrelated industries the need for informed field investigation is just as paramount in case No. 1 as in case No. 2. The key point is that this procedure inherently begets waste because it may result in the suspension of case 1 for case 2 and perhaps ultimately the return of case 1 for closing because of failure to obtain enough evidence where law or order violations are clear. What can we forthrightly tell the applicant and his Congressman in such event?

The implementation of a procedure designed to make the forwarding Division the captain of its own fate in the assignment of priorities I do not consider to be realistic when such priority assignments may be played off one against another when both matters are of equal importance.

One of the recurrent problems in the field has been the understaffing of cases. I recognize the severe demands placed upon field office personnel, but, at the same time, there are cases which of their very nature warrant the application of more than one capable attorney; for example, the TBA cases. This factor additionally adds to an inherent problem if the priority system, as proposed, generates return of half finished cases which should have been completed if properly staffed.

IV. PAGE 5, PARAGRAPH 1

It is noted that matters twice suspended because of higher priority matters will be returned to the originating Division for re-evaluation, etc.

I am unclear as to how this procedure, if implemented, will safeguard against a restraint of trade investigation being passed over twice in favor of two First Priority deceptive practice investigations. I further feel that this procedure will almost insure that Priority-4 matters will never be gotten to and this may well involve many "spot checks" of orders initiated without complaint of violation.

V. PAGE 5, PARAGRAPH 4

It is stated that each seven digit investigation proposed for initiation within the Division itself, e.g., investigational hearings, will be subject to the PES program. While I can understand the desire to plan the programming of work as being more comprehensive than to control just the channeling to the field, I do not see why if, in a particular Division Chief's judgment, he can spare men from other matters to conduct a formal investigational hearing that such should be subject to priority evaluation vis-a-vis the work of other Divisions within the Bureau.

VI. PAGE 6, PARAGRAPH 1

It is stated that the Priority Committee will concern itself with the "disposition of applications for complaint" received since the preceding meeting. This, I think, is an overly burdensome procedure from the standpoint of the respective Division Chiefs to the extent that they will be discussing each other's applications for investigation. In addition, it will necessitate weekly contact with every attorney who may have received a telephone call complaining as to a possible violation of an order or statute, even though said attorney may be in the process of preparing a memorandum covering such application. Moreover, I fail to see the practicality in my being asked to, in effect, evaluate the disposition of an application for complaint received by the Division of Discriminatory Practices since the preceding meeting when, in fact, they may not have even had an opportunity to fully evaluate said application.

VII. PAGE 6, PARAGRAPH 2

Future priority designations will be supplemented, inter alia, with respect to matters handled within the Divisions. I believe no priority designation should be required unless the matter has been assigned a seven-digit number. Of course, periodic reports are compiled with respect to the opening of all seven-digit matters although priority classifications are not being presently assigned thereto.

VIII. PAGE 7, PARAGRAPH 5

Where a seven-digit investigation pending within the Division or the field is related to significant matters currently pending within the Division, the Division will review its files and identify each pending investigation in the field as to priority classification suggested.

While I recognize the desire to phase-in the priority system in relation to and not at the expense of matters presently pending in the field without a priority classification, it would be unfortunate if low priority matters approaching maturity or conclusion in the field were to be suspended at such juncture so as not to permit an informed resolution of the case. This provision, in my opinion, is subject to that possibility.

SUMMARY OF COMMENTS AND ALTERNATIVE RECOMMENDATIONS

As previously stated, I recognize the desire and the need for increased efficiency in planning and scheduling work on the part of operating Divisions and Bureaus of the Commission. I am assuming for present purposes that a comparable or identical program must be placed in effect by the Bureau of Deceptive Practices. That Bureau is a most active competitor for the limited resources of the various field offices.

At the risk of sounding too negative but with a conviction of objectivity, I feel that certain aspects of the proposed procedure would prove to be not only unduly cumbersome to administer but might well prejudice the effective handling of cases. The assignment of a priority to a matter going to a field office which, in turn, might affect the disposition of a previously assigned case of obvious merit is, in my opinion, substituting mechanical formulae for what must inevitably be a matter of sound administrative determination on the part of the Attorney in Charge of the particular field office. I do feel that a priority system may eliminate some cases which should not properly have been docketed for investigation in the first instance, let alone forwarded to a field office. Such aspect of the proposed plan, namely the assignment of priorities to matters, I think is worth trying. However, because of the conviction that I have to the effect that this procedure is too cumbersome in balancing one case against another, I believe it would be preferable for the Bureau to assign an appropriate priority and that the matter then be left to the discretion of the field office as to disposition. There should not be an interlacing procedure of case bumping and passover, in my opinion, since it is inherently too cumbersome to be effectively workable.

RESPONSE TO THE COMPLIANCE DIVISION'S COMMENTARY

Mr. Gerecke submitted a memorandum indicating a detailed review of the proposed program.

1. The first point made is with respect to proper determination of matters to be classified as "unassigned" in the field. This does present an implementation question, but resolution of it should merely require a definition of "unassigned" cases, as those cases on which no work has been done, or on which less than X hours of work has been done.

2. The second proposition raised is whether a "contact" with a Field Office through the Bureau of Field Operations, making inquiry as to whether personnel free of priority assignment may be made available to secure further evaluation information "on an informal basis"—means by a "memorandum to the field, via channels." The answer is negative.

3. Point III of the Compliance Division's memorandum presents a basic objection to the proposed program and is important for that reason. The objection, first of all, however, assumes a false premise. Any case of first priority, under the proposed program, will have required a review of pending investigations by, normally, no less than three Field Offices. *Each* of such offices will have reviewed their pending investigations, compliance investigations in the instance of Mr. Gerecke's Division, to determine whether any compliance matter, on the basis of investigational results ascertained to date, justifies suspension to permit expeditious handling of the matter of first priority. Another *first* priority investigation, as in Mr. Gerecke's example, would not be elected nor be eligible for suspension. It would be unusual indeed for each of three Field Offices to have only "first" priority Division of Compliance investigations. Other examples cited in the Division of Compliance memorandum, as a matter of fact, indicate that many compliance matters sent to the field do not apparently merit or at least are not given priority handling. Mr. Gerecke cites examples of prolonged inaction by the field in connection with compliance investigations, for months, and sometimes years (American Greetings Corp., Docket No. 5982; Republic Molding Company, Docket No. C-212; Kay Windsor Frocks, Inc., Docket No. 5735; Tyrex, Inc., Docket No. C-713; Kaiser-Jeep Corp., Docket No. C-739; etc.). This is the kind

of thing the proposed program seeks to remedy. Such unintended but de facto initial "suspension" of cases under the present system requires remedy both because of the evident loss of any effective control by the division over those matters themselves, but also because when finally investigated they will in turn occasion successive delay of inquiry into matters which, hopefully, are of sufficient significance and immediacy to warrant inquiry *currently*. Matters cited by Mr. Gerke which have, to his knowledge, remained inert for periods of up to and exceeding two and a half years, certainly would appear to be susceptible to some "weeding out."

4. Point IV of the Compliance Division's memorandum concerns itself with the question of whether Deceptive Practices' priorities are intended to suspend Restraint of Trade investigations. The answer is negative. It is anticipated that coordination of the work of the two Bureaus will permit a fair and workable allocation of work assignments between them by the Bureau of Field Operations.

5. The next point raised, is that matters going to the field, perhaps, should be assigned priorities, but that what is done within the Division of Compliance should not "be subject to priority evaluation." In this regard, the proposed program assumes that justification of appropriated dollars spent should be on the same basis for matters both initiated and investigated within the Division as for matters initiated within the division and investigated in the field.

6. Point VI of the Compliance memorandum deals with, as "overly burdensome," the matter of Division Chiefs being "prepared to report briefly as to disposition of applications for complaint received" by the respective Divisions at Priority Committee meetings. The purpose of the proposal, of course, is to provide a forum for closer correlation of activities among the Divisions. Where letters of complaint are received by one Division having a relation to matters already being considered by another Division, for example, or which indicate a new aspect of practices within an industry as to which another Division has devoted considerable study, or where orders to cease and desist are outstanding, appropriate apprisement and coordination may be effectuated.

7. Point VII. Informal matters are excluded from priority procedures, as noted on page 8 of the proposal.

8. The final point made in the Compliance memorandum is in defense of maintaining full field investigation of low priority matters even at the cost of shelving investigations of high priority, because to make a selective choice of proceeding with the important matters" . . . would be unfortunate if low priority matters approaching maturity or conclusion in the field were to be suspended at such juncture so as not to permit an informed resolution of the case."

In the above connection it has been said,* in substance, that, "rational choice among alternative courses of action" leads to better results than any other decision-making process, "when resources are scarce."

APPENDIX 4

MEMORANDUM

OCTOBER 15, 1968.

Subject: Proposed Planning and Priorities Program for Bureau of Restraint of Trade.

To: Bartley T. Garvey, Program Officer, Bureau of Restraint of Trade.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

In accordance with your request for comments on your memorandum of September 24, 1968, concerning "Proposed Planning and Priorities Program for Bureau of Restraint of Trade" the undersigned submits the following.

1. I frankly find considerable difficulty in concurring with John Hurley's recommended solution to the problem confronting this Bureau. It appears that his suggestions totally ignore the realities of our operating history as well as a series of functions for which this Agency as well as the Bureau were established. His *in vacuo* approach leaves much to be desired. Not only does he fail to show an understanding of our day to day work, but also a logical extension of his reasoning could ultimately lead to an "economic policeman" role for the Federal Trade Commission which was never intended and is certainly not desirable.

*The Executive Director in his memorandum of October 27, 1967, to the Bureau Directors and Office Heads, noted, relative to the necessity of a planning program:

"The theory of PPB is derived from the theory of choice which is one of the cornerstones of economics. The basic point of that theory is that *rational choice among alternative courses of action*, where resources are scarce, leads to better results than any other decision-making process."

Finally, I am surprised at the unequivocal acceptance of Mr. Hurley's suggestions by the Executive Director. Mr. Hurley's basic assumption that a statistical study of concentration will lead to the "cure" of all economic illness of our society displays a certain "panacea" psychology. Such an approach might be applicable to our Merger Division. However, Section 5 of the FTC Act as well as Section 2 of the Clayton Act rely most frequently on totally separate factors for demonstrating violations of the laws we administer.

2. In previous memoranda this Division has recommended and urged formalized joint activity between the Bureau of Economics and in particular this Division. We again urge such a program; but not to the exclusion of servicing the small businessmen relying on us for aid that for many reasons cannot be obtained elsewhere. *Inter alia*, Mr. Hurley ignores the reality that hundreds of significant and economically substantial matters have developed from these letters throughout our history. Certainly, a program combining a formal, searching and continuing relationship with the Bureau of Economics along with our present "mail bag" activity would both satisfy the Bureau of the Budget and allow for services and protection to the small businessmen regularly relying on us.

3. This Division has since its existence maintained regular liaison with the Bureau of Field Operations in order to expedite the investigations for which we are responsible. Accordingly, I do not see the need for a new "superstructure" to formalize what already exists. In lieu thereof, it is suggested that Division Chiefs of the Bureau be required to meet regularly with the responsible administrators in the Bureau of Field Operations to implement the *priority system* outlined in the September 24, 1968, memorandum. After each such meeting, the Division Chief should then be required to report, in writing, the changes in priorities that were instituted to the Bureau Director for his information as well as approval. Such a system should necessarily both expedite the investigation of cases involving greater economic significance, as well as indicate to the Bureau of the Budget that the process of "selectivity" or "choice" is being given full and formal implementation.

4. Finally, our impression, voiced previously, is that the Bureau of the Budget does not fully appreciate the valuable services we perform daily for the business community. No other Agency provides small businessmen in particular not only with guides to behaving legally, but also with protection against encroachments from larger competitors. Typical of letters received by this Division weekly is one from a paint distributor who had lost a line he had carried for years because of incipient illegal activity, and was reinstated because of our efforts.

"I wish to take this occasion to thank you very much for your assistance on my behalf and although I had a lose, it is comforting to know that the Federal Government will give assistance to help a small business man such as myself. It is also comforting to know some of these big companies have to stay on the ball."

Our entire history is replete with the language of "incipient monopolies" or "incipient illegalities". No economic study will find or foresee these activities at that level. In one sense it is too late if a formalized economic study can detect them. Only the "mail bag" can keep us informed and in a position to prevent the growth of illegalities. We are beginning to spend millions to protect the individual consumer. Certainly the individual small businessman deserves equal treatment.

APPENDIX 5

MEMORANDUM

NOVEMBER 4, 1968.

Subject: Proposed Planning and Priorities Program for Bureau of Restraint of Trade.

To: Bartley T. Garvey, Program Officer, Bureau of Restraint of Trade.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices, Bureau of Restraint of Trade.

By memorandum dated September 24, 1968, from the Program Officer, Bureau of Restraint of Trade, this Division was directed to make written comments concerning a "Proposed Planning and Priorities Program for Bureau of Restraint of Trade." Before commenting on the specific proposals recommended, some general observations should be made.

The papers submitted to this Division from the Program Officer do not, in our view, specifically identify the problems that the recommended changes are attempting to solve. Are we confronted with inadequate planning for budget pur-

poses, inadequate screening, inadequate communication with the field offices or a severe backlog of cases in the field offices that cannot be expeditiously completed?

As for planning, we favor initiating projects separate from complaint letters. This Division has been concerned about getting involved in new areas. There are at least three major areas not being actively pursued because of manpower limitations. They are the hardware, fiber and appliance industries. In hardware, entry is foreclosed unless one affiliates with a buying group. In fiber, "bags" of promotional money are being paid to the favored few, and promotional payments in the appliance industry are overdue for serious consideration by this Division.

In addition, of growing concern to this Division is the rapidly growing practice of large buyers integrating backward into processing and production resulting in significant foreclosure in substantial segments of the various markets involved. A combination legal and economic investigation would be needed to study all of the ramifications of this problem. This, of course, is another area not presently being studied because of manpower limitations.

In industries where numerous complaints have been received, the Division has organized project teams organized along major industry groups, e.g. apparel, dairy products, chain grocery, automotive replacement parts, bakery products, drapery hardware, drugs, fresh fruit and vegetables, publishing and tri-partite arrangements. This procedure permits the fullest utilization of accumulated expertise in a particular statutory area with special emphasis on industry-wide problems. It also reasonably assures the elimination of duplication of effort and inconsistent activities and policies.

We favor increased selectivity in screening. In fact, that has been the policy and practice of the Division of Discriminatory Practices. In fiscal 1968, approximately 63 investigations were selected out of approximately 350 applications for complaint. The selection process utilized required an evaluation of, among other things, the market structure, requisite public interest, relative size of the participants, substantiality of the practice, jurisdiction and likelihood of a successful remedy.

We do not favor the allocation of priorities. Effective screening should result in sorting out insignificant matters. Only significant matters should be sent to the field for investigation. The responsibility for making the final decision as to cases that should be initiated for investigation should reside in the Office of the Bureau Director. The responsibility for progress of the investigation should be left to the divisions. We favor close cooperation between the assigned attorney and the field offices and any system where cases found to be without merit after preliminary investigation can be quickly terminated.

We do not favor the meetings, the preparation of Priority Evaluation Statements and other interoffice memorandums proposed. The decision as to whether a case should be investigated can best be made upon review of the complete factual memorandum recommending that field investigation be undertaken. All facets of the proposed investigation should be set forth. The initiating memorandum would be reviewed by the Bureau Director and the Program Officer.

Suspension or substitution of investigations should be done only after consultation with the division, subject to review by the Bureau Director and Program Officer. However, it must be recognized that the threat of possible suspension of our work will entail more direction by the divisions in the conduct of field office investigations.

APPENDIX 6

OCTOBER 8, 1968.

MEMORANDUM

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.
Attention: Bartley T. Garvey.

From: Chas. R. Moore, Acting Director, Bureau of Field Operations.

The first 7½ pages of the memorandum titled "Bureau of Restraint of Trade Planning and Priority Program" (submitted with your memorandum dated September 25, 1968, requesting suggestions from this office for improvement of that part of the program affecting the Bureau of Field Operations) deals essentially with the creation and functioning within the Bureau of Restraint of Trade of a committee that is to assign priority ratings to cases.

No comment is offered with reference to those matters relating entirely to internal operations within your bureau.

Other matters will be considered in their order of appearance in your memorandum. Since the procedures proposed are rather complicated, it is necessary to answer with considerable detail.

A question arises as to why assigned but yet completely uninvestigated cases in the field offices are not also given priority ratings. (See paragraph 2, page 3 and paragraph 2, page 6.)

In paragraph 3, page 3, provision numbered 2, it is provided that your bureau will contact, "through the Bureau of Field Operations", field offices to determine availability of professional personnel to obtain certain limited information on an informal basis. The exact procedure contemplated is not outlined. It is believed that the offices of the Director or Assistant Directors of the Bureau of Field Operations should be contacted by your bureau and that they should, in the interest of independent, orderly and efficient management of the Bureau of Field Operations, determine availability of personnel for this and other purposes, as we have in the past. This bureau has always cooperated speedily and closely with other bureaus and on a simple and informal basis. The doors of our offices are always open. It is believed that this is the best procedure. However, extensive past experience has conclusively proven that over-specialization in field office personnel and specific percentage allocations of staff time to various classes of cases has proven markedly inefficient, impractical, and is expensive and that it creates an imbalance in overall performance of this bureau and the Commission's entire duties. Also, that utilization of the best talent available on a particular case problem, in light of our entire calendar of cases, requires that determination of availability of personnel in the Bureau of Field Operations and assignment of cases must remain with its management as presently provided. (Administrative Manual Ch. 6-053, Attorney's Manual pp. 15-19, and Administrative Bulletin 65-10.) In endeavoring to accomplish the ends you desire, we shall continue to cooperate to the fullest degree.

With reference to the comments in paragraph 4, et seq. on pp. 4 and 5 of your memorandum, it should be observed that the temporary discontinuance of one field investigation and the undertaking of a more pressing investigation (i.e., one having a greater priority, in the opinion of the initiating bureau) is continually being done on an informal basis. It is believed that consideration should be given to the retention of as much informality and flexibility as is possible in inter-bureau relations, for it is fast, efficient and prevents procedure from becoming an end within itself rather than a tool to an end.

Past experience also indicates the need for constant vigil to prevent not only imbalance in investigative efforts resulting from a priority system—a condition that can be highly injurious to the Commission—but to prevent too many cases from becoming priority cases and thus invalidating the whole purpose of the procedure. This factor is significant in connection with the provisions of paragraph 1, page 5. This provision may require delaying the development of Bureau of Deceptive Practices and Bureau of Industry Guidance matters that are of equal or greater importance until all the Restraint of Trade priority matters are completed. It is doubted that the Commission would wish its consumer protective work relegated to such an inferior position.

The procedures suggested in paragraph 3, p. 8 of the memorandum are, in our judgment, completely unwieldy and impractical and would constitute a handicap to the management of the Bureau of Field Operations in the exercise of its experienced judgment, and are in direct contravention of existing Commission created organizational structures. Administrative Manual Ch. 6-053, the Attorney's Manual Sections II and III, and Administrative Bulletin 65-10.

We are not aware of any delays in Bureau of Restraint of Trade cases or the cases of other bureaus resulting from (1) assignments to improper field offices or (2) failure to utilize all available professional manpower on field office staffs which would give rise to the need for the Bureau of Restraint of Trade suggesting procedures to replace the direct use of the informed and seasoned judgment of the management of the Bureau of Field Operations on either point. This office has long maintained an expedite calendar and regularly checks to see that cases so classified receive priority treatment. From time to time, in our daily contacts with members of the staffs of all bureau's and their management, we have, consistent with available manpower, endeavored to move the most pressing cases first and in accord with the wishes of the various bureaus. However, since the Bureau of Field Operations serves several bureaus, it must not

ignore or give inadequate consideration to the needs of any bureau in the development of cases. This last factor (i.e., needs of other bureaus) appears not to have been adequately considered in the priority procedures memorandum submitted for our comment.

Relative to the suggestions in the penultimate paragraph, page 9 of your priority procedures memorandum, it is our belief that the Bureau of Restraint of Trade is in a better position, since all its staff is at headquarters and in frequent contact with the Commission and other top management officials, and are more conversant with their own yardsticks for measuring comparative importance of cases and projects, to assess priority ratings of their own cases than is the field offices and, if made by the Bureau of Restraint of Trade, those ratings should be justified by that bureau, not by the Bureau of Field Operations. Unless the Bureau of Field Operations has already conducted substantial investigation, it would be unable to comply with the requirements of Appendix B. If substantial investigation has been made, the Bureau of Field Operations can give the information involved in Appendix B but in many cases we will be so near completion that it may be impractical to suspend investigation, for if there is much delay in resumption—and this could occur under the complex rating system suggested—the investigative effort already expended might be rendered worthless. Ordinarily the case chosen for suspense status would be the case of very limited public interest. Once chosen, it probably would be the case chosen the second time for suspense and this requires a return of the case. This could create an accumulation of aging cases. Incidentally, it is not clear who reactivates the case, once it is suspended.

Paragraph 3, page 10 of the memorandum states it is a principal responsibility of the Bureau of Field Operations to obtain information "supporting priority evaluations of each case in the field." (The first portion of this sentence appears to deal with elements of a preliminary investigation and the latter portion of the sentence with the elements of a full investigation.) While the Bureau of Field Operations may conduct limited, preliminary, investigations that would be of great assistance in determining whether a matter warrants full investigation and in establishing priority ratings, responsibility for justifying ratings established by the Bureau of Restraint of Trade should rest with that bureau. (Incidentally, it is suggested that if judiciously and selectively employed, preliminary investigations, that involve even contacts by your bureau by correspondence or by field office attorneys with the alleged violator, might be used to much advantage. Use of seven digit numbers on such cases would be necessary under present policy, and that would be an advantage to this bureau in assigning time and getting credit for work performed.)

Paragraph 4, page 10 of your priority memorandum again creates questions of what is involved. Presently, attorneys of your bureau and those of other bureaus regularly and freely discuss the status of pending cases with attorneys of the Bureau of Field Operations and, when desired, they go to the field offices and review the cases before completion and on occasion we make interim written reports on cases. It is felt that there should be no barriers to the ascertaining of the status and development of any case and that there should be all necessary collaboration between members of the staffs of all bureaus on matters of mutual concern. However, a multiplicity of interim written reports would impede the efficient, productive conduct of investigations. The same handicaps can result from too much red tape in making assignments and reports on priorities. All this should be most carefully avoided and the day-to-day operations of the Bureau of Field Operations and the implementation of field investigations, subject to your general outlines and the procedures discussed above for close informal collaboration, must be left in the management of the Bureau of Field Operations, as is presently provided by the Commission, if undue disruptions of the investigational activities of this bureau are to be avoided.

From the introductory part of your memorandum it appears that the primary need is that cases be entered on a basis that will assure application of regulatory effort in the restraint of trade area to practices that are most injurious. It apparently is felt that too much reliance has been placed on discovery of those illegal practices through complaints that are filed with the Commission and incidental to our investigations of cases and not enough on our own discovery through research, etc. Selection of and entry of cases or projects is a function of your bureau and any procedure employed within your bureau for that purpose or in rating cases as to their relative importance is not of direct concern to the Bureau of Field Operations, except insofar as they involve limited or preliminary

field investigations. In the conduct of this type of investigation and of full investigations, our joint responsibility is to get the job done as efficiently as possible, with available resources, due regard being given to all Commission responsibilities. Within this framework, the Bureau of Restraint of Trade has a proper concern that its priority ratings be respected. The provisions of the Commission's Administrative Manual (6.053.6) are well suited to the accomplishment of that purpose. The Bureau of Field Operations will, as it has in the past, fully cooperate toward the attainment of those ends and fully respect the priority ratings given by your bureau. It is believed the procedures outlined in your proposals go, without justification, much beyond the purposes just mentioned and into day-to-day operations of the Bureau of Field Operations and that those procedures are so cumbersome and constrictive that they will impair orderly and efficient operations of the Bureau of Field Operations in connection with its investigation of Bureau of Restraint of Trade cases and the cases of other bureaus. Also, this method of operation would create a most serious morale problem, particularly in this bureau.

COMMENTS OF BUREAU OF FIELD OPERATIONS

1. A question is posed as to an oversight respecting "assigned but yet completely uninvestigated" matters in the proposal. We will correct this ambiguity.

2. As to instances of securing further "evaluation" data on an informal basis, the Bureau of Field Operations proffers its cooperation.

3. The Bureau of Field Operations observes that it pursues a process of selective substitution of more pressing for lower priority investigations already, on an informal basis, and prefers that more formal procedures not be instituted. We believe more formal procedures to be necessary.

4. The next question raised, is as to the likelihood that the proposed Restraint of Trade priority procedures will adversely effect Deceptive Practices and Industry Guidance investigations. It is not our intention that the investigations of these other Bureaus should be affected at all.

5. The Bureau of Field Operations opposes the proposed procedures for selection of pending cases for suspension to permit expeditious investigation of high priority matters. The procedures are opposed as: (a) contravening the existing organizational structure; (b) not necessary because of the effectiveness of present procedures involving the use of the informed and seasoned judgment of the management of the Bureau of Field Operations; and, (c) the field offices could not apply the criteria indicated in Appendix B of the proposal unless an investigation were so near completion as to render suspension impractical. As to (c) above, the field offices, normally, will be checking investigative information against a pre-existing Divisional evaluation, initially made as to the first three criteria (Appendix A). The proposal contemplates a modification of investigative techniques, to the extent necessary to permit attorneys in the field specifically to "look for" information as to the indicated criteria elements, from the outset.

6. The next item commented upon is a possible distinction between "preliminary" investigations and "full" investigations. While purely "preliminary" investigations may be necessary in appropriate circumstances, *all* investigations should be subjected to critical evaluation and reappraisal, as new data is uncovered and new considerations presented. For example, a 2(a) investigation of a number of suppliers might, on the basis of investigative developments, be better redirected against a particular "power" buyer.

7. The Bureau of Field Operations next notes that there are presently no "barriers" between that Bureau and the Bureau of Restraint of Trade, but that a multiplicity of written interim reports would create an impediment to productive work. Written interim reports are not contemplated, but a closer working relationship between the Bureaus is, in fact, proposed.

8. The final comment of the Bureau of Field Operations is, in effect, that if the Bureau of Restraint of Trade does undertake a priorities program, that the handling of such priority matters, after they are received by the Bureau of Field Operations, be handled by that Bureau as they have in the past, pursuant to the present provisions of the Commission's Administrative Manual (6-053.6). This, of course, we accede to, if the Commission determines, as it may, that alleged shortcomings in the Bureau of Restraint of Trade's present procedures are not related to the handling of restraint of trade matters by the Bureau of Field Operations. However, we believe that the alleged shortcomings of the Bureau of Restraint of Trade's present program inextricably involve the handling of restraint of trade matters out in the field as well as matters technically within the Bureau of Restraint of Trade. Accordingly, changes in this Bureau's procedures require accommodating variations in the handling of restraint of trade matters while they are being investigated in the field.

APPENDIX 7

MEMORANDUM

FEDERAL TRADE COMMISSION,

September 18, 1968.

Subject: Planning a more effective allocation of bureau resources in trade restraints and in deceptive practices.

To: Bureau directors.

From: John N. Wheelock, Executive Director.

I am transmitting herewith a very thoughtful memorandum dated August 27, 1968, in regard to the above subject prepared by Economist John J. Hurley of the Office of Program Review.

I am in general agreement with Mr. Hurley's memorandum. The principles of program planning expressed therein are essentially the same as I have expressed to each one of you individually and, also, in our budget meetings. In my view, it is vital to the future operations of this Commission, in carrying out its statutory mandate, to initiate and execute intelligent planning of its work. Our jurisdiction is just too wide and extensive to continue our past practice of selection of matters for investigation. That system of selection was probably acceptable and perhaps advisable when the Wheeler-Lea Act and the Robinson-Patman Act were in the development stage and the economy was not as sophisticated as it is today.

We had hoped that the justifications for the 1970 budget would reflect better planning. Mr. Hurley refers to these justifications as a "pasting together of divisions' and bureaus' justifications." We must do better than this if we expect the Bureau of the Budget to recommend the additional funds that this Agency should have to protect the public and competition.

The Bureaus of Restraint of Trade and Deceptive Practices are making structural changes in those Bureaus designed to aid the planning processes. There must be coordination within the Bureaus between and among planning and budgetary personnel and the operating divisions. The basic planning must be done under our present system in the Bureaus and the responsibility for this is in the Bureau Director. Planning and budgeting obviously must be carried on constantly all during the year and not just at the time for preparing budgets. The cliché is still true, that is, "plan the work and the work the plan."

Law enforcement activities such as those engaged in by the Federal Trade Commission must, of course, reserve a part of its resources for unforeseen projects and for matters which may require attention because of Congressional or other official requests. However, most of our resources can be devoted to our planned operations.

We should be now planning not only our current work but also forming the basis for our budget justifications for the fiscal year 1971.

Please carefully consider the basic principles outlined by Mr. Hurley. If you do not believe that these principles apply to your Bureau, I would like to discuss the matter with you. If they do apply to your Bureau, please implement the necessary planning processes in your Bureau. The Office of Program Review is, of course, available to you for advice and counsel. I am hoping that when the Program Review Officer, Mr. Sweeny, returns that he will be particularly valuable in aiding the over-all planning in the deceptive practice field regardless of bureau lines.

I would expect that at a subsequent date or dates that we would have conferences with the Chairman and with the respective Bureaus to discuss progress in this field.

MEMORANDUM

AUGUST 27, 1968.

Subject: Planning a more effective allocation of bureau resources in trade restraints and in deceptive practices.

To: Executive Director.

From: John J. Hurley, Economist, Office of Program Review.

Considering the serious illness of the Program Review Officer, this seems an appropriate time to report on what this office is doing.

The continuing function of program review is to come up with reasonable proposals for a more effective Commission. The hard issue is how to ensure that

the enforcement bureaus start significant investigations. We have been working on this problem. This report suggests a few practical bases for determining what investigations should be started. The memorandum also offers some proposals for setting bureau priorities straight.

FOCUSING ON THE IMPORTANT IN THE RESTRAINT-OF-TRADE FIELD

There still continues a heavy reliance on complaint letters as the initiating factor in instituting investigations of general trade restraints and discriminatory practices. The resulting effect tends to misdirect Commission resources, putting first things last. In concentrated industries—which really need a substantial amount of Commission attention—the large producers rarely complain and the few small firms that have survived in these industries think twice about lodging complaints with us against their powerful rivals. In competitive industries, on the other hand, there are lots of small firms ready to complain to the Commission if any competitors step on their toes.

Planning major antitrust investigations along industry lines by the Bureau of Restraint of Trade, assisted by the Bureau of Economics, through joint legal-economic analyses of basic industries could reach significant trade restraints. The decision to start a new investigation would be based primarily on the size of the industry, the level of industry concentration, and the size of the proposed respondent(s). In this approach complaint letters are relegated to a supplementary role in launching antitrust actions.

Under this holistic form of planning, the restraint of trade staff would first survey the spectrum of major industries and choose the industry areas in which to proceed with new investigations. The bureau attorneys, assisted by economists, would look at the universe of industries (industry sales), identify concentration trends and problem areas, and then make some choices to deal with the most important anticompetitive problems. Bureau attorneys would be assigned to maintain continual close watch (and develop potential legal actions) in basic industries—iron and steel, automobiles, basic chemicals, and petroleum refining, among others. Serious monopolistic problem areas may be bypassed if the bureau reacts mostly to surface indicia of non-competition, such as local price wars, cast up by complaint letters.

The Senate Subcommittee on Antitrust and Monopoly has published data on industry shipments and concentration ratios based on the Census of Manufactures for 1958 and 1963. These data can provide the trade restraints staff with a useful tool to identify major trouble spots and to direct bureau resources against those areas. Since the Commission does not have unlimited resources, the bureau could initially confine new investigations to industries with total sales of at least \$100 million unless the industry had a high degree of concentration (8 firms supply 75 percent or more of industry shipments).

Planning new and significant investigations by the Bureau of Restraint of Trade, irrespective of complaint letters, should cover industries that are reaching or have attained a state of oligopoly in which a few large sellers are rivals. Once the condition of concentrated industry structure is established, the probabilities are that a change in the market behavior of the industry members will take place in a noncompetitive direction. There is also an apparent tendency for concentration to increase in oligopolistic industries and less for it to decrease than in other less concentrated industries.

To plan for competition the trade restraints divisions should focus upon practices of the largest corporations. The promise behind this approach is that corporations of large size with substantial financial and market power have a greater probability of injuring competition than small business firms. Using large corporations as a modus operandi for initiating investigations does not involve opposition to bigness per se but to bigness accompanied by substantial anticompetitive power.

The Quarterly Financial Report, made jointly by the FTC and SEC, shows total assets and sales by manufacturing corporations classified the asset size of such companies. Based on these data: Table 1 discloses that manufacturing corporations with assets of \$100 million and over account for 73 percent of the total assets and 60 percent of total sales of all manufacturing corporations. New antitrust investigations of proposed respondents with these substantial assets and sales should usually take precedence over new actions against firms within the smaller asset size categories.

TABLE 1.—TOTAL ASSETS OF ALL MANUFACTURING CORPORATIONS, 1ST QUARTER 1968, AND THEIR TOTAL 1967 SALES BY ASSET SIZE

[Dollar amounts in millions]

	Total assets of all manufacturing corporations ¹		Total sales ² of all manufacturing corporations ¹	
	Amount	Percent	Amount	Percent
\$1,000,000,000 and over.....	\$194,560	43	\$169,087	29
\$250,000,000 to \$1,000,000,000.....	92,842	21	120,167	21
\$100,000,000 to \$250,000,000.....	39,404	9	53,992	10
\$100,000,000 and over.....	326,806	73	343,246	60
\$50,000,000 to \$100,000,000.....	20,817	5	30,536	5
\$25,000,000 to \$50,000,000.....	18,299	4	27,233	5
\$10,000,000 to \$25,000,000.....	17,965	4	28,723	5
\$10,000,000 and over.....	383,887	86	429,738	75
\$5,000,000 to \$10,000,000.....	12,203	3	22,220	4
\$1,000,000 to \$5,000,000.....	27,677	6	58,663	10
Under \$1,000,000.....	25,131	5	64,804	11
All asset sizes.....	448,897	100	575,427	100

¹ Figures are rounded and will not necessarily add to totals.² Sales—net of returns, allowances, and discounts.

Source: FTC SEC, Quarterly Financial Report for Manufacturing Corporations, 1st Quarter 1968, 50-55, 61 (1968)..

DEVELOPING SIGNIFICANT INVESTIGATIONS IN THE DECEPTIVE PRACTICES FIELD

The deceptive practices employed by the nation's largest corporations should constitute a principal point of departure of the Bureau of Deceptive Practices in initiating new seven-digit investigations. To avoid the mire of unimportant cases against small respondents, the bureau might be instructed to siphon incoming complaints against firms with assets under \$10 million of state consumer protection agencies. As Table 1 shows, manufacturing companies with assets under \$10 million account for only 25 percent of total sales by all manufacturing corporations.

Additionally, the allocation of the deceptive practices budget (around \$2 million) should be planned and distributed along consumer industry lines, considering the volume of advertising in the industry. In food processing, for example, the National Commission on Food Marketing cited breakfast cereal manufactures as an example of heavy sales promotion and industry concentration leading to administered prices and higher-than-average profits. Industries that spend the most on consumer goods advertising warrant more deceptive practices surveillance than industries selling undifferentiated products.

At the time of Mr. Sweeny's recent heart attack, he was developing a planned program of consumer protection that would integrate the resources available to the bureaus having consumer protection responsibilities. Predominant reliance on complaint letters reporting market deceptions has tended to limit Commission efforts to seek out and determine the magnitude of serious consumer problems in the market place.

In decisions to open new investigations of market deceptions, complaint letters should supplement and play a subordinate role to the primary factors of size of respondent, volume of respondent's advertising outlays, industry size and industry advertising expenditures. The real objective of this method of planning is to shift bureau resources to worthwhile investigations and to increase and maintain continual surveillance over heavily advertised consumer products and the selling practices of large national advertisers.

CONCLUSIONS AND RECOMMENDATIONS

This report on planning a more effective use of Commission resources advanced two main propositions:

1. In opening up new investigations in trade restraints, the main bases (*regardless of complaint letters*) are the level and trend of industry concentration as well as the size of the industry and the monopoly power of the largest corporations. The resources of the bureau would then be used to have the greatest impact on the more concentrated industries.

2. In deceptive practices, primary consideration should be given to the volume of advertising expenditures and size of relevant industry, as well as to the size and advertising outlays of the proposed respondent. This approach would de-emphasize complaint letters as a primary factor for beginning new investigations of market deceptions.

There is also a real need for some innovations to provide the Commission with insight into the program planning of the bureaus. *It is suggested that every six months the Program Review Officer should go before the Commission with his main proposals as to major areas of deceptions and trade restraints. Accordingly, the Executive Director is requested to issue a directive to each bureau head requiring a report to the Program Review Officer on or about November 1 and May 1 covering each bureau's ten most significant investigations and ranking its priority investigations (with supporting rationale).*

By this means the operating bureaus must develop standards for determining what is important in order to set their priorities. In turn the Commission will be in a position to see important resource commitment issues early, and to compare the direction and costs of upcoming bureau investigations and major programs. The Office of Program would function as a center for priority analysis.

PENDING PROJECTS

The major recent assignment of this office has been the preparation of recommendations to the Commission on what the Commission should do to enforce its mandate under the new Truth In Lending Law and how it should do it. The office is now providing economic support to the legal staff charged with truth in lending implementation (Attorney Sheldon Feldman). We are working with the Federal Reserve Board staff in the drafting of regulations to carry out the purposes of the new Act.

In the planning area this office is examining what is wrong with program planning and budgeting at the bureau level and with ways and means to overhaul the Commission's archaic budget preparation process. The Commission budget is still more a pasting together of divisions' and bureaus' justifications than a unified and balanced Commission program.

MEMORANDUM

JANUARY 3, 1969.

Subject: Economic means to plan more effectively the initiation of new investigations by the bureaus.

To: Executive Director.

From: John J. Hurley, Economist, Office of Program Review.

This is a good time to take some stock of the practice of planning in the bureaus. With the possible exception of the Division of Mergers, the operating bureaus show few signs of planning on a rational basis the investment of their manpower in significant, new investigations. For instance, of the 56 investigations initiated by the Bureau of Restraint of Trade during the first quarter of 1969, 43 of these matters, or 77 per cent, derived from reactions to complaint letters.¹

The apparent hang-up in the practice of planning at the bureau level may be due in some measure to different views on the meaning and requirements of planning. Consequently, this memorandum will deal with what planning is and what it is not. Effective planning by the bureaus can help the Commission make better decisions on what it should do.

PLANNING DEFINED

Planning is a concept of many meanings, but it can usefully be defined as follows: *Planning* is the *process* of preparing a set of decisions for action on what *resource investments* should be made, directed at achieving specific goals by choosing among *alternative courses* of action.

Planning thus means resource investment planning or strategic planning, which has to do with what new investigations should be undertaken to make the best use of our limited funds and manpower resources. Investment planning, therefore, concerns defining major problems and illuminating different basic approaches to a desired result through the comparison of the merits and limitations of these approaches. Investment planning contrasts with the implemental kind of planning or operational planning which concerns "how-to-do-it" decisions.

It would appear that the bureaus have a distinct preference for operational (implemental) planning over investment planning. This is understandable because operational planning is more concrete and visible. When a bureau or division head works on implementing programs he thinks in specific terms of certain people and jobs—things that he knows and sees.

Investment planning is harder, more abstract, and not practiced to an applicable extent in the bureaus. This major type of planning inquires: In which direction should the bureau and the Commission move? What goals—for instance, prevention of general trade restraints in what product lines—should the Commission seek and how shall it decide on its goals. Unless the Commission finds its own answer to these questions, it will misdirect much of its resources responding to outside complaint letters. As long as the Commission is "outer-directed" instead of "inner-directed" it will not be able to hew new paths but only to follow the beaten ones.

COMMON DENOMINATORS OF PLANNING

Under these circumstances, some improvement in planning by the bureaus of new investigations would follow if the bureaus would use two basic ideas in economics. These are: (1) look at problems of resource investments in terms of *choices* or options open to the decision maker, and (2) weigh the *opportunity cost* of each course of action—that is, the value of the alternatives that must be sacrificed.

¹ FTC Management Office, *Workload and Manpower Reports*, No. 23 (1968).

FINDING ALTERNATIVES

The process of determining alternatives is an essential common denominator of planning.² This is the point where economics can make a contribution to improved decision making on new resource involvements. The particular method of economics is to factor out the costs, the benefits, and the net advantage or disadvantage of alternative courses of action.³ If the effects cannot be appraised in quantitative terms, then qualitative appraisals can be substituted. Put differently, the economist thinks in terms of *trade-offs*—for instance, the trade-off between an internally generated Commission investigation of patent monopolies in drugs and a new probe of possible price fixing in the plywood industry.

OPPORTUNITY COST

In a rational system of planning new investigations, the bureau would consider and estimate the full costs, not just the costs in one year, of each alternative course of action. The choice of a particular option means that certain specific manpower and money can no longer be used for another investigation or purpose; these are clearly the costs. The true measure of these costs is in terms of the opportunities they preclude—the opportunity cost. (To illustrate this cost factor, if a college graduate decides to go to law school, the actual cost to him is not only law school tuition and board but also the opportunity cost in the form of the wages he would have earned if he had entered the labor market.)

The economist's concept of cost—opportunity cost—involves, therefore, an explicit recognition of the problem of choice that should be faced by each bureau and the Commission in deciding on new investigations and the allocation of resources. Planning involves the development and costing of future alternative courses of action. This planning approach can help the bureaus put more emphasis on opportunities to develop worthwhile investigations on their own initiative.

RECOMMENDATIONS

The bureaus should be advised to instruct their divisions that proposals to start new investigations should be accompanied by reasoned alternatives. The bureaus should also take into account the opportunity cost of each proposed investigation, that is, the gains that the resource to be committed would produce in its best alternative use. In bureau planning the adoption of these two economic concepts—determining alternatives and opportunity cost in deciding new resource investments—could alone contribute to better planning by the bureaus.

To increase Commission participation in the planning process, it is also recommended that the bureaus be requested to supply quarterly planning reports to you on the most significant investigations they plan to launch in the quarter ahead. To review and evaluate bureau programs—a function of this office—we need an information base periodically furnished by the bureaus dealing with what they want to do and why.

In this connection it would be useful to require the bureaus to prepare and submit a planning report, possibly within the next 30 days, that would cover these points: the five most promising areas of non-competition to investigate, specifying the ones not identified through outside complaints; the steps taken by the bureaus during the past year to come up with new investigations derived from sources other than complaint letters, and the results of these efforts; and the new directions in which the bureaus think the Commission should move in the year ahead.

² Ewing, *The Practice of Planning* at 53 (1968).

³ Heller, *New Dimensions of Political Economy* at 5 (1967).

MEMORANDUM

FEBRUARY 17, 1969.

Subject: Policy Planning Program—First Interim Report.

To: The Commission.

From: James M. Nicholson.

1. *Interpretation of Request.* As I interpret the Commission action of January 24, 1969, the five Commissioners all expressed their concern with the need for re-examination of policy determination and effectuation. My assignment, as I understand it, is not just to present my conclusions on what should, or should not, be done to institute a new policy planning program, but rather, in consultation with my fellow Commissioners (because this is a *Commission*, not a Nicholson, project), to gather information and ideas and alternatives for the Commission to consider in deciding upon what kind of a program it might want to adopt, and how that kind of a program might be implemented. I assure the Commission that I do not intend to present a report which reflects only my conclusions, but rather a number of approaches and alternatives, since policy is determined, in my opinion, by the opportunity for choice.

2. *Initial Conclusions.* There are four initial conclusions which were quickly reached in looking back into the history of policy planning at the Commission.

First, since 1947 there has been a continuing concern within the Commission and its staff with the necessity for planning policy.

Second, although there are periodic efforts made to give attention to the problems of planning policy and priorities by the Commission and the staff, these efforts fizzle out, and, except for determination of policy from time to time in special projects, there is no coordinated planning effort.

Third, the inconsistency between the desire for policy planning and the failure, over-all, of effectuating that desire, is due to the absence of sufficient priority being given to the planning function itself by both the Commission and the staff, and the failure to build into the programs adopted from time to time a means by which policy is subjected to continual review.

Fourth, the organizational structure of the Commission is not an essential factor to effective policy planning. In the past, structural reorganization has been substituted for planning, while planning can really be made to fit almost any structure. Effective policy planning may, however, indicate where structure enhances or impedes the effectuation of that policy, and thus some structural changes may eventually flow from planning.

3. *Plans for Implementation of Request.* To date, my efforts have been directed toward "getting a feel" of the area of policy planning through reading, talking to

staff members to see why we haven't accomplished our goals to date, and frankly, just thinking about the problem. My future efforts will include:

(a) *Discussions with Commissioners.* Since policy planning is our joint responsibility, each of us has ideas on the subject. Accordingly, I would appreciate the opportunity to discuss the project with each of you, and as the program develops, to have your assistance. The staff, and eventually the public, must be made aware that this is an effort of all five Commissioners, and is a joint concern of all.

(b) *Discussion with the Staff:*

(1) All supervisory personnel of the Commission will be asked to contribute their thinking on the subject of policy planning.

(2) A representative cross section of the medium level staff will be interviewed.

(3) A representative cross section of the younger staff will be asked for their views.

(c) *External Contacts.* Subject to the suggestions of my fellow Commissioners and to additions which may follow as this project develops, the following individuals and groups will be contacted:

(a) John W. Gardiner—Urban League, former HEW Secretary.

(b) James E. Webb—Former Administrator of NASA; former Director of Bureau of the Budget; former Assistant Secretary of State.

(c) Robert Hampton, Chairman, Civil Service Commission.

(d) Faculty of Harvard Graduate School of Business.

(e) Robert A. Hammond III, First Assistant, Antitrust Division, former Director of Policy Planning.

(f) Bozell & Jacobs or a New York firm composed of former Bozell & Jacobs personnel.

(g) Rand Corporation, or some other "think tank" type of organization.

4. *Commission Direction and Participation.* I intend to keep the Commission informed through individual meetings and periodic report memorandums, of which this is the first. If any Commissioner feels that I am misdirecting my efforts, I would suggest the question be raised promptly. If any Commissioner has any suggestions, I would appreciate your thoughts. If any Commissioner would like to participate more directly at this, or any other stage, your assistance is solicited.

5. *Target for Completion.* I hope to present the report to the Commission for its consideration by March 30.

MEMORANDUM

JANUARY 16, 1969.

Subject : Economic Means to Plan More Effectively the Initiation of New Investigations by the Bureaus—Comments by Dufresne.

To : John N. Wheelock, Executive Director.

From : Joseph P. Dufresne, Chief, Division of Special Projects.

The following are my comments regarding the memorandum dated January 3, 1969 by John J. Hurley, Economist in the Office of Program Review (copy attached). I believe it appropriate to mention that they are based primarily on my experiences as Chief of the Division of Special Projects and as a senior trial attorney in the Division of Mergers. In view of this specialized experience it may be that my comments have a bias which you would not find in comments from others.

With regard to Mr. Hurley's introduction, I don't believe any of us would seriously argue against continuous planning on a rational basis, regarding the best use of our resources. Whether one Division does a better job in this regard than others, I believe, is debatable. I certainly do not concede that our present bases are not rational, impressions Mr. Hurley may have to the contrary, notwithstanding.

Complaint letters, it seems to me are an excellent basis—among several—for deciding what investigations we will docket. In this same connection, and in fact I wonder whether it isn't a bit misleading, if not inappropriately pejorative to say, in effect, the docketing is a "reaction".

Complaint letters and I define these as letters from the general public, including consumers, retailers, distributors and suppliers—are an excellent source of information as to what trade practices are offensive to the letter writer. They serve to bring our attention to practices in current use which have led "someone" to write to us and tell us about it. The staff member who receives the letter for handling must make the first judgment as to whether the matter warrants docketing. The Chief of the Division to which he is assigned and the Bureau Director or his representative also review the recommendation so the docketing definitely is not merely a "reaction". Hopefully in making this judgment, all the staff members are influenced by :

1. The administrative instructions regarding starting new cases. (See pages 5, 6 attached memo dated 10/24/68 from Frank C. Hale to the Commission.)
2. The frequency with which he has heard the complaint.
3. His personal experiences.

With the present administrative reports we are using, your office and other upper echelons of the Commission are regularly and frequently apprised as to what we are doing. Other factors affecting our planning, of course, are requests for action based on Commissioners' requests, letter inquiries or suggestions from Senators and/or Representatives, agencies and departments in the Executive Branch, as well as legislative fiat e.g. Fair Packaging and Labeling, Truth-in-Lending, Fur and Flammable Fabrics Acts, etc.

I believe we do engage in "investment planning" (see fourth paragraph, Hurley memo) but perhaps not in the academic fashion suggested by Mr. Hurley. And it may be worthy of special note that we operate under considerable pres-

sure to *do something*. We would enjoy a relaxed, "depressurized" atmosphere in which we could define *major* problems and illuminate different *basic* approaches to a *desired* result through the comparison of the merits and limitations of those approaches. (See fourth paragraph, Hurley memo.) Unfortunately, day-to-day operational requirements impinge on our desire to engage in staff—as distinguished from *line*—functions to the extent Mr. Hurley believes would be preferable.

With regard to Bureaus preferring operational to investment planning, I agree it is understandable and hasten to add that it *is* basically an operational function which the Bureaus were established to perform with scant organizational establishment for "investment" planning. To improve this, it was my understanding that the Program Review Office was created in large part to improve our planning *and* operations.

The operational type of planning has the advantage of being responsive to what is being complained about by members of the public and avoids the "big brother" syndrome implicit in what Mr. Hurley suggests with his "inner directed" (see second paragraph, page 2) to be preferred over "outer-directed" planning. I would hope we are sufficiently astute to make judgments melding the two concepts in deciding what we will docket.

Insofar as weighing alternatives by factoring out costs, benefits, net advantages or disadvantages using qualitative appraisals when quantitative ones are impractical, recognizing that assigning people to a task inhibits their use on other tasks (see pages 2 and 3, Hurley memo), I believe we do these things—in our irrational way! But the procedures we employ are neither so ponderous nor so pedagogically oriented as Mr. Hurley apparently feels is desirable.

Rather than require Bureaus to file still another report, I would recommend that you:

1. Have Mr. Hurley read the budget justifications.
2. Read the quarterly highlights reports.
3. Read the reports to President Johnson as to what we have been doing.
4. Read the internal management documents currently in use.
5. Spend a month in each of the Bureaus doing a management improvement study.
6. Appraise the current operational procedures and make specific recommendations on a "nuts and bolts" as distinguished from "highest echelons of academia" basis for doing the Commission's work better. In this connection preparation of a document such as an SOP—Standard Operating Procedure—for each of the Divisions by using techniques an organization and methods examiner would use, in my view, would provide Mr. Hurley with better insight into "how" we do things and "where" we should head and, I would hope, could lead to specific suggestions for improvement. It is a technique of "self-inspection" frequently used in the military with worthwhile results if implemented with a view toward providing friendly, constructive suggestions for doing things better.

I appreciate the opportunity to comment and assure you that I have the greatest professional and personal respect for Mr. Hurley. I do believe, very firmly, that a period of "working with the troops" and his preparing an internal inspection report for comment by the staff and submittal to the Commission would benefit the Commission, us and Mr. Hurley.

MEMORANDUM

FEBRUARY 4, 1969.

Subject: Comments on Hurley Memorandum of January 7, 1969.

To: John N. Wheelock, Executive Director.

From: Bureau of Restraint of Trade.

Under date of January 7, 1969, you forwarded "for study and consideration," a memorandum dated January 3, 1969, by John J. Hurley, Economist, Office of Program Review.

Each of the enforcement Divisions of the Bureau has reviewed that memorandum. I am attaching their individual comments for your information.

The Bureau has heretofore submitted for Commission consideration a proposed planning and priorities program. That proposed program incorporates concepts both of inter-project evaluation and choice alternatives in the institution of Bureau investigations. Insofar as the memorandum by Mr. Hurley advocates use of these concepts and insofar as definitions of terms and citations of general economic and planning principles are concerned, we have no quarrel with it. However, Mr. Hurley assumes a one-dimensional objective with respect to institution of investigations by this Bureau with which we cannot agree. Accordingly, the suggestions incorporated in this latest memorandum, as well as those contained in his earlier memorandum of August 27, 1968, appear to us to have little, if any, practical application.

It would be a simple matter indeed to allocate the Bureau's limited resources in arithmetic proportion and without regard to possible law violation, to investigation of selected major industries "... that are reaching or have attained a state of oligopoly in which a few large sellers are rivals."¹ Alternatively, were our mandate no broader, the Bureau's resources might easily be apportioned between industries and major individual producers "... primarily on the size of the industry, the level of industry concentration and the size of the proposed respondent(s). In this approach complaint letters are relegated to a supplementary role in launching antitrust action."² Again, the Bureau might divide its resources among each of "... the five most promising areas of non-competition to investigate."³

We agree that factors such as these have a place in the planning of this Bureau. We cannot agree, however, that they, in any manner or form, constitute planning. Bureau planning, as we see it, must accommodate within the compass of its limited resources, not one, but several areas of responsibility. Among them are some, apparently not contemplated by Mr. Hurley, such as: enforcement responsibility with respect to specific statutes, the Robinson-Patman Act for example;⁴ responsibility to seek out and deter anti-competitive practices at stages of development *before* they reach Sherman Act proportions;⁵ a responsibility of surveillance;⁶ a responsibility to reasonably accommodate requests for action from Congressional and other official sources; and, a responsibility, to some degree at least, specifically to countenance and consider the applications and complaints of the business community disclosing violations of those laws assigned by Congress for enforcement by this agency.

The heretofore submitted proposed planning program for this Bureau seeks to accommodate each of the foregoing areas of responsibility. Absent specific Commission direction to the contrary, we believe the Bureau's planning must. For this reason, perhaps, or because certain changes in methods and procedures were also recommended in the Bureau's proposed planning program, the proposal may be viewed in some quarters as still too "outer directed," and, in others, as too radical a departure from the "old" system.

We are seeking improvements in the Bureau planning. We are seeking also improvements in efficiency through recommended changes in methods and proce-

¹ Hurley memorandum of Aug. 27, 1968, page 2, last para.

² *Ibid.*, page 1, last para.

³ Hurley memorandum of Jan. 3, 1969, page 4, last para.

⁴ In Section 2 Clayton Act secondary-line cases industry concentration is a matter of little direct concern. With respect to the application of the Robinson-Patman Act to "non-competitive" industries, see comments Division of Discriminatory Practices memorandum attached, page 3.

⁵ "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipency acts and practices which, when full-blown, would violate these Acts. ..." *F.T.C. v. Motion Picture Adv. Service Co.*, 344 U.S. 392 (1953).

⁶ Section 5(6) of the Commission's organic Act states: "The Commission is hereby empowered and directed to prevent ... unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

dures. We find little practical assistance or enlightenment in Mr. Hurley's comments or suggestions in this regard.

Directing attention to Mr. Hurley's specific recommendations, we would comment as follows:

1. With respect to formulas for quantifying the "value" of proposed investigational projects, referred to as "... the point where economics can make a contribution to improved decision making on new resources involvements," we are apprehensive that the process itself would occasion substantial additional resource involvements.⁷ Computations by economists measuring the "costs" of monopoly pricing, or the equating of industry concentration with competitive pricing in terms of the cost to consumers or to the economy, are useful antitrust tools. Other bases for quantifying antitrust values may also conceivably be formulated on the basis of behavioral studies of particular practices in particular industries. We fail to perceive, however, how a determination of *whether to initiate* a particular investigation can logically be made to rest upon the basis of information that is available only *after* investigation.

2. With respect to Mr. Hurley's approach to selection of "alternatives," we have more than one difficulty.

First, we believe that any consideration of alternative courses of action assumes practical relevancy in the first instance, only with respect to alternatives consonant with a given objective; e.g., under Section 7, which mergers should be investigated? and, again, under Section 2(a) of the Act, which areas of indicated violation should be investigated? The extent of the resource commitment which should be assigned within particular statutory sections presents a separate value judgment. Accordingly, the "gains" produced by the expenditure of resources necessary to undertake an economic study of the effects of the granting of patent monopolies to members of the drug industry, to cite Mr. Hurley's illustration, are not the same kind of "gains" produced by agency action looking to re-creation of competition eliminated through a price fixing conspiracy by members of the plywood industry. The applicable objectives are different.

Next, in the process of selecting alternative courses of action, it becomes apparent that the selection perspective varies with the known universe of alternatives. The Division of Mergers, over a given period, for example, has a substantially complete universe of mergers (at least larger mergers) under consideration. The Division of Discriminatory Practices, on the other hand, has available to it only an incomplete universe of investigative alternatives, limited, for the most part, to information secured in past investigations, testimony in legal proceedings, and information from the business community, largely in the form of applications for complaint. Robinson-Patman investigations, accordingly, frequently must include, in process, separate inquiry on the question of the relative significance of that particular investigation.

Finally, an essential consideration in selecting alternative courses of action, in our view, is justification of any new proposed course, weighed against existing assignments. We believe that some process of selective substitution is called for. We do not find that Mr. Hurley's generalizations on this subject are equated with the problems of actual investigational project selection.

3. Should the Bureau's proposed planning program be approved, the regular quarterly workload report showing "Highlights" for the current and ensuing quarters, would, we believe, provide the principal information recommended for submission in the form of separate "planning" reports by Mr. Hurley. We accordingly do not feel that a separate quarterly "planning" report is needed.

4. Mr. Hurley's recommendation with respect to matters to be included within a suggested 30-day report to the Commission, in our view, inappropriately assumes a Bureau commitment to areas of economic study beyond the proper office of this Bureau. This Bureau's responsibility to conduct economic behavioral studies, appears to us to attach only as a matter of special Commission assignment. We certainly do not view it as a Bureau prerogative available, at the Bureau's option, as a displacing alternative to law enforcement. Areas of existing monopoly, without unlawful monopolization, and existing oligopoly, without collusion, may very well comprise Mr. Hurley's target of "the five most promising areas of non-competition to investigate." Studies involving conglomerate

⁷ The Division of Mergers states in this regard: "Our very limited manpower resources makes such a complicated requirement . . . impractical for such a small operation."

mergers, the department store industry or the electrical supply industry, however, might serve as illustrations of Commission assignments to the Bureau which are not specifically enforcement oriented, but which must, when so directed, be fitted within the Bureau's planning program.

Taking into account the foregoing areas of disagreement with Mr. Hurley, we endorse the proposition that new investigative projects should be initiated on the basis of a careful evaluation of alternatives, whether such investigations are the subject of complaint letters or not, and that a process of continuous reappraisal of projects should be made operative to successively cull out matters of lesser importance. This concept is reflected in the program which has been proposed by this Bureau.

JANUARY 16, 1969.

Subject: Reply to Mr. Hurley's Planning Memorandum of January 3, 1969.
To: Cecil G. Miles, Director, Bureau of Restraint of Trade.
From: William J. Boyd, Jr., Chief, Division of Mergers.

It is believed that this Division is, generally speaking, following the tenets set forth in the Hurley memorandum, as is confirmed in the opening paragraph of that document. Furthermore, merger investigations are, by their very nature, of the "inner-directed" type, and few matters are developed as a result of complaints from outside sources. This fact of life offsets much of the criticism contained in the memorandum directed at "outer-directed" reactions within the Bureau.

The problems involved in determining alternative courses of action, using the tools of factoring out costs, gauging benefits, and assessing ultimate advantages or disadvantages, are not practical within this Division unless there is a great deal more background, or intelligence information available for accomplishing this type of appraisal. We do not know what comparative costs of proceeding within one "line of commerce" might be when compared to that of an alternative "line of commerce". Our very limited manpower resources makes such a complicated requirement, requisite to the opening of each new investigational file number, impractical for such a small operation. The Division Chief does, in fact, determine alternatives and assess comparative costs when he authorizes a new investigation, but it is an administrative decision based upon experience, and is not reduced to some formalized procedure. To require a quarterly planning document would, in my opinion, be an unnecessary duplication of the existing budget reports now being furnished by this Division.

It is believed that our present budget and work reporting systems do satisfy the major purposes emphasized in the Hurley memorandum.

JANUARY 21, 1969.

Subject: Memorandum of January 3, 1969 by John J. Hurley concerning Planning of New Investigations.

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.

From: Rufus E. Wilson, Chief, Division of General Trade Restraints.

I have read Mr. John J. Hurley's memorandum of January 3, 1969 to the Executive Director concerning economic means to plan more effectively the initiation of new investigations by the operating bureaus of the Commission and herewith submit my comments in respect to it. Speaking for my Division I can assure you immediately that before each new investigation is initiated, careful consideration is given to alternative courses of action that can be practically undertaken in the circumstances, the resource investments in terms of cost of each alternative, and the likelihood of accomplishing some effective benefit to the public through each such alternative.

Unfortunately, the planning and initiation of new investigations is not an exact science; we have neither the initiative, cognition, the perspicacity nor the subtle discrimination to always make the infallible choice. In many instances this privilege of alternatives is denied to us because of the circumstances under which the original complaint arose (i.e., a congressional complaint). In other words, the initiation of investigations by this division is never pragmatic; investigations are thoughtfully conceived within the limitations of our resources. Certainly it can be said that our investigational planning is not as ethereal as the recommendations in the subject memorandum.

It is true that many of our investigations arise from outside sources. In this manner we respond to public demands for corrective action. Public informants can reveal areas of possible law violations where corrective action is needed far better than we can by sitting in our offices and speculating about where our action should be directed. When an outside complainant reports to us, it is a sign of smoke and we should respond to see if there is in truth a fire. In a sense most law enforcement agencies operate in a like manner. The FBI, for example, cannot plan where the next crime will be committed; it must stand vigilant to respond when the alarm is sounded.

This is not to say, of course, that resource investment planning has no place in our lives. We will continue to be alert to the possibilities offered by sound planning of future investigations. However, if this memorandum is intended to focus our bureau on planned investigations of large, monopolistic or oligopolistic industries, such planning should be done by a task force of attorneys and economists, not by our bureau in a routine manner. If a preliminary economic investigation by an assigned task force reveals areas of possible law violations, a legal investigation could then be instituted by this bureau based on the evidence uncovered in the economic study. It must be remembered, however, that the planning and execution of such industry investigations are expensive and time consuming, and in many instances no corrective action would flow from this great expenditure of our limited resources. That such investigations are a better utilization of Commission resources, as opposed to investigation of actual complaints from industry sources, is highly doubtful.

I recall, in this respect, the Commission's antibiotic study and the subsequent legal investigation which gave birth to the tetracycline patent case, *American Cyanamid Company, et al.* Congress directed an investigation of the antibiotics industry. An economic study of the industry was undertaken which developed areas of possible violation of law. A legal investigation by a task force of attorneys followed, resulting in the issuance of a complaint charging monopoly through fraud practiced on the Patent Office. This proceeding was highly successful and has resulted in tremendous benefits to the public through a lowering of drug prices. However, the economic and legal investigations utilized a considerable part of the Commission's staff and funds over a lengthy period of time.

In sum, Mr. Hurley's memorandum is perhaps beneficial in refreshing our understanding of the desirability of a carefully husbanding our resources through effective planning of new investigations; however, his memorandum offers little by way of practical guidance in this endeavor.

MEMORANDUM

JANUARY 24, 1969.

Subject: Comments on Economist John J. Hurley's memorandum dated January 3, 1969 on planning investigations.

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices.

We take issue with the statement that this Division engages in planning that only concerns "how to do it" decisions. We are, of course, concerned about the various alternative courses of action that we should take to carry out our various objectives. At the same time, a lot of thinking and planning is continuously being done on what resource investments should be made.

We do not launch a new investigation for every complaint we receive from businessmen who allege that they are being unlawfully injured in the competitive struggle. In fact, increased selectivity in screening has been our policy and practice for many years. In fiscal 1968, approximately 63 investigations were selected out of approximately 350 applications for complaint. The selection process required an evaluation of, among other things, the market structure, requisite public interest, congressional interest, relative size of the participants, substantiality of the practice, jurisdiction and likelihood of a successful remedy. Moreover, when we did initiate an investigation, we were moving into areas where we had a reason to believe that a violation was occurring.

Admittedly, this activity is to some extent "outer-directed". But does it necessarily follow that we "show few signs of planning on a rational basis the investment of . . . manpower in *significant*, new investigations". In order to determine whether we are doing anything that is *significant*, we perhaps should look at the direction in which this part of our activity has taken us.

In areas where numerous complaints have been received, the Division has organized project teams organized along major industry groups, e.g. apparel, dairy products, chain grocery, automotive replacement parts, bakery products, drapery hardware, furniture, drugs, fresh fruit and vegetables, publishing and tri-partite arrangements. The importance of these products and industries to the economy and the consumer is obvious. We would not characterize this activity as insignificant.

There are areas being neglected such as appliances and backward integration by large buyers into processing and production because of manpower limitations. We feel that we have (1) looked at choices or options open, and (2) weighed the opportunity cost of each course of action—that is, the value of alternatives that must be sacrificed. We struggle with this problem every day.

We favor initiating projects separate from complaint letters. In fact, we have recently undertaken a complete study of the department store industry with a view of determining what course of action should be taken in that industry. This project for the most part is "inner-directed." However, since the practices involved are *anti-competitive*, this study probably doesn't meet the test of a "promising area of *non-competition* to investigate."

One must distinguish between practices which are anti-competitive and those which are non-competitive in that behaviour differs. Price fixing is a non-competitive practice. Uniform pricing, price leadership, etc. would give one a reason to believe that the particular industry should be investigated.

In mergers, the decision as to what industries should be investigated involves weighing evidence of lack of competition or non-competition such as trends towards concentration in the industry, acquisition history of the industry and the proposed respondent, freedom of entry, market shares, etc. Elimination of an actual or potential competitor is non-competitive behaviour. All this can be evaluated before one decides where to allocate resources.

On the other hand, discriminatory pricing practices are anti-competitive. The objective of the statute is to eliminate discriminations and the victims of the alleged practices are the ones who came to us for help. They are usually very knowledgeable. We evaluate these complaints very carefully. We only investigate when we are persuaded that a violation may be involved.

We would not have this help from applicants in initiating investigations in non-competitive industries where no complaints have been received. We would have to go out and find witnesses who had never complained that they were being injured.

We wonder how many customers are receiving favoritism that they are not legally entitled to in non-competitive industries. What would be the incentive for price discrimination among customers? What would be the incentive for territorial price cuts that would lessen profits, if the the participants are not competing? Why raid your competitor, if you are not competing? If companies are not competing, why wouldn't their industry try to keep profit margins high? If the industry is oligopolistic and everybody is satisfied with their individual market share or power, why engage in the practice of giving promotional allowances? If a company is not competing, why would they give anyone anything of value?

Assuming we study non-competitive industries and sacrifice investigations resulting from complaint letters, there is no assurance, as in all our work, that we will achieve anything of value after studying the industry for several years. At best, its a guessing game as to whether we made a good "*trade-off*".

We doubt that this proposal, as it relates to investigations of non-competitive industries, has general application to all of the Divisions in the Bureau of Restraint of Trade. However, we do not oppose the proposal. We only attempt to point out that we think it has limitations as it relates to the activities of his Division.

In connection with the proposal that planning reports, as required by this proposal on planning, be filled quarterly, we favor filing the reports every six months.

MEMORANDUM

JANUARY 16, 1969.

Subject : Comments re John J. Hurley's Memorandum of January 3, 1969
 To : Director, Bureau of Restraint of Trade
 From : Chief, Compliance Division, Bureau of Restraint of Trade

Your transmittal slip of January 13, 1969 requested the comments of this Division with respect to the above referenced memorandum.

While I recognize the desirability of applying, as a matter of effective planning, a rationalized distinction between the investment concept and operational planning, I must confess that I find Mr. Hurley's memorandum to contain certain questionable premises.

In the abstract, I believe a distinction must be drawn between the application of investment planning as applied to a proprietary business where funds and resources can mindfully be committed to one area of potential profitability and the practical need for each Division to be responsive to deserving matters whether generated by public complaint of possible statute or order violation or whether the project is selected internally. The volume of work that the Compliance Division has had to shoulder over the years in relation to available manpower has necessitated, on a daily basis, the shifting of men away from meritorious and pressing assignments to others equally as important but requiring, for varying reasons, the diversion forthwith of able professional personnel.

I further point out that the administration of cases at the Compliance level of the Commission's operations is precisely governed not only by a multiplicity of Commission directives, but inherently requires the Commission's literal conformity with its Rules of Practice as affecting the processing of each of these matters.

The compliance function must assume a meaningful balance between a prophylactic or defensive analysis of compliance reports and the assumption of a burden of affirmative inquiry and investigation with respect to importance and controversial fact situations. We have had to elect priority for the former at the expense of the latter in many situations. This is not a criticism of the system but is a realistic observation of the need to affix priority to the procurement and administration of effective compliance with respect to presently active cases. When this is done with available manpower, the desire to inquire into the actual letter and extent of compliance with significant orders issued in the past remains primarily as an aspiration and not a realistically achievable endeavor. Nevertheless, we have, over the past several years, sent out for compliance investigations approximately 50 major restraint of trade orders for compliance spot checks which were unrelated in the vast part to any complaint being received alleging violations of these orders. This was done because of our administrative determination as to the need to check significant orders in keystone industries.

A review of significant compliance matters pending in the field offices further illustrates the present dilemma. I recognize the severe burden of case volume in relation to manpower placed upon the field offices. However, I am acutely aware of the understaffing which occurs in relation to major cases, the delays in assignment of cases to attorneys who cannot get to them because of prior commitments to other matters, etc. By way of illustration, the TBA order investigations that have been referred to the field involved, from the standpoint of the initial investigation, a task force of in excess of a half dozen capable attorneys and resulted in the expenditure of hundreds of thousands of dollars of public funds in the Commission's successfully adjudicating these cases up to and including the Supreme Court level. These post order cases were staffed for a measurable part of the period after they were referred to the field with one attorney, and it is my understanding that recently another attorney has been assigned.

The complexity of these matters and their importance to the economy warrant, as a minimum, the application of a bank of capable professional attorneys to conduct field work. A related problem will be faced in this Division when these cases are returned. We will have to divert manpower at the expense of compliance report processing and from other endeavors. Here, again, however, the field must make an election involving its commitment to these matters and many others involving in major part specific Commission directions to expeditiously investigate. I have always felt personally very gratified that this Division has been able to handle under the severe handicaps of available professional personnel the volume and quality of work that has been produced. Again I point out, however, that each case turned out has involved an election on my part to defer meaningful action on other meritorious matters that must await their turn.

To : Commission.

From : Commissioner Nicholson.

I recently proposed that policy planning in this agency be examined. The Commission requested I give my recommendations as to how it should policy plan. I do so in this report. I first state what I think policy planning involves, then I isolate the main impediments to it, and finally I present my proposals for improving the situation.

1. Nature of the problem

At the policy level the question is what should the Commission do to make the best use of its limited resources. At the operating level the inquiry is how to implement what has been determined should be done. Under Reorganization Plan No. 8, policy planning is a function of the Commission—"determining upon the distribution of appropriated funds according to major programs and purposes". Operational planning is a function of the Chairman—"the executive and administrative functions" as "governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make".

The crux of the Commission's policy planning problem has two main elements as I see it :

1. The Commission and its enforcement bureaus do not have a rational inner-directed system for determining what new investigations will be made. The primary basis used in instituting investigations is usually a complaint originating from an aggrieved competitor or other outside source.

2. Due to this prevailing enforcement policy mainly responsive to outside pressures, the Commission has to acquiesce in resource commitment decisions determined by the bureaus, and then the Commission decides on further resource involvements within what I regard as too narrow a decision-making framework. In the present framework, the cases and other business that cross the Commission's table constitute a seeming endless production belt served up by the bureaus as finished products or semi-processed investigation files one after the other. I think that the proper role of policy planning is to widen that framework by providing the Commission with more options as to what it can and should do—not just options with respect to handling the single matter before it.

The basic trouble that forecloses policy planning is that we make decisions for the most part seriatim on each particular case or matter that the bureaus select—we should see. We react to the bureau's case which in turn has derived usually from the bureau's reaction to a complaint letter. The unsettling question is whether the particular case that passes in front of us on the assembly line is the most important matter we should be looking at, or even whether we should be examining the matter at all. The Commission is thus locked into a no-choice method for using its limited resources—that is, we take or leave the bureau proposal on a particular matter (in contrast to comparing alternatives as between several proposed investigations involving different industries).

2. Policy planning barriers

The decisive factor in perpetuating the no-choice decision making apparatus used by the Commission is the persistent heavy reliance by the bureaus on outside complaints in committing our scarce resources. I do not want to lean too much on this point; it has been made often before by others. I think a complaint letter is only one sometimes useful factor in considering what investigations to undertake. The indications are, however, that the bureaus are still too strongly tied to this mode of operation in both the restraint of trade and deceptive practices fields.

The bureaus' past and current reactive kind of law enforcement—a dead body is found and a patrol car is dispatched to the scene of the crime—is no longer suitable, if it ever was, to either the antitrust or consumer protection fields. The state's attorney or FBI do not have to strike a balance between the number of cases brought against dope pushers as compared with murder cases. By contrast, the Commission's principal missions of maintaining competition and consumer protection require policy planning to achieve a *balanced* enforcement program within and between these fields of Commission concern, so that we do not distort our coverage of products and industries—the domain of competition and monopoly.

In the antitrust area, relying on outside complaints tends to let silent oligopolies off the hook and overemphasizes behavioral problems at the expense of more serious structural problems. In the deceptive practices areas, reactive enforcement tends to scatter and spread thin the deployment of manpower all over the product spectrum, often in relatively insignificant cases against small respondents that are not even listed in Moody's Manual let alone the Fortune Directory of the largest corporations.

It is therefore time for the Commission to turn itself around and insist that the bureaus use a rational basis—a logical set of rules and quantitative criteria, particularly industry size—for instituting investigations. This approach of strategic planning has encountered strong and continual resistance at the bureau and division levels, and we have done next to nothing about it. At stake is the power to decide and control the deployment and uses of Commission resources. Since this vital power determines the direction in which the Commission moves, it should be lodged in the Commission itself and not rest, without checks and balances, in the hands of the upper staff in the operating bureaus.

3. *Effecting policy planning*

The Commission cannot plan policy as long as the bureaus use the mailbag as the dominant basis for launching investigations. It is as plain as that. The mailbag does not give us any choices as to future courses of action. Responding to outside events rather than moulding them is the antithesis of policy planning. Therefore, we must have before us some options—investigate steel or oil or drugs or industry x—if we are to policy plan. In short, we need a rational system for determining what new investigations we will make in the first instance. (The bureau's consideration of options only applies *after* it accepts the particular outside complaint, but appraising options should reach the issue of whether to start the investigation in the first place.)

Policy planning would widen our decision making framework for determining where our funds and staff resources will be allocated. It can do this because it would tell us what alternatives there are—not just for handling a specific case and then another different one, but choices with respect to competing proposals contending for the same resources to investigate different industries.

Accordingly, I recommend the following proposals to develop policy planning in this agency:

1. The Commission should direct each enforcement bureau and division to aim, by the start of calendar 1970, to have 50 percent of its manpower resources devoted to developing investigations independent of, and not derived from, outside complaint letters. The other 50 percent of each unit's resources would continue to deal with complaints from outside sources. This resource division is a goal—not an exact requirement—but the operating units would have to show and report a substantial shift away from the mailbag by the end of 1969.

2. To reduce the bureaus' heavy preoccupation with complaint processing, the Commission should direct the bureaus to expand the use of, and adhere closely to, the principle that follows before opening up investigations based on complaint letters: If the complaint can be handled by the Commission or by a state or local agency, send it to the state or local agency. This guide line is not only a sound means of sensibly reducing the increasing supply of complaint letters for bureau processing, but it is also a sound principle of government operations. Those public and non-profit private agencies closest to the consumer problem should assume responsibility in accordance with their authority and strength.

Under substantially increased use of this cooperative approach with local agencies, no complaint letter to us would ever go unanswered and no complainant would be told by the staff that his problem is too unimportant for us to consider. However, if the matter is trivial the complainant would be informed by letter that due to the Commission's jurisdictional limitations we are *referring* his problem to the appropriate local agency. The Commission's federal-state relations staff should be increased to direct this traffic in complaints to the proper local channels.

3. The bureaus can also be better positioned to develop planned investigations on their own initiative by delegating to them the power to dispose of old backlog and thus clear their decks for more internally planned activities. Indeed it is ironical that the Commission delegates to the bureaus the crucial power to open investigations and withholds from them the less significant power to get rid of the cats and dogs that clog their backlog. I therefore recommend that

the Commission authorize bureau heads to close out, on their own, any matter in their backyard that is more than two years old, unless a complaint recommendation appears likely and imminent.

4. The Commission should direct a pronounced shift in emphasis in the enforcement bureaus' compliance work to mindfully commit resources to examining important orders outstanding (regardless of outside complaints). The bureaus should give priority to—and assign at least one-half the compliance manpower to—affirmative inquiry on their own initiative to significant orders in strategic industries. The present way of operating in the compliance area spends too much time and effort defensively processing current compliance reports.

5. The enforcement bureaus' insistent use of the mailbag appears based on the questionable premise that outside complaints reflect public demand for Commission action. The real measure of consumer need for Commission surveillance is, however, the amount of money the public spends for the product or line of products—in short, industry sales.

The key criterion for opening up a new investigation in either the antitrust or consumer protection fields should be industry sales. If these sales are under \$10 million annually, the incoming complaint should be turned over to local consumer authorities. The same disposition should follow where the proposed respondent has total sales under \$1 million. Otherwise we will never get out of the morass of trivial matters. Priorities in each enforcement bureau should also be set on the basis of industry sales (unless there is some compelling offsetting factor).

6. The rational replacement for complaint letters as the primary source of Commission investigations in the years ahead should be industry analysis—used to develop the tetracycline case. Industry analysis—the structure and performance of industries—is tailor-made for the general trade restraints and merger fields. In the discriminatory practices area, the staff study of the department store industry illustrates the successful use of planned investigation in the Robinson-Patman jurisdiction. Internal staff-initiated price discrimination investigation could be extended to bilateral oligopolies with R-P propensities, as in our recent investigation of the anti-competitive relationship involving a leading canned soup producer and giant chain store.

The most serious policy planning problem occurs in the deceptive practices area where outside pressures come from many angles. To plan here we have to give more emphasis to internal task force type investigations that involve economists, staff doctors, and the lawyers, to move swiftly against significant consumer deceptions that we determine, on our own, may exist on a large scale—for example, blatant TV advertising deceptions of cough syrups during the recent flu epidemic. Nor does legislative fiat (fair packaging) preclude planning of balanced investigations irrespective of outside pressures; products and industries must still be selected by the division head and industry priorities assigned.

The bureaus have undertaken some ad hoc industry-wide projects of late, but these attempts typically have grown out of investigations of complaints showing large-scale involvement in a single practice. These projects have been motivated by a desire to treat competitors fairly. But what I mean by industry analysis is to deal with the outcroppings of deception, non-competition or anti-competition that are revealed by staff self-generated analysis of the industry. Industry analysis of the planned kind indicated would enrich the significance of our activities, as in the case of auto warranties and games of chance.

7. We should make some good use of outside consultants from the nation's top business schools (Harvard, Stanford, Chicago, and Wharton) to help shape up and modernize our decision-making apparatus. As a start, I suggest we bring in two experts on planning, performance (program) budgeting, and decision theory from the Harvard Business School, Professors Warren Law and Paul Vatter or Charles Christenson (co-author of "Managerial Economics")—for a series of two-day conferences and seminars with the Commissioners and bureau staff. At these sessions we could outline for them some of our problems in effectively allocating our resources and get their views and solutions down on paper.

The Harvard managerial specialists could be requested to propose improvements in our violations-oriented organization where it impedes planning and control. In addition, they should contribute ideas on how we could upgrade our budget and management information setup in order to provide us with useful

information for appraising and deciding on an effective apportionment of our resources.

8. Effective policy planning requires that we appoint a highly capable Program Review Officer and give him our full backing. We should not have any undue concern with the word "planning"; we use it technically to mean getting options before us to decide rationally on the direction and scope of our resource involvements. Accordingly, I propose we make our Program Review Officer the Director of Policy Planning—he plans as well as reviews (evaluates and controls) the bureaus' resource investments.

To perform his job as planning counselor to the Commission, he should have the rank at least equal to the bureau directors, and the power to command them and their resources as necessary to achieve the major objectives and priorities we should set. The Director of Policy Planning should also have a highly competent and broad-gauged economic and legal staff to support his activities.

9. To focus on policy problems and to keep on top of major resource commitments contemplated by the bureaus, I recommend that we establish a Commission Council that would meet monthly. This council would be chaired by a different Commissioner each month with the Director of Policy Planning as co-chairman and counselor. The council would also be composed of Bureau Directors and the Executive Director. Its primary function would include determining major new investigations in the month ahead and setting priorities right.

10. Finally, to give greater emphasis to product safety for the consumer in the textile products area, I favor a planned pronounced shift (around 25 percent) in the use of our textile and fur manpower resources away from labeling inspections to affirmative investigation of a sampling of manufacturers of baby blankets, sweaters and clothing to ascertain flammable fabrics violations.

4. Motion

I ask your serious consideration of these proposals offered to improve policy planning and decision-making by the Commission on its resource distribution. I move that the Commission endorse these proposals, either singly or collectively, and that the bureaus be directed to carry them out.

MEMORANDUM

JUNE 17, 1969.

Subject: Fiscal year 1970 budget estimates, revised June 16, 1969.

To: Commission.

From: William J. Boyd, Jr., Chief, Division of Mergers, Bureau of Restraint of Trade.

With FY 1969 all but completed, we are in a much better position to indicate which projects in this Division are going to receive greater emphasis in FY 1970, i.e., the ones to which the major portion of the manpower and resources will be devoted. Moreover, we can now estimate more accurately the amount of manpower (on an attorney man-year basis) minimally required to carry forward these projects. It is presently estimated that 42 man-years, rather than the 38 man-years previously estimated, will be required to carry forward the on-going work of this Division in FY 1970.

The ten major priority projects as reported under the "revised" column of the attached Appendix A will require 38 man-years. The ten non-priority, but nevertheless important, projects reported under the "revised" column of the attached Appendix B will require a minimum of 4 man-years, and will provide for the three new project categories (insurance, furniture, and truck-trailers and shipping containers).

When the FY 1970 budget was originally submitted over a year ago, the projects of this Division were not categorized on a priority or non-priority basis as was required in the preparation of budget estimates for FY 1971. There was a single listing of projects which indicated a total requirement of 38 man-years.

There follows on a project basis a brief explanation for the estimated manpower now required (as of June 16, 1969) to handle the ten priority projects listed on Appendix "A".

Grocery products.—We now have 11 investigations pending, 5 of which have been opened since the beginning of FY 1969. Four complaints are expected to be recommended in the next few months from these 11 investigations. Thus, it is anticipated that 5 man-years, instead of the 4 originally estimated, will be necessary to handle this project.

Automotive parts.—Although only one new investigation has been initiated in FY 1969, two complaints have been issued and are pending in the pre-trial stage. Both are expected to be vigorously contested. In addition, another complaint is expected to be submitted to the Commission for issuance within the next month. Five man-years, rather than 4, to handle these formal cases and pending investigations is a conservative estimate.

Cement.—Four new investigations have been opened in FY 1969, in one of which a complaint has been directed, but not yet issued by the Commission, and in another a complaint will be before the Commission in the next 60 days. In addition to one case already pending in the pre-trial stage, two other complaints issued recently and are also pending in the pre-trial stage. Eight other investigations remain pending. Also, a re-opening and modification petition is pending in another case. Accordingly, 5 instead of 3 man-years, are required as a minimum to handle the workload of this project.

Special projects.—This is a new project set up to handle the 4 enforcement policy matters (food distribution, cement, grocery products manufacturing, and textile mill products), the conglomerate merger study, and the pre-merger notification program. Minimally, an estimated 3 man-years will be needed for this work.

Commercial and industrial equipment, machines and supplies.—Several of the investigations pending in this project have been removed and placed in two new projects: (1) Lumber and Building Supplies and (2) Furniture. Some 14 investigations remain in this project, four of which were opened in FY 1969. Two complaints have been issued in FY 1969 and 4 others will be recommended in the next few months. Thus, the 4 man-years originally estimated is a most conservative estimate.

Metals, minerals and mining.—Since the beginning of FY 1969 a major conglomerate complaint involving copper and coal has issued and the trial requiring 3 attorneys remain. Six investigations are pending and a recommended complaint in one of these is on its way to the Commission. Thus, 4 rather than 2 man-years are required to handle this project.

Lumber and building supplies.—This is a new project created because of the increased merger activity occurring in this area. Nine investigations are pending, five of which have been opened since the beginning of FY 1969. Whereas no manpower was allocated to this project when the FY 1970 budget estimates was prepared, it is felt that a minimum of 3 man-years are now required to handle this project.

Apparel.—Eight investigations pending, one of which was opened since first of FY 1969. Manpower requirements are the same as originally estimated, namely 3.

Paper and paper products.—Two man-years, rather than one as was originally estimated, are required, since one complaint has been issued since the beginning of FY 1969. It is in the pre-trial stage and is expected to be fully litigated. Two major comprehensive investigations are pending.

Miscellaneous.—Four man-years, rather than one as was earlier estimated, are now believed necessary as 9 new investigations have been opened since FY 1969 began and 7 other investigations were pending. At least one recommendation for complaint is anticipated.

An analysis of the revision in manpower required for the ten non-priority projects reflected in Appendix "B" follows:

Confectionery.—The man-years required have been reduced from one man-year to $\frac{1}{4}$ man-year primarily because 4 of the 5 pending investigations are old and do not appear to hold much likelihood that complaints will be recommended. The $\frac{1}{4}$ man-year allocated should be sufficient for closing out these old investigations, as well as handling the new one opened in FY 1969.

Department stores.—Despite the recent opening of a new investigation to look into the major merger between Dayton Corp. and J. L. Hudson Co., this has been a project that was considered nearing completion. Unless this merger and the Broadway-Hale-Neiman-Marcus merger spark a new merger trend, it is now felt that $\frac{1}{4}$ man-year rather than one man-year should be adequate for this project.

Vending.—No new investigations have been opened in FY 1969 and one has been closed, leaving six investigations pending. Also, the Seeburg case was concluded, with an order of divestiture during FY 1969. Thus, $\frac{1}{4}$ man-years rather than one man-year should be sufficient for this project.

Drugs, pharmaceuticals, cosmetics and sundries.—The preparation for and trial of the complaint against Sterling Drug, Inc. involving its acquisition of Lehn & Fink should be handled with an allocation of one man-year. Since this is the only case in this project and no other investigation has been opened in FY 1969, the manpower allocation was reduced from 2 to 1.

Food distribution.—This is a project which is now included in the Special Projects category. Only two investigations are pending and none were opened in FY 1969. Most of the work required now concerns this Division's involvement in concurring or not concurring with Advisory Opinion requests. By and large the Enforcement Policy for this industry has been very effective and is the reason why an allocation of $\frac{1}{4}$ man-year rather than 2 man-years presently is enough for this project.

Plastics.—Merger activity seems to have decreased in this industry. No new investigations were opened in FY 1969. Prior Commission cases, plus the consent order in FY 1969 with Standard Oil of Indiana and a pending complaint in the pre-trial stage, probably account for the reduced activity in this area. One rather than 4 man-years now appears adequate to handle this project.

Reciprocity.—The manpower allocation has been reduced from 1 to $\frac{1}{4}$ man-year because this project cuts across industry lines and the theory of reciprocity is covered in cases and investigations in other priority or non-priority projects. However, since three merger investigations remain pending involving mainly reciprocity a $\frac{1}{4}$ man-year allocation is believed sufficient for FY 1970. A pending recommendation for a major investigation involving reciprocity between Sears Roebuck & Co. and its suppliers, if approved, will likewise necessitate increasing the manpower for this project to 2 man-years in FYs 1971 and 1972.

Furniture.—This is a new project and one on which we are just getting started. Two major merger investigations are pending and until we get further into this project a $\frac{1}{4}$ man-year allocation should be adequate.

Insurance.—Another newly created project in which two new investigations were opened in FY 1969. There is much merger activity occurring in the field in-

volving insurance of all types. This could be a major project in the future. However, for the present a $\frac{1}{4}$ man-year allocation should suffice.

Truck-trailers and shipping containers.—This is another new project. It was created since there appeared to be a number of mergers occurring between the closely related truck trailer industry and the shipping container industry. For present purposes a $\frac{1}{4}$ man-year allocation is adequate.

The foregoing revision of FY 1970 manpower estimates parallels those being submitted for FY 1971. By the same token, it may be advisable to re-evaluate the FY 1971 estimates a year from now in the light of actual developments during FY 1970, in order to make them more current in the light of merger developments, trends and occurrences during FY 1970.

In view of the above re-evaluation of the FY 1970 budget estimates for this Division, based upon the actual situation just two weeks before the new fiscal period actually begins, it appears that previous estimates for FY 1971 will also need revision. This will be done, and will be included with the Division memorandum responding to the directives set forth in the memorandum of June 10, 1969, from Commissioner Nicholson. Appendix A indicates that the group now classified as priority projects were originally estimated to require a total of 22 man-years. The remaining eleven projects listed in the original FY 1970 estimate (Appendix B) were allocated 16 man-years. Since that time, two of these projects have been eliminated: houseware and household appliances (electrical non-electrical); and Litton Industries, since the pilot investigations forming the basis for this project were closed. The original FY 1970 budget estimate also allocated 1 man-year each to the projects Fertilizers and Textiles, which have a total of some eight inactive investigations outstanding. Although our revised estimate eliminates the manpower requirement, the categories are being retained for possible future implementation.

APPENDIX A

FISCAL YEAR 1970 BUDGET ESTIMATES (REVISED JUNE 16, 1969); DIVISION OF MERGERS

Summary of priority projects, project category	Estimated man-years	
	Original estimate	Revised estimate
Grocery products.....	4	5
Auto parts.....	4	5
Cement.....	3	5
Special projects (new category).....		3
Commercial and industrial equipment, machinery and supplies.....	4	4
Metals, minerals and mining.....	2	4
Lumber and building supplies (new category).....		3
Apparel.....	3	3
Paper and paper products.....	1	2
Miscellaneous.....	1	4
Total.....		38

APPENDIX B

Confectionery.....	1	$\frac{1}{4}$
Department stores.....	1	$\frac{1}{4}$
Housewares and household appliances—electric-nonelectric.....	0	0
Vending.....	1	$\frac{1}{4}$
Drugs, pharmaceuticals, cosmetics and sundries.....	2	1
Fertilizers.....	1	0
Food distribution.....	2	$\frac{1}{4}$
Plastics.....	4	1
Reciprocity.....	1	$\frac{1}{4}$
Litton Industries.....	1	0
Textiles.....	2	0
Furniture (new category).....		$\frac{1}{4}$
Insurance (new category).....		$\frac{1}{4}$
Section 8.....	0	0
Truck-trailers and shipping containers (new category).....		$\frac{1}{4}$
Total.....		4
Grand total of appendices A and B.....	38	42

MEMORANDUM

JUNE 4, 1969.

To: Commission.

From: Division of Scientific Opinions.

Subject: Commissioner Jones' request for more detailed information on this Division's plans for fiscal year 1971 budget.

Pursuant to Commissioner Jones' memorandum of May 27, 1969 on "Budget Plans" for fiscal 1971, there is transmitted herewith a memorandum from the Division of Scientific Opinions furnishing the requested information. This memorandum is substantially the same as that submitted to the Bureau Director on April 18, 1969 except for the sub-sections on professional manpower project requirements which we were then told to defer pending a Commission determination of priority project areas.

Although manpower requirements are discussed in connection with each of the categories covered under "Continuing Projects" and under "New Projects", it is deemed essential that the Commission be made fully aware of the Division's present dire plight arising out of a critical shortage of professional staff personnel. Two years ago the Division of Scientific Opinions, exclusive of its cigarette testing laboratory, had ten professional staff members (7 physicians, 2 general physical scientists and a chemist who was chief of the Division) and four supporting clerical personnel. Through retirements and transfers, its professional staff has been cut in half with the clerical force reduced to three. We now have but three physicians (including the acting chief) and two general physical scientists.

It must be recognized that the present workload is becoming unmanageable and that without additional manpower, adequate coverage cannot be given to projects currently underway much less taking on a variety of new ones. It is futile to discuss future programs without substantial increases in professional and supporting personnel. The truth of the matter is that the unrelenting pressures of Commission requests and the day to day operational demands preclude this Division's assuming any further responsibilities and may even necessitate curtailing or stopping some of what it is now doing. There is a physical limit reached some time ago as to what five scientists can handle no matter how selective the program planning or the priority ratings. It is not an exaggeration to state that the mounting volume of work and pressures have left the staff near the point of exhaustion and complete frustration.

The present situation leaves virtually no time for the reflective thinking or meaningful planning exhorted by the Commission of the staff. This Division has a number of ideas for more effective and efficient operation which it would like to explore and commit to memorandum form when possible. There is likewise little time for serious thought about the administrative problems of this Division or for the development of more effective operational relationships with other divisions with whom we are involved in joint project operations or from whom we receive requests for assistance on an ever increasing scale.

The Division of Scientific Opinions cannot overemphasize the urgency of being allotted the necessary resources to beef up the professional staff with adequate increases in supporting clerical personnel. A doubling of the professional staff restoring its number to at least that of two years ago is regarded as an indispensable beginning. Anything less would be wholly unrealistic and would ultimately result in a hopelessly bogged-down Division incapable of effectively serving the public interest. We are compelled through the medium of comparison to stress this Division's pressing need by pointing out that the Food and Drug Administration, despite its more limited jurisdiction, has scores of physicians scattered over many bureaus and divisions supplemented by still more physical and biological scientists yet here this Commission is attempting to regulate the advertising of the monumental multi-billion dollar food, drug, cosmetic, tobacco and pesticide industries with a pitifully small token professional staff of five.

The Acting Chief of this Division is seriously in need of assistance to assume at least part of the day to day burden of supervisory review of the Division's work. Such partial relief would permit the acting chief to devote part of his time to the more important administrative tasks and responsibilities of work planning and organization.

It should also be noted that the continuing and ever increasing demands upon this Division leaves its professionals with practically no time to keep abreast of the scientific advances in different fields pertaining to our regulatory work.

It is necessary that the staff have the time to keep itself fully informed of medical and other scientific developments by perusing current scientific journals and periodicals to which the Commission wisely subscribes and by attending scientific meetings and seminars which have a direct bearing on this Division's work. Research developments and new information and data obviously have an immediate and direct bearing on regulatory program affecting foods, drugs, tobacco products, medical devices, cosmetics and related commodities being promoted with health claims.

It is essential that channels of communication be established with various scientific organizations for the appointment of scientific advisory committees to cooperate with the Federal Trade Commission and to whom the staff could turn for consultation and help on the wide variety of scientific problems that arise in connection with the Commission's regulatory operations. The nurturing of such cooperative relationships obviously requires active liaison by this Division. Dividends from this kind of relationship cannot be realized, unless the proper investment of time is made in the cultivation of the scientific community in those areas which not only help solve problems, but which also aid in the recognition of potential problems before they become public crises. The training and experience of the present staff is unique in matters of consumer interest. The regular application of a portion of the staff's consumer oriented expertise to the recognition of incipient problems would produce benefits to the Commission much as scientific research does for industry. Regulatory problems of a scientific nature could be anticipated more readily and dealt with in their incipency rather than "after the fact", as is so frequently the case now. Neither the present staffing nor the present routine workload allow for the kind of productive creative thinking and scientific consultation that is needed to look beyond our daily routine chores, important as those may be.

It must be emphasized that many of the advertising claims presented to this Division for evaluation deal with complex scientific matters which cannot be resolved by sitting at a desk and putting on a "wizard hat". Much more fundamental and time consuming considerations are involved including extensive search, consultation and conferences with experts and a careful weighing of the scientific evidence "pro and con" in arriving at a tentative staff decision on how best to meet the problem and protect the public interest. This process of scientific investigation comes into play and requires the time and expertise of this Division at various stages of the handling of an investigative matter, from the preliminary stages, through the investigation leading to regulatory action and more intensively in preparation for the Commission's hearings. The scientific aspects of an investigation, therefore, may require many man days of scientific investigation, literature research and consultation with scientific experts. Interpretation of the Commission's problems, needs and goals to the knowledgeable experts in the scientific community is not a one time endeavor and cannot inure to the benefit of the public interest unless the appropriate manpower and time is provided.

The role of this Division in regulatory activities is poorly described by our title, or by our time sheets. For major projects involving food, drug, tobacco and pesticide advertising, our staff may spend much time over a period of several years developing background material before the first seven digit numbered case is opened. It has been our past experience that when a major case goes to complaint and litigation we must budget a minimum of from one-half to one man-year of time of this Division for trial work. One litigated medical case now, therefore, would eliminate almost one-third of our capability to process other medical material, and knock out 20% of our entire scientific staff for other work.

Our expertise is an integral part of the entire regulatory process. This Division is called upon during preliminary screening to check the advertising in connection with a determination of sufficiency of public interest to warrant action. It is asked after an investigation of a docketed matter has been completed, for a more comprehensive review and evaluation of the advertising in the light of current scientific knowledge. It is requested to study reports and results of tests submitted by proposed respondents in support of advertising claim and prepare a critique. It is also asked to participate in conferences with proposed respondent and counsel for discussion of questioned advertising claims. This Division helps the trial attorney in the drafting of the scientific aspects of the complaint. It contacts, consults with and arranges for the appearance of experts to testify at hearings. It serves as technical advisor prior to, during, and subsequent to

hearings. During hearings, it assists in the preparation for direct examination of witnesses in support of the complaint, and for cross-examination of respondent's witnesses. It also arranges for rebuttal witnesses when necessary. It reviews and abstracts the scientific testimony of the transcript and assists the trial attorney in briefing the scientific aspects of the case including proposed findings of relevant scientific facts.

It is self-evident that the successful outcome of a litigated may depend upon the care with which the scientist dissects and realigns the documentary evidence, points up the fallacies in various statements and finds other evidence in the record to refute it, explains the complex issues and develops appropriate analogies. The brief description in the preceding paragraph of this Division's participation in matters under litigation provides but a panoramic view of how it serves the Commission in one area of Commission's overall regulatory operations.

Realistic planning for Fiscal 1971 in terms of project work and a time schedule is almost impossible without knowing how much manpower will be authorized and will become available. Not only are physicians and other scientists in short supply generally, but the particular psychological orientation, motivation and experience essential for successful functioning in our almost unique role is even more scarce. The nature and extent of a recruitment campaign for medical office in and other scientists will depend on how many additional positions are authorized; the initiation of a broad and continuing search for professional personnel must, therefore, await a Commission decision. Recruitment on a piece-meal basis is impracticable.

Respectfully submitted,

GEORGE DOBBS, M.D.,

Associate Chief, Division of Scientific Opinions.

MEMORANDUM

JUNE 4, 1969.

To: Commission.

From: Division of Scientific Opinions.

Subject: Plans for fiscal 1971 budget.

DIVISION OF SCIENTIFIC OPINIONS

The activities of the Division of Scientific Opinions are concerned primarily with consumer health protection and arise out of the Commission's authority over the advertising of foods, drugs, devices, and cosmetics under Sections 12 through 15 inclusive of the Federal Trade Commission Act, and also through activities concerned with the advertising of a variety of related commodities under the general authority of Section 5 of the Act, but which in one way or another affect the health of consumers. The prodigious task of regulating the advertising and other promotional efforts in the field of consumer health protection may be gleaned from the statistic that in 1967 (data for the calendar year 1968 are not yet available) the sales of packaged medication alone exceeded \$2,200,000,000, and from the further statistic that during the same period the cost of advertising the principal brands of drugs and other health aids came to more than \$300,000,000. Similarly, in the area of cosmetics and other toiletries sales during 1967 exceeded several billion dollars and advertising budgets for the principal brands of such articles totaled more than \$300,000,000. The 1967 money figures in this report as they pertain to product category sales volume and advertising expenditures, are taken from data published in the Drug Trade News of July and August 1968, a well-known trade publication for the drug and cosmetic industries. The 1967 data are the latest available.

The Division of Scientific Opinions provides scientific advice and assistance in scientific matters to the Commission and to various operating divisions, including the Division of Food and Drug Advertising, Division of Special Projects, Division of General Practices, and the Division of Compliance of the Bureau of Deceptive Practices, and the Division of Advisory Opinions, the Division of Trade Regulation Rules and the Division of Industry Guides of the Bureau of Industry Guidance. On occasion, we are consulted by the Bureau of Textiles and Furs, the Bureau of Restraint of Trade and the Bureau of Economics. Since this Division is technically not an operating division but serves more in an advisory capacity, the subject matter and volume of work performed by this division depends in part upon the demands for advice and assistance

made by the various operating divisions. This makes it somewhat difficult to project unilaterally a program of future activities for the Division of Scientific Opinions. This Division does, of course, actively participate in project and program planning with respect to Section 15 and other commodities for which health or other scientific claims are made in advertising. There follows a discussion of various projects affecting consumer health with which this Division is likely to be concerned, and which will require close surveillance and regulatory attention in order to curb false and misleading advertising.

Manpower requirements have been estimated for each of the "continuing projects" and for each of the "new projects". A tabular summary of these professional needs is attached hereto. There will doubtless be some overlapping among some of the projects, and also between some projects and matters handled as part of the routine workload. This overlapping may result in some overall economy in prospective manpower needs but not much net saving is anticipated since a slackening in one project area is commonly picked up by increased promotional activity in another, especially with the expanding growth of the economy and its usual concomitant of deceptive advertising practices. It should be noted, however, that most of this Division's presently available professional manpower is consumed by the routine and ad hoc "special" matters that arise in connection with the day to day operations of the Commission, unrelated to specific project undertakings. Little time is left for project work.

I. CONTINUING PROJECTS

A. Drug and device industry

The Division of Scientific Opinions based its recommendations on long time familiarity with the promotional practices of the particular industries being regulated, constant surveillance of the trade press with particular reference to the volume of advertising and sales of various types of products and new promotional schemes, regular liaison with other regulatory agencies, comments in the medical literature about abuses, and review of the NAS-NRC advisory panel opinions on labeling of non-prescription drugs. We have known for years that most drug and special dietary food advertising is designed to and does mislead the public as to the value of the products and the indications for their use. Neither our manpower supply nor our assigned role have permitted us previously to recommend initiation of the steps necessary to correct the situation.

1. FTC-FDA evaluation of nonprescription drug claims

This project involves ultimately a review of the advertising claims for several thousand drug products. This division is currently working with FDA in formulating new patterns of labeling, to be promulgated by FDA, which will incorporate the opinions of the NAS-NRC panels which have evaluated their efficacy, and the principle of more informative affirmative disclosures of the limitations of and contra-indications to their uses. Thereafter, the Commission should consider the desirability and feasibility of issuing a series of trade regulation rules which would embody the principles so established but apply them to advertising of all comparable drugs, whether or not they were ever "new drugs". The alternative would be a series of individual complaints against manufacturers who violated in advertising the principles set forth in the FDA regulations on labeling. Either approach would involve extensive participation by the scientific staff in fiscal 1971 and thereafter.

The categories of drugs covered in this FDA-FTC cooperative review include (with some overlapping) :

- Dentifrices and mouthwashes.
- Sore throat remedies (gargles and lozenges).
- Nasal drops, sprays, inhalers.
- Analgesics.
- Antihistamines.
- Cough preparations.
- Asthma preparations.
- Compound Cold Tablets.
- Drugs for premenstrual tension and menstrual cramps.
- Laxatives.

Antacids, plus a few other products for other gastroenterologic problems such as diarrhea.

Drugs for motion sickness.

Ophthalmic preparations.

Contraceptives.

Douche preparations.

Iron preparations.

Single vitamin preparations.

Multivitamin and vitamin-mineral preparations.

Salt substitutes.

Insulin preparations.

Antibiotic ointments (plus a few other antibiotic-containing products from previous categories).

Topical antihistamines.

Topical antiseptic preparations.

Dandruff preparations.

Antifungal preparations (athlete's foot).

Deodorants and antiperspirants.

Sun-screen preparations.

Topical anesthetic preparations.

Counter-irritants.

Miscellaneous skin "protective" products.

Miscellaneous skin preparations for poison ivy, insect bites, etc.

Rectal suppositories.

Miscellaneous.

It should be stressed that products covered by new drug applications represent only the visible portion of the iceberg. For most categories of drugs listed there are many more products on the market that were not handled as new drugs than that were.

Preliminary evaluation of the NAS-NRC panel reports in this Division has been completed. Letters have been sent to every manufacturer of a non-prescription drug which went through the new drug procedures between 1938 and 1962 and is still being marketed, requesting recent advertising. Many of the replies have been reviewed. It is already apparent that most of the advertising money for drug advertising to the public is spent for products which are not on this list—although they may be substantially identical. In general, new drug applications have been submitted by companies which by choice do not advertise to the laity. When the drugs are no longer "new" they are copied by "proprietary" manufacturers, who then advertise them heavily to the public. Many of the specific drugs reviewed by the panels are no longer even marketed by their originators. The regulatory problem, therefore, will be concentrated on the "me too" products manufactured or sold by other companies.

We envisage immediate regulatory problems in connection with several major categories of products, i.e., cough preparations, antacids, laxatives, mouthwashes, topical antiseptics and antibiotics, topical anesthetic preparations to name a few, which will be considered in more detail under New Projects—Drug Industry.

It is our intention to propose a series of trade regulation rules covering categories of non-prescription drugs. The first, dealing with antiseptic mouthwashes, gargles, and throat lozenges and representing an extension of the principles established in *Sucrets* case, has been tentatively drafted in this Division. Time has not yet been available to evaluate it at the Bureau level. If the final draft meets with approval by the Commission and is consistent with the position of FDA, which has yet to be ascertained, we would then propose that a trade regulation rule be promulgated.

Similar approaches are contemplated for a number of other categories of products. We foresee ultimately a series of rules specifying legitimate claims in advertising for all major categories of old drugs. After consultation with FDA physicians and after the Appeal Court decision on the *SSS* case, we intend to propose a trade regulation rule hearing on iron preparations designed to cover the entire industry and to remedy some of the defects in the present *Geritol* order.

Manpower requirements.—It is conservatively estimated that at least three physicians will be required for this project in order to implement the results of the NAS-NRC panel reports as they affect our jurisdictional sphere, quite apart from any other project. Allowing for the vagaries and imponderables of a project

of this magnitude, and assuming that three professionals could be assigned to it, our best "guesstimate" is that a minimum of about three years would be required to complete the most important categories. Hopefully one-third would be finished at the end of Fiscal 1971.

How much of the FTC-FDA Evaluation of Non-Prescription Drug Claims Project will be completed in Fiscal 1971 with action taken, will depend in part on how many professional people can be allocated to this task. At the present time we are hard put to assign anyone to this program unless other work is stopped, or alternatively the staff is substantially augmented.

2. Analgesic product advertising

This project involves the advertising of oral non-prescription analgesic drugs, analgesic rubs for skin application and oral products offered for arthritis and rheumatism. It has been reported that the 1967 sales of products in this highly competitive field totaled more than \$500,000,000 and that advertising promotion expenditures exceeded \$100,000,000. Many companies are engaged in promoting a large number of these products in the marketplace. These constitute a substantial portion of the over-the-counter drug business in the United States, and are the largest single category of non-prescription drugs in terms of consumer dollars.

Pain-relieving drugs are of immediate moment to the consumer and his health, are used by all ages and classes of people, and are, therefore, a fertile area for exaggerated claims and public deception. The advertising claims deal with comparative speed of onset, efficacy, and duration of analgesia as well as alleged freedom from gastrointestinal irritation and other toxic effects. The products for arthritis and rheumatism are promoted for an alleged anti-inflammatory effect to relieve pain and reduce the stiffness and swelling of arthritis and rheumatism, and present problems of substantial public health significance since the questionable promotion is directed to an estimated 12 million arthritics in this country, many of whom are elderly.

In hearings before the Special Committee on Aging, United States Senate, 88th Congress, 1st Session, on "Frauds and Quackery Affecting the Older Citizen," representatives of The Arthritis and Rheumatism Foundation stated that quackery on a more sophisticated level still besets the arthritic sufferer and urged correction of regulatory agency understaffing as well as broader publicizing of enforcement actions. The Arthritis and Rheumatism Foundation estimated that all forms of "frauds and fallacies" cost arthritis sufferers \$250,-000,000 annually.

A proposed Trade Regulation Rule for analgesic drugs was published in July, 1967. This proposed rule has already been challenged in the courts. A public hearing on the proposed rule will probably be held during fiscal 1970 and a final rule adopted. Any final Commission decision with respect to a Trade Regulation Rule will doubtless be fully contested by the analgesic manufacturers.

The past history of analgesic advertising leaves no doubt but that this problem will carry over into and well beyond fiscal 1971. It may become necessary, pending a final outcome of a Trade Regulation Rule and the whole analgesic problem, to undertake proceedings in individual cases of questionable advertising of analgesic products, especially with respect to those promoted for arthritis and rheumatism which would be relatively unaffected by the proposed Trade Regulation Rule for analgesic drugs since other claims in addition to those of pain relief are involved.

Manpower requirements.—It is estimated that this project will require the full time of at least two medical officers into and well beyond fiscal 1971. On an annualized basis, oral non-prescription analgesic drug advertising will consume one-man year, analgesic rubs for skin application one-half man year and oral arthritis and rheumatism product advertising one-half man year.

3. Vitamin-mineral product advertising

This project involves a wide variety of vitamin and mineral preparations promoted to the public with all kinds of health claims. The Food and Drug Administration's special dietary food regulations when finally promulgated will not, in our opinion, cover the question of drug claims for these products. New products continue to be brought on the market and new claims not previously made or covered by outstanding Commission orders show up in advertising.

During 1967 the sales of over-the-counter vitamin-mineral preparations approximated \$200,000,000 while about \$13,500,000 was spent in their promotion.

Manpower requirements.—This product category will continue to require close surveillance and regulatory attention which will doubtless extend through fiscal 1971 and beyond. No curtailment of promotional activity in this field is anticipated. It is estimated that this project will consume the full time of at least one medical officer in order to cope with the steady parade of vitamin-mineral product advertising.

4. *Weight reduction advertising claims for drugs, plans, formulas and devices*

It has been estimated that from 25 to 30% of the population of the United States is overweight. Because the dangers of obesity to health have been widely publicized in the lay press, public interest remains high in all schemes advertised to bring about a loss of weight. A large number of weight reducing drugs, plans, and formulas including dietary supplements continue to be promoted actively for weight reduction as are a broad spectrum of girdles, belts, vibrators, massagers, steam bath cabinets, slim suits and exercisers. Weight reduction promotional schemes flourish and have become a substantial commercial enterprise.

It has been reported that during 1967 sales of products in the dietary aids category alone totaled \$149,000,000 and that advertising promotional expenditures for this dietary aid category exceeded \$20,000,000. Past experience indicates that drugs, plans, formulas and devices advertised for weight reduction purposes are likely to continue to be actively promoted with questionable representations. It is anticipated that such practices will require regulatory attention throughout fiscal 1971.

Manpower requirements.—It is estimated that this project will require the full time of one medical officer throughout fiscal 1971 and beyond. No diminution of promotional schemes in this area is foreseen during the next few years.

B. Cigarette Industry

Cigarettes represent the single most important product health hazard in the United States affecting the lives and welfare of more than 50,000,000 people in this country. Cigarette advertising and promotional expenditures for all media reached a total of \$312,000,000 for 1967. Expenditures on filter tip cigarette advertising in 1967 constituted 95% of total cigarette advertising expenditures. These figures reflect the continuing intensity of cigarette promotion to the public, especially of the filter tip brands. Filter tip cigarettes are being actively advertised to the public with a variety of tar and nicotine reduction claims, including the newly introduced promotion of gas phase reduction of cigarette smoke.

The prohibition in the Cigarette Labeling and Advertising Act against requiring a warning in advertising will expire on June 30, 1969, unless extended by Congress. The Commission has reinstituted its proceeding for the promulgation of a trade regulation rule regarding unfair and deceptive acts or practices in the advertising of cigarettes. Moreover, the Federal Cigarette Labeling and Advertising Act requires the submission by the Commission of annual reports to Congress regardless of whether or not the ban on advertising is extended.

The Commission's program on labeling and advertising of cigarettes is a continuing project of considerable magnitude that will require close surveillance and regulatory action through fiscal 1971 and into the foreseeable future. If legislation now being considered by Congress should be enacted into law, it would become necessary to test filter efficiency for those noxious substances found to be "incriminated agents."

The Commission's Cigarette Testing Laboratory continues its program of testing and reporting three times a year the tar and nicotine content of domestic brands of cigarettes to enable the public to choose cigarettes spewing less tar and nicotine and thereby lessen the hazard to their health.

A variety of new devices, processes and filters are being developed which purport to lower in varying degree the tar, nicotine or benzopyrene content of cigarette smoke. Reduction of certain gas phase constituents is also alleged. Some of the proponents of these devices and processes testified at the hearings on cigarette smoking held recently by the House Commerce Committee and followed their testimony by requests for Commission staff conferences and advisory opinions. These companies wish to market their devices, filters and proc-

esses with claims of reduced health hazard. Their proposals are long on claims but short on scientific evidence. Increasing amounts of the staff's time are being consumed by these matters including for some time, an evaluation of voluminous reports submitted in connection with proposed advertising claims. It is apparent that the staff will be confronted with increasingly complex problems of a scientific and technical nature requiring frequent and extensive consultation with experts inside and outside government. These complex problems cannot be ignored nor our consideration of them deferred. Recently, a non-tobacco "cigarette" product made of processed lettuce leaf came to market with implied safety claims. Although it contains no nicotine, vegetable matter when burned at high temperatures yields a tar which has been reported to produce skin cancer, much like tobacco, when applied to animals.

Manpower and other requirements.—Based on the past several years experience, it is estimated that for fiscal 1971 and the next few years at least three professional people (two medical officers and one non-medical scientist) will be required to cope with scientific and technical problems in the field of smoking and health arising out of advertising of cigarettes. The Commission's Cigarette Testing Laboratory now needs an additional GS-3 clerk to be used in the office to assist in preparing reports on the results of cigarette tar and nicotine analyses including typing and filing work.

In the event that cigarette gas phase advertising promotion compels the Commission to undertake gas phase analyses in its Cigarette Testing Laboratory, additional personnel, laboratory space and laboratory equipment would be needed. On the basis of present operations and careful estimates, it is calculated that three additional GS-4 laboratory technicians, 500 square feet of additional laboratory equipment totaling about \$37,000 would be required.

C. Food Industry

1. Cereal foods and breads

Cereal foods and breads are being promoted to the public with a variety of special health claims. New claims for this product category continue to surface in the advertising from time to time. This project with heavy activity can be expected to continue through fiscal 1971.

2. Soft drinks and powdered beverage mixes

Various fluid and powdered beverage mixes are being advertised to the public. Some are being offered impliedly as a substitute for natural juices, to wit, Orange Plus. This project requires continuing surveillance and regulatory attention and can be expected to extend through fiscal 1971.

3. Miscellaneous food products

Health claims of one kind or another for miscellaneous food products constitute a substantial volume of work for this division and will continue to do so in fiscal 1971, although there is no definite pattern whereby one can predict exactly how many or which products will require our consideration. Current examples of this type of problem are Swift's Meats-for-Babies making startling health claims (such as prevent colds, fight infection), and various imitation food products.

Manpower requirements.—It is estimated on the basis of past experience that the full time of two and one-half professional people (two medical officer man-years and one-half man-year of a non-medical scientist) will be required to deal with the regulatory problems arising out of food industry advertising in fiscal 1971 and beyond. It is anticipated that commodities in this project area will continue to be intensively promoted in advertising necessitating close observation and regulatory attention.

D. Economic Poisons and Pesticide Industry

This category includes insecticides, disinfectants, weed killers, and rodenticides as well as economic poisons and pesticides.

This project, which is likely to be continued on an extensive scale, is concerned primarily with use and safety claims in advertising which contradict, negate, detract from, or are inconsistent with any statement, warning, or directions for use in the labeling of such products. Such advertising may adversely affect the public health by inducing persons to use these products in a careless and harmful

manner. Such advertising is also a matter of considerable concern to the Pesticides Regulation Division of the Department of Agriculture, which agency is charged with the enforcement of the Federal Insecticide, Fungicide and Rodenticide Act and with whom we have been working and continue to work closely on our mutual problems.

Some 500 companies distribute approximately 60,000 individual products in this category and will require time-consuming review by this Division. It has been reported that sales for 1968 exceeds \$4,000,000,000 and that advertising promotion commensurate with that sales volume is directed to agricultural, industrial and home users of the products.

A trade regulation rule proceeding for this class of products has been initiated but is not yet completed. The record is closed. A final report will be prepared and submitted to the Commission. A broad scale review of the advertising of products in this category will then be undertaken. It is anticipated that this project will carry through the entire fiscal year 1971. The promulgation of a trade regulation rule for pesticides advertising is being vigorously opposed by the affected industry. We therefore anticipate that the work entailed by this project will not diminish during fiscal 1971. Further, in the absence of a trade regulation rule, the control of pesticides advertising will require a substantially greater amount of this Division's effort in evaluating claims and in seeking expert scientific testimony for case-by-case consideration of the advertising. While the consideration of pesticides advertising is not new, a new regulatory approach to deceptive pesticides advertising has been made feasible by changes in the Department of Agriculture's laws and procedures in the last five years. Therefore an intensified approach to objectionable pesticides advertising is now possible.

Manpower requirements.—It is estimated that this project will require the full time of at least one scientist through fiscal 1971 and beyond in order to implement a Trade Regulation Rule for this class of products. It should also be noted that the thorny issue of comparative efficacy claims will not be resolved by the TRR and will continue to require surveillance and regulatory attention at the staff level.

E. Cosmetic Industry

Cosmetic products are widely advertised by a large number of companies to promote thousands of cosmetic preparations. Deception in many cases is by innuendo and indirection and regulatory action depends on the interpretation placed upon the advertising as a whole. This category embraces eye lotions and washes, lip protectors, face and skin creams, including bleach creams and hormone creams, wrinkle removers, depilatories, deodorants, anti-perspirants, sun tan lotions and oils, wave-set kits, dandruff removers, hair dyes and other hair preparations, and a host of miscellaneous toiletries.

During 1967, total sales of products in the cosmetic category are reported to have exceeded \$4,000,000,000 with an annual advertising expenditure of more than \$300,000,000. This project is of a continuing nature since new products and promotions spring up perennially. It will doubtless continue into fiscal 1971 and beyond.

Manpower requirements.—It is estimated that this project will require during fiscal 1971 the equivalent of the full time of one professional member consisting of one-half man-year of a medical officer and one-half man-year of a non-medical scientist.

F. Formal Liaison Activities

Early recognition of problem areas can be enhanced by close and regular liaison with other government agencies engaged in consumer protection activities. At present, this Division maintains day-to-day operational liaison as necessary with FDA, Pesticides Regulation Division of USDA, certain offices of the Public Health Service, such as the National Clearinghouse for Smoking and Health, National Cancer Institute, and certain community health services. Members of this Division attend regular liaison meetings with FDA and with the Federal Committee on Pest Control. Through fiscal 1971 and beyond we anticipate increased liaison obligations with the above and other agencies as a means of early detection of new problem areas. Such liaison is essential to our "early warning intelligence" to facilitate the recognition of potential problems so they can more readily be dealt with on a preventive, rather than on an after-the-fact basis.

Proper and adequate liaison consumes time like any other investigational activity, but properly conducted can lead to the cultivation of valuable sources of scientific information which will aid the staff in dealing with problems in their incipient stages. Increased liaison is suggested or contemplated with the following agencies: FDA, Natl. Clearinghouse for Smoking and Health, Natl. Cancer Inst., Federal Committee on Pest Control, Natl. Inst. of Environmental Health Sciences, and Pesticides Regulation Division of USDA.

It is essential that channels of communication be established with various scientific organizations for the appointment of scientific advisory committees to cooperate with the Federal Trade Commission and to whom the staff could turn for consultation and help on the wide variety of scientific problems that arise in connection with the Commission's regulatory operations. The nurturing of such cooperative relationships will require continuing active liaison by this Division with a substantial investment of time.

Manpower requirement.—It is estimated that effective formal liaison activities inside and outside of government will require during fiscal 1971 the equivalent of about one-half man-year, probably divided between a medical officer and non-medical scientist.

II. NEW PROJECTS

As stated in the Division of Scientific Opinions memorandum of June 4, 1969 transmitting to the Commission its fiscal 1971 budget plans, it is futile to discuss new projects and programs without a massive transfusion of professional and supporting clerical personnel to remedy the Division's manpower anemia. The Division's present workload its becoming unmanageable and without substantial increases in manpower projects now in progress are unlikely to receive adequate coverage much less taking on new ones however desirable or needy such projects may be. As observed in the aforementioned memorandum the day to day operational demands preclude the assumption by this Division of any further responsibilities and may even necessitate curtailing or abandoning some of what it is now doing.

The undertaking of any new projects will become feasible only if the professional staff and supporting clerical personnel are substantially augmented. There follows a list and discussion of those "new projects" which are deemed to be of sufficient public interest and health importance as to warrant regulatory consideration on a product category and industry-wide basis.

A. Drug and Device Industry

1. Cough preparations

In 1967 the public spent \$211,060,000 on cough preparations (drugs, lozenges, troches, sirups, elixirs and expectorants), and the industry spent over \$14,000,000 in advertising them. A trade regulation rule incorporating the NAS-NRC panel recommendations as well as the significant principles established in the Commission's case against Merck (Suctrets) will be recommended and could extend into and well beyond fiscal 1971.

Manpower requirements.—It is estimated that this project would require one half year of a medical officer's time.

2. Mouthwashes, gargles, antiseptics, and aerosol disinfectant sprays

The industry spent \$45,465,000 in 1967 advertising 19 brands, with a cost to the public of \$200,470,000. The experts who have evaluated these products feel that no medicinal or therapeutic or preventive claims may justifiably be made for any of these products, which are advertised for the prevention and treatment of colds, sore throats, influenza and other ailments. Lysol Disinfectant Spray and Listerine exemplify the problem. It may be possible to handle these in the same rule as the cough preparations, or two separate hearings may prove necessary. In either event we foresee action extending through fiscal 1971 and longer.

Manpower requirements.—It is estimated that this project would require one man-year of a medical officer's time.

3. Common colds and sinus preparations

A wide variety of preparations including cold tablets, capsules and vaccines, antihistamines, nose drops, nasal sprays and inhalants, and salves and ointments are advertised with many questionable claims for the common cold and its many symptoms, and for sinus conditions. The consumer spent about \$255,000,000 on

common cold and sinus preparations during 1967 while industry advertising promotional expenditures exceeded \$25,000,000. Indicative of the public interest is the estimate that some 500,000,000 cases of the common cold alone occur annually.

Manpower requirements.—It is estimated that this project would require one and one half man years of a medical officer's time.

4. *Antacids and laxatives*

The customers spent \$91,950,000 in 1967 for antacids, and \$183,600,000 for laxatives. Advertising figures are given for the two categories combined as \$36,757,000. A major regulatory effort extending over several years will undoubtedly be necessary to handle the deceptive problems of which we are now aware with respect to antacids. Laxatives may require a trade regulation rule to limit claims and to require affirmative disclosures. It is unlikely that this could be undertaken prior to fiscal 1971.

Manpower requirements.—It is estimated that this project would require one man year of a medical officer's time.

5. *Topical antiseptics*

These products constitute a large proportion of the \$28,094,000 spent in advertising skin medications. The public spent \$58,930,000 in external antiseptics alone. It is doubtful whether many of these products possess any useful properties, medically speaking. These products will probably require more individualized handling, so that the project will start later and extend into fiscal 1971 and beyond.

Manpower requirements.—It is estimated that this project would require one half man year of a medical officer's time.

6. *Dentifrice and dental preparations*

Dentifrice advertising has been the subject of Congressional investigation and consumer organization criticism. Involved are questions of excessive abrasiveness, whitening claims and dental decay protection claims. The advertising bombards the public with scientific sounding test results from which the public cannot determine for itself whether the claims are true, half-true or false.

The dentifrice field is highly competitive with so-called new products being introduced frequently. The volume of advertising is substantial with more than \$39,000,000 having been spent by industry in 1967. The public is reported to have spent more than \$316,000,000 on dentifrices in 1967.

Manpower requirements.—It is estimated that this project would require one-half man year of a medical officer's time and one and one-half man years of a non-medical scientist's time.

7. *Sedatives and stimulants*

Advertising product promotions for relief of tension, anxiety, nervousness and insomnia, and to calm "jittery" nerves and induce sleep are increasing, as are products being offered to keep you awake if you are tired and sleepy. Such claims are suspect and these products constitute another project for fiscal 1971. In 1967, industry spent over \$8,800,000 advertising eight principal brands of sedatives and stimulants while the public spent almost \$25,000,000 on non-prescription sleeping aids alone.

Manpower requirements.—It is estimated that this project would require one half man hour year of a medical officer's time.

8. *Skin remedies*

Products for psoriasis, acne and other skin conditions are being actively advertised and promoted to the public often with exaggerated claims. This product category is another project for fiscal 1971. In 1967, the public spent more than \$41,000,000 for acne aid products alone.

Manpower requirements.—It is estimated that this project would require one man year of a medical officer's time.

9. *Miscellaneous drug product advertising*

Adequate coverage of the advertising of a miscellaneous variety of products offered for memory impairment, epilepsy, diarrhea, asthma, relaxation, burns, foot trouble, aphrodisia, weakness, fatigue and numerous other symptoms, conditions and diseases is another project to be deferred until fiscal 1971.

Manpower requirements.—It is estimated that this project would require one man year of a medical officer's time.

10. *Miscellaneous device product advertising*

The propriety of advertising claims for a miscellaneous variety of devices such as oxygen inhalers, circulatory improvement devices, sun lamps, bed warmers, bed boards, sleep inducing and teaching devices, electric toothbrushes, electric shavers, vaporizers, therapeutic shoe devices and devices with general health claims, is another project to be deferred until fiscal 1971.

Manpower requirements.—It is estimated that this project would require one man year of a medical officer's time and one man year of a non-medical scientist's time.

B. Food Industry

1. *Vegetable oil, vegetable shortening and margarine product advertising*

More than 500,000 deaths annually are attributed to heart attacks. Many thousands of these deaths occur among people in the prime of life. Heart attacks are responsible for more than 25% of all deaths in the United States. The pathological condition underlying the development of heart attacks is atherosclerosis or hardening of the arteries characterized by fatty degeneration of the blood vessels. Experimental evidence points to a strong association between elevated blood cholesterol levels and atherosclerosis, and between high saturated dietary fat intake (animal fats such as bacon, lard, beef fat, butter, cream, and egg yolks) and above normal blood cholesterol levels. The substitution of polyunsaturated fats (mostly liquid vegetable oils and fish oils) for a substantial percentage of saturated fat intake has been reported to lower the blood cholesterol level.

The American Heart Association has taken a strong official position in publications and releases addressed to the laity and to the medical profession on the need of curtailing animal fat intake and substituting instead polyunsaturated fatty acid containing foods such as vegetable oils and margarine. It must be emphasized that not all vegetable oils and margarines are high in polyunsaturated fatty acids.

There has been wide-spread exposure of the general public to information on the subject of edible oils and fats and the possible health benefits from increased consumption of polyunsaturated fats (vegetable and fish oils) and simultaneous decreased intake of saturated fats (animal fats, such as bacon, lard, beef fat, butter, cream and egg yolks). The news media have informed the consumer that there is a strong association between elevated blood cholesterol and atherosclerosis, and between high saturated fat intake and above normal blood cholesterol levels; and that the substitution of polyunsaturated fats for a substantial percentage of saturated fat intake has been reported to lower the blood cholesterol level. The general public has also been told that the pathological condition underlying the development of heart attacks is atherosclerosis or hardening of the arteries, and that heart attacks are responsible for more than 25% of all deaths in the United States.

Various vegetable oil, vegetable shortening and margarine products are being promoted to the consumer as good sources of polyunsaturated fats. Many are being advertised as being high, higher and highest in polyunsaturated fats and low, lower and lowest in saturated fat. Food fats and oils contain three kinds of fatty acids, saturated, monounsaturated and polyunsaturated. A single food may, and usually does, contain varying amounts of all three kinds of fatty acids. Liquid vegetable oils which have been hydrogenated or "hardened" for use in margarine and shortening manufacture have lost part of their original polyunsaturated fat content. Hydrogenation chemically converts some of the polyunsaturated fat into saturated fat, the degree of conversion depending upon the extent of the hydrogenation and the particular process employed. Since margarine and other vegetable oil products vary in their content of each of the three kinds of fatty acids, and in other respects which may be of health significance, depending not only upon the basic ingredients used but also upon the method of manufacture of the finished product, neither the consumer nor most physicians are presently in a position to make perceptive selections.

Neither current labeling nor current advertising of this product category provides sufficient information to enable consumers or physicians to make a knowledgeable choice on the basis of relative content of polyunsaturated fats and

saturated fats from among the products on the market. There have been a number of complaints from consumers and physicians about the failure of labeling and advertising to provide this needed information.

By memorandum of September 28, 1966, the Division of Scientific Opinions suggested, and by memorandum of October 10, 1966, the Commission authorized this Division to implement its recommendation that companies, which voluntarily promote their oils, fats and fatty foods as being high in polyunsaturated fatty acids, state in advertising how much polyunsaturated, monounsaturated and saturated fat are present in the product. The Division of Scientific Opinions had stated in this memorandum that if the health value of substitution of polyunsaturated for saturated fatty acids in the diet is as great as many physicians believe it to be, the deception inherent in inadequate declaration of the ingredients in such products may be material. By Commission memorandum of January 13, 1967, the Bureau of Deceptive Practices was relieved of the duty of submitting further interim reports and the then Bureau Director suspended further work on this project. It is recommended that this project be renewed.

Manpower requirements.—It is our intention to recommend a trade regulation rule proceeding as a proposed solution to the problem presently raised by vegetable and margarine advertising. Prior to such staff recommendation, liaison with the Food and Drug Administration, and with the Food and Nutrition Board of the National Research Council is deemed desirable to develop a common enforceable scientific policy in this area. Consultation with the Council on Foods and Nutrition of the American Medical Association may also be advisable. It is estimated that one man year of a medical officer and one man year of a non-medical scientist would be required to undertake and see this project to fruition.

2. *Special dietary foods*

Pending the completion of the Food and Drug Administration's hearing on proposed regulations for foods for special dietary use, which have been actively under way for almost one year, we have been relatively inactive in this field. A final decision by FDA is anticipated during fiscal 1970 so that a project undertaking in this category by FTC can be programmed for fiscal 1971.

Manpower requirements.—It is estimated that this project would require one man year of a medical officer's time.

3. *Artificial sweeteners*

A major new project which should be started because it involves a health question is a re-evaluation of advertising for all low-calorie drinks containing artificial sweeteners. In the light of new scientific evidence of the potential hazard of artificial sweeteners, the Food and Drug Administration has recently initiated major labeling changes.

In 1967 industry was reported to have spent over \$4,500,000 to advertise and promote artificial sweeteners, while the public spent more than \$47,000,000 in their purchase.

Manpower requirements.—It is estimated that this project would require one half man year of a medical officer's time.

C. Miscellaneous Product and Device Advertising Other Than Foods, Drugs, Devices and Cosmetics

There are a large number of products and devices that can be grouped together in a miscellaneous category. This category includes cooking utensils, detergents, soaps, household and other cleaning agents, bleach dispensers, silver cleaners, paint removers, plastic cements, soil conditioners, fertilizers, silage treatments, window cleaners, solvents employed in coin-operated machines and water sterilizers.

An evaluation of the advertising of these products and devices from the standpoint of their efficacy and safety is another project for 1971.

Manpower requirements.—It is estimated that this project would require one half man year of a medical officer's time and one and one half man years of a non-medical scientist's time.

Respectfully submitted,

GEORGE DOBBS, M.D.,
Associate Chief, Division of Scientific Opinions.

TABULAR SUMMARY OF PROJECT MANPOWER NEEDS FOR FISCAL 1971

I. CONTINUING PROJECTS

	Medical officers	Nonmedical scientists
A. Drug and device industry:		
1. FTC-FDA evaluation of nonprescription drug claims.....	3	-----
2. Analgesic product advertising.....	2	-----
3. Vitamin-mineral product advertising.....	1	-----
4. Weight reduction advertising claims for drugs, plans, formulas, and devices.....	1	-----
B. Cigarette industry.....	2	1
C. Food industry.....	2	1 1/2
D. Economic poisons and pesticide industry.....	1 1/2	1 1/2
E. Cosmetic industry.....	1/4	1/4
F. Formal liaison activities.....		
Subtotals of estimated manpower needs for fiscal 1971.....	11 3/4	3 1/4

II. NEW PROJECTS

	Medical officers	Nonmedical scientists
A. Drug and device industry:		
1. Cough preparations.....	1 1/2	-----
2. Mouthwashes, gargles, antiseptics, and aerosol disinfectant sprays.....	1	-----
3. Common cold and sinus preparations.....	1 1/2	-----
4. Antacids and laxatives.....	1	-----
5. Topical antiseptics.....	1 1/2	-----
6. Dentifrice and dental preparations.....	1 1/2	1 1/2
7. Sedatives and stimulants.....	1	-----
8. Skin remedies.....	1	-----
9. Miscellaneous drug product advertising.....	1	-----
10. Miscellaneous device product advertising.....	1	1
B. Food industry:		
1. Vegetable oil, shortening and margarine product advertising.....	1	1
2. Special dietary foods.....	1	-----
3. Artificial sweeteners.....	1/2	-----
C. Miscellaneous product and device advertising (other than foods, drugs, devices and cosmetics).....	1/2	1 1/2
Subtotal of estimated manpower needs for fiscal 1971.....	12	5
Combined totals of I and II.....	23 3/4	8 1/4

Note: Total professional manpower needs for fiscal 1971; clerical supporting personnel to be increased accordingly.

MEMORANDUM

JUNE 20, 1969.

To: The Commission.

From: Bureau of Deceptive Practices.

Subject: Preliminary 1971 budget. Commission Minute, June 4, 1969, instructed the staff to submit comments and recommendations.

I. THE MISSION AND GOALS OF THE BUREAU OF DECEPTIVE PRACTICES

Although interpreting and enforcing Section 5 of the Federal Trade Commission Act dominates the business of the Bureau, the Bureau, in support of the Commission and to achieve effectiveness in the spectra of consumer problems, must embark visibly on a planned consumer program designed to speak to public demands for solutions to unmet marketplace needs. As we said in Part I of our "prebudget submittal" of April 25, 1969, (hereby made a part of this memorandum by reference) the Commission must consider new directions, new laws, and in the event of failure to do so, the emergence of new agencies to cope with today's problems unsolved by yesterday's machinery.

Everybody has found the consumer—the legislator, the government administrator, the corporate executive and, most importantly, the citizen who has discovered that as a consumer it pays to complain. Demands for solutions to the aggravations and frustrations of the consuming public impel a widening of the objectives of the Federal Trade Commission. Such goals should include development of techniques for identifying nationally-important marketplace problems; responding to individual consumer complaints; a legislative program to fill the gaps in consumer protection laws; consumer education; a program for improving producer-consumer relations; a Federal Trade Commission public information program for consumers; effective liaison with consumer organizations and organizations with identifiable consumer interests; participation in significant institutes and seminars on consumer problems in concert with law schools and other graduate disciplines, i.e., economics and business, trade associations and labor unions; organizations of state, country and city officials; sponsorship, annually, of a national marketplace conference with participants recruited from consumer spokesmen, businessmen, government, and the academic community; and the development of a government program to achieve "... uniform and intelligible consumer product standards ...".

In this paper, we are offering the first, rough draft, outline of a program to meet the ever-increasing demands of the American consumer and businessman for a fair shake and an honest deal. Much of our presentation is old stuff—a reshaping of traditional programs. Much of it is new and perhaps, to some, quite visionary. Where practical, we have tried to follow the suggestions and answer the questions of Commissioners Jones and Nicholson. Unfortunately, the shortage of time and the unique nature of our existing and proposed programs ruled out rigid adherence to their principals. For these departures, we apologize.

II. THE BUREAU'S PRESENT SITUATION AND PLANS FOR 1970

Historically, the principal function of this Bureau has been case-by-case enforcement of the Federal Trade Commission Act. All of its efforts and all of its personnel were directed to that end. This situation began to change in 1967, when the Division of Special Projects was formed within the Bureau. While this Division at the outset expended a good part of its effort in the enforcement field, handling casework on segregated housing and the D.C. Consumer Protection Program, it has now departed completely from that role and is engaged solely in programs having an industry- or country-wide application. If a need for a case-by-case approach is discovered within one of its programs, the responsibility for drafting complaints and conducting individual respondent-directed inquiries is shifted to one of the other divisions. Needless to say, the uncertainty surrounding the industry-wide programs which will be assigned to the Bureau greatly complicates the task of planning for 1971. Bureau management finds it very difficult to predict whether its role in the industry-wide, regulatory field will be enlarged

or curtailed. We can never know whether the Commission will assign primary responsibility for a project such as the upcoming automobile pricing inquiry to this Bureau or the Bureau of Industry Guidance. However, for the purposes of this paper, we are assuming that the Bureau will at least continue to be assigned consumer protection programs having application throughout the industry or the country and will carry through programs already started. We also assume that we will continue to have responsibility for the Truth-In-Lending statute.

The rise of "consumerism" has forced the Bureau to devote an ever-increasing amount of effort to anticipating and responding to the demands of the highly vocal and visible spokesmen of this phenomenon. Simply answering the mail now takes far more than ten percent of our time and personnel. While the Bureau has received some additional personnel over the years, the influx has not kept up with the new duties and functions assigned. The result has been that the number of attorneys now engaged in casework enforcement is twenty percent smaller than the number engaged in that work in 1964. We now have about forty-two men ostensibly engaged in enforcement: in 1964, we had fifty-two.

Turning now from the general to the specific, we will give a current situation report on the major programs with which this Bureau is engaged and our plans for fiscal 1970. The Commission Minute of June 4, 1969, directs us to organize our presentation along functional rather than organizational lines, and we have done so. The pattern of organization which appears in this section will be followed in the final section where we discuss our needs for 1971.

A. THE INPUT PROGRAMS

By "Input Programs" we mean the programs which supply us with the information needed to plan and conduct an intelligent campaign of consumer protection. The programs include not only the "passive" mailbag input where information is thrust upon us, but encompass the affirmative efforts to acquire information, such as monitoring and liaison contacts with groups and individuals who possess needed information. All of these programs are now grossly understaffed, with the result that necessary information is either not being gathered or when gathered is not being properly analyzed and utilized in developing programs.

1. The Mailbag

The processing, answering and analyzing of complaints and inquiries from the public, other government agencies and the like, is currently being handled by three experienced attorneys (two being on detail from enforcement divisions) and three recent law school graduates under the direction of Mr. Berryman Davis. The current practice is to break in new attorneys on the mailbag for a period of three to six months. They are then transferred to other divisions and newly hired law school graduates take their place. As the Commission will see in an ensuing section, we plan to drastically overhaul and change this procedure.

It should not be thought that this small letter-writing force is up to the task of responding to all complaint and inquiry letters received by the Bureau, for, much of this work is performed by the lawyers assigned to the other divisions. For example, very few of the approximately one hundred and fifty Congressional letters now received each month are answered by this group. The attorneys in Mr. Vitale's Division alone have been answering about one hundred Congressional letters a month, in the latter half of fiscal 1969.

The size of the mailbag is growing quite rapidly. In fiscal 1968, this Bureau received 7215 applications for complaint. In fiscal year 1969, this figure will rise to 8904. In fiscal year 1968, we received 944 inquiry letters. These will rise to 1062 for fiscal year 1969. At the present time, we are doing little more than merely handling this torrent of mail. We are not properly analyzing it for trends or implications. This situation will change with the advent within a few weeks of ADP. We will begin changing both the structure and the procedures of our correspondence unit in 1970. The planned changes are outlined below in the section containing our 1971 proposals. Hopefully, some of the plan can be implemented within the budget structure approved for 1970. The need is here now, but the present "personnel freeze" and the demands of other programs may frustrate plans for an early start.

2. The Advertising Monitoring Program

The Monitoring Program as presently conducted can only be called a token, pilot operation. We usually use two or three part-time law students to physically conduct the Monitoring Program, but at the present time, are down to one. These monitors perform a purely clerical function. Attorneys throughout the entire Commission submit requests for advertising of products in which they are interested such as analgesics, hemorrhoid remedies and the like. The monitors examine the material received from various sources and clip the requested advertisements. In other words, this is a "clipping service" and not a monitoring service. The only monitoring being done at the present time is that of the national television networks' submissions. These are submitted to an attorney in the Food & Drug Advertising Division and to scientific personnel in the Division of Scientific Opinions. The television ads are there examined for truthfulness and general compliance with the law. We are not—repeat, not—monitoring in this sense regional television and radio, national radio national print media, and newspapers. Our plans for 1971 involve an effective Monitoring Program. We do not have one at this time, and 1970 will see little, if any, improvement. We have formulated a plan to monitor national magazines using Commission personnel on a volunteer basis. This will work in much the same fashion as the present volunteer television Monitoring Program, except that only selected persons will participate. For example, we will supply photography magazines to persons who have that pastime as a hobby, and hence, have some expertise. They will return the magazine after perusal with suspect ads noted and comments thereon. The monitor gets to read a free magazine, and the Commission gets a free, expert opinion.

There is only one thing inhibiting the initiation of this Program. We have no attorneys to handle the input the Program would generate. It must wait until 1971.

3. Affirmative Input

An Input Program which is not functioning at this time is the affirmative seeking out from government, consumer, and private groups of information as to consumer needs which we are unable to secure via the mailbag and referrals. The poor don't write letters, and an affirmative effort to learn their needs is mandatory. We have no time and no personnel at the present time to devote to this necessary function. Of course, a few intermittent contacts are made in pursuit of a particular program such as the D.C. Consumer Protection Program, but what is needed is a direct and continuous contact on a broad-scale by personnel who are especially competent by reason of educational and other qualifications to handle this kind of assignment and to properly analyze the results.

B. THE ENFORCEMENT PROGRAM

By the "Enforcement Program" we mean that activity which is devoted entirely to the enforcement of our various statutes via the traditional seven-digit investigation and case-by-case approach. In this Bureau, this Program is the responsibility of the Divisions of General Practice and Food & Drug Advertising. At the end of the third quarter of fiscal year 1969, we had a total of forty-two attorneys handling the enforcement caseload of the Bureau. The figure of forty-two attorneys includes two division chiefs, and three senior grade attorneys who assist them and who handle practically no cases themselves. The number of effective case producers shrinks even more when one considers that attorneys Cox and MacDonald are detailed full-time to the Screening and Planning Section, and Attorney Vittone is detailed full-time to Commissioner Nicholson's office. Attorneys Williams and James handle very little casework, but are engaged primarily in consumer liaison and educational activities in connection with the D.C. Consumer Protection Program.

The two enforcement divisions have been reducing their caseload (from 967 investigations at the beginning of the fiscal year to 787 at the end of the third quarter), but the procedure by which this has been accomplished will not reflect credit upon the Commission and is probably doing much to harm its image. We simply have not been opening very many new cases. In fiscal year 1967, we opened 666 investigations. In fiscal year 1968, the number had dropped to 388. This year, we will open between 170 and 180 new seven-digit investigations. This means that 8724 pleas for action or assistance were turned down.

The case-producing attorneys labored assiduously during 1969, and have compiled quite a record. By the end of the year, they will have completed about 507 investigations. They will have secured the issuance of about 63 complaints and the issuance of about 72 final orders to cease and desist. But, it is doubtful that production at this rate will continue in fiscal year 1970, since the Bureau has lost by resignation, transfer and illness, ten of its effective case-producing attorneys.¹ The replacements, when secured, will have to be trained. Moreover, it does not appear that 1970 will bring a reduction in the Congressional letter and report writing duties of the attorneys. Thus, during 1970, the Commission can expect a continuation of the delays in processing of casework and a continuation of the present policy of drastically restricting the number of seven-digit investigations opened.

C. THE COMPLIANCE PROGRAM

The Bureau's Compliance Program in 1969 and in 1970 is and will be one hundred percent passive. The eleven attorneys assigned to this work are unable to keep up with the work which is thrust upon them. A glance at the statistics shows the situation. During the first three quarters of fiscal 1969, the Division handled 536 complaints of order violation, but ended up the third quarter with a backlog of 183 matters, twenty more than they had at the start of the fiscal year. The same situation exists with respect to reports of compliance. They had 146 at the beginning of the fiscal year and ended the third quarter with 171 on hand. They began the year with 164 compliance investigations in progress and ended the third quarter with 181. In sum, they're losing ground!

Only three matters were certified to Justice for penalty proceedings during the first three quarters of 1969, but this figure will be at least doubled in 1970. However, penalty certifications are a reflection of the compliance investigations instituted. Fiscal year 1970 will see a drastic reduction in the number of investigations commenced, for a crash effort will be made to reduce the number of reports of compliance awaiting processing. Since only 43 were completed during the first three quarters of fiscal 1969, the backlog of 171 appears formidable.

D. THE TRUTH-IN-LENDING PROGRAM

The Truth-In-Lending Program is a developing operation at present conducted by seven attorneys in Washington by the temporary, full-time assistance of two attorneys in each field office. This small force has performed a yeoman's service in fiscal year 1969. It has mailed out three quarters of a million copies of Regulation Z by utilizing a private distribution source. The force has distributed more than fifty thousand copies of the booklet itself by direct mail from Washington and by utilization of the eleven field offices. The mailbag, consisting for the most part of inquiries, for this group has now reached an average of approximately fifty letters a day. The field office personnel are at present entirely engaged in an educational effort aimed at informing lenders and creditors how to comply with the statute. We estimate that the field men have spoken to about fifteen thousand businessmen during the past four months. Needless to say, there is no fat in this Program at the present time.

The present plans for the 1970 fiscal year call for an increase in the manpower for this Program to a total of one hundred and fifty. However, the deployment or allocation of the personnel between the field and Washington has been revised somewhat. Present plans envision the placement of one hundred and fifteen of the total personnel in the field offices. Each of the eleven field offices will have one supervising attorney-examiner. The ninety, nonlawyer, consumer credit examiners, and a clerical supporting staff of fourteen will be allocated among the various field offices in proportion to area to be covered. The Washington staff will consist of three supervisors, nineteen staff attorneys, four professionals with nonlegal discipline, and a clerical staff of nine.

Needless to say, the recruiting, training, and placement of this staff is not going to take place overnight, and much of 1970 will be devoted to recruiting and organization. At the same time, 1970 will see the beginning of an Enforcement Program and a continuation of the educational effort.

¹ Attorneys Oden, Rodway, Vittone, Oglesby, Eberly, Frascati, Mirabelli, Barr and Bullock. Mr. Pope suffered a stroke, and is on extended sick leave. Needless to say, we hope for his speedy recovery and return.

E. THE PACKAGING PROGRAM

At the present time, the five professionals working full-time on packaging put in a full day. A steady input of written and telephone requests for information and technical interpretation has occupied the main efforts of two members of the staff. Telephone requests have averaged 150 calls per month for one of these members. Since the initial publication of the first interpretative bulletin in March, the mail-list has risen to 1500 by individually submitted requests. Requests for written, technical interpretations have numbered 200 in the past eight months and conferences with visiting attorneys and businessmen average at least two per day. One member of the staff expends his full-time in screening and responding to complaints concerning packaging and labeling matters. In the past eight months, 125 complaints have been answered. Industry has been contacted in at least one-third of these cases, with encouraging response to corrections suggested.

During the year, fiscal 1970, the first public hearing under the regulatory procedure is scheduled. This is an uncharted course and could be time consuming. In addition, the staff must render technical assistance to the General Counsel defending the District Court suit challenging the Federal Trade Commission's definition of "consumer commodity". It is anticipated that these cases may be only the beginning of an extremely demanding, time-consuming episode of other hearings are demanded or threatened suits are filed. In addition, the staff has been directed to undertake an investigation of nonfunctional, slack-fill in the toy industry, investigate the necessity of proper naming and ingredient-listing in the charcoal industry, and complete the issuance of "cents-off" regulations. These efforts will be the maximum possible under Section 5 of the Act with the staff of five professionals as now planned. Primary enforcement efforts must be devoted to additional liaison and schooling assistance to field offices, state agencies and Customs' officials. Complaints are anticipated to increase many fold, and timely screening and answering may pose an insurmountable problem. An involved study of state integration and uniformity; surveys and market studies for effectiveness of the Act desired by Congress: enforcement; and industry and consumer aids to the total understanding of this Act must await appropriate staffing. Interpretations are anticipated to continue in high demand for at least the next six months after which, it is hoped, a certain amount of effort may be turned to industry survey and advice followed by possible voluntary compliance where mistakes are discovered. Since new compliance actions are not available for this year and enforcement will be meager, a laxity is anticipated which will be a severe burden for future years. Industry has already shown the desire for these basic regulations to erase deception and will perform a great deal of self-policing. If these reports are not aggressively followed up, the entire thrust of our efforts will wane to ineffectiveness at this beginning stage. Needless to say, this small group of five professionals and three clerical employees will be more than busy in 1970.

F. THE SCIENTIFIC ADVICE AND ASSISTANCE PROGRAM

This Program is conducted entirely by our Division of Scientific Opinions. This Division has suffered two key retirements during fiscal 1969 (Mr. Irish and Dr. Hall), and we are currently experiencing difficulty in recruiting replacements. We are dependent upon scientists in this Division for expert advice in drug and medical cases; we also use the physical scientists to assist in the investigation and preparation of cases involving a wide variety of nonmedical, scientific disciplines. Moreover, the personnel of this Division are expected to act as the scientific eyes and ears of the Commission and to bring to its attention any detected need for action by the Commission in the scientific field. Scientists in the Division are currently assigned the job of reviewing all food, drug and cosmetic advertisements secured through the national television Monitoring Program. A substantial portion of the almost 3000 television scripts and storyboards which this Program produces each month involve these products. We can only hope that in 1970, we will see our recruiting efforts succeed and that the staff will at least be brought up to its former, authorized level. Moreover, it now appears that the one additional medical officer authorized in the 1970 budget will not give the Division the manpower it needs to carry out its duties. We hope that at least two of the eleven new attorney positions authorized for the

FDA Drug Evaluation Program can be changed to permit the hiring of two additional medical officers for this Division in 1970. The need is pressing and immediate.

G. THE REGULATORY PROGRAMS

In this category fall the miscellaneous activities which do not usually involve casework and which have application to an entire industry. At this point, we will discuss only the most important programs of this type and their planned activities in fiscal 1970. With the exception of the FDA Drug Evaluation Program conducted by the Divisions of Drug Advertising and Scientific Opinions the programs are carried out by the Division of Special Projects.

1. The FDA Drug Evaluation Program

This involves the review of the advertising claims of at least 2000 and perhaps as many as 4000 individual drug products in light of labeling requirements to be promulgated by the Food and Drug Administration.

It was originally estimated that this project would commence in the early part of fiscal 1969 and carry through fiscal years 1970 and 1971. However, due to delays within FDA, our participation has just recently gotten underway. We have sent out approximately 150 letters of inquiry involving eight categories of drugs. We have received approximately 75 replies.

We have now reached the point in this Program where members of the staffs of FTC and FDA are ready to sit down to discuss proposed labeling changes involving some eight categories of nonprescription drug products. Included in this group are iron preparations, antacids, dentifrices, topical antibiotics and anti-septics. The first meeting is set for the middle of July.

We have received approximately 400 NAS/NRC Panel Reports which cover essentially all of the nonprescription drug categories.

In January, 1969, the Commission requested a supplemental appropriation for fiscal 1969 in the amount of \$150,000 for twenty-two positions to carry out the responsibilities of this Program. This included one medical officer, eleven attorneys, seven clerical positions and three monitors. The fiscal 1970 Budget request calls for a total of \$250,000 for the same twenty-two positions with one additional clerk-typist for a total of twenty-three new positions. No one has been hired for this Program to date. As a matter of fact, both the Division of Food and Drug Advertising and the Division of Scientific Opinions have less personnel than they had in January.

Obviously, the progress of this Program in 1970 depends upon the recruitment of legal and medical personnel for the two responsible Divisions. If we can get the full complement of authorized people, one-third to one-half of the project can be completed in 1970. This assumes, of course, that FDA will move along apace, an assumption made suspect by experience.

2. Special Regulatory Projects

Time and space considerations will not permit a detailed, seriatim discussion of each of these programs and its expected progress during 1970. All that we will attempt to do here is to give a brief run-down on the current status and expected 1970 progress of the more important of these programs. In the following section presenting our 1971 plans, we discuss each of these programs in some detail.

Cigarettes.—In response to a Commission direction, we have detailed one additional attorney to work on the preparation of the 1969 report to Congress on cigarettes. The three attorneys will submit the report on time. The trade regulation rule proceedings, contact with private and government sources of information, legal supervision of the laboratory and preparation of press releases will occupy the full-time of two attorneys during 1970.

Consumer protection hearings.—Father Ralph Dwan of Georgetown University has been retained to analyze the record of the past year's hearings and prepare a report thereon. It is anticipated that this report will be completed and submitted to the Commission in September of 1969. Doubtless, additional work will be required after the Commission reviews the draft report. We anticipate using at least one attorney on this project for the balance of 1970.

Magazines.—Surveillance and supervision of the PDS Code and the door-to-door sale of magazines in general will continue to occupy one attorney full-time

during all of 1970. This is in addition to the enforcement activities which may become necessary. A rather large-scale field investigation is currently underway and should be completed within a matter of weeks. We will spend a month or more analyzing the results of this investigation and preparing a report to the Commission.

Encyclopedias.—This program involves oversight and study of the sales practices employed by encyclopedia salesmen. Little active work has been performed on this program during 1969 because of a lack of manpower. We hope to complete the project during fiscal 1970 and submit a comprehensive report to the Commission with recommendations as to the action deemed necessary. One attorney will be working on this project full-time until it is completed. We do not anticipate that the project will run over into 1971.

Softwood lumber.—Since there appears to be a fundamental difference between the Commission and the Department of Commerce as to the proper standards to be set up, we anticipate that this program will demand the services of an attorney for most of 1970.

Automobile warranties.—The staff report on this matter will be submitted by July 3, 1969. The submission of this report will certainly not end this program's demand for manpower. As a matter of fact, Commission adoption of the staff's recommendation will make it necessary to assign two or three attorneys to this program on a full-time basis during 1970.

Gasoline.—There are two facets to this tremendously important program. We have recently submitted a recommendation for a trade regulation rule to require disclosure of octane ratings. The second part of the program, that of probing the extent, effect, and legal implications of the substitution or swapping of gasoline among marketers has not yet gotten underway. One attorney will be working full-time on these projects in 1970.

Other programs.—Several other programs just getting underway will require manpower in 1970. These include affirmative disclosure, product standards and television radiation.

III. THE BUREAU'S PROGRAMS IN 1971

A. INPUT PROGRAMS

1. The Mailbag

During 1971, the Bureau's passive input, that is the sum total for all applications for complaint, referrals, and inquiries received from all sources will reach rather startling proportions. Utilizing simple, straight-line projection, we calculate that during 1971 we will receive 13,300 actual applications for complaint. Inquiries will total at least 1400.

Our plans for 1971 entail an entirely new approach to this avalanche of mail. A first step is to change the type of personnel utilized in this endeavor. We intend to employ and train a nonprofessional staff which will handle the greater part of this correspondence. This staff of consumer specialists will operate under the general over-all supervision of one or more seasoned trade-regulation attorneys. With the assistance of Personnel, we hope to draft job descriptions for these consumer assistants' positions which will command grades ranging from GS-7 to GS-12. With this type of salary structure, we can attract the caliber of individual needed to expertly man these key positions. The likely source of material is the present nonprofessional staff of the Commission. There are many senior secretaries and clerks throughout the Commission who could perform these duties in a competent manner with very little training since they are already familiar with Commission procedure and the statutes enforced. Of course, the obvious reason for handling the mailbag in this fashion is to free professional personnel for other duties. But, there is a second and equally compelling reason. We believe that in the long run, we will get a more expert job than results from present procedures. A spanking, new attorney just out of law school can hardly be expected to be familiar with the wide-range of precedents, statutes and procedures which one should have at his fingertips to facilitate the accomplishment of a speedy and competent analysis of an application for complaint. Under present procedures, we transfer him to one of the divisions at about the time he becomes sufficiently acclimated to perform his mailbag job competently.

During 1971, a goodly part of the mailbag applications will be handled under the new minor violations procedure. Here, again, we don't need attorneys to

make the initial contact with a suspected, errant trader. The Commission should be aware that the minor violations procedure has a dual purpose. It is first of all a preliminary investigation tool which permits the acquisition of information from a possible, proposed respondent without the necessity of setting up a seven-digit file. Its other equally important purpose is to indirectly secure redress for aggrieved consumers. Since the procedure is untried, it is difficult at this juncture to say which purpose is more important.

At the present time, we have six attorneys engaged in answering the mail. During 1971, we hope to use only two attorneys in this pursuit and eight non-professional consumer communication specialists.

2. The Advertising Monitoring Program

As discussed in an earlier section, our present Monitoring Program is almost nonexistent. The only actual monitoring being done is the review by attorneys and scientists of the national television commercials. We receive a rather vast amount of material from various media around the country, but this material is not examined to determine whether our statutes are being violated. No one is reading national magazine advertising, national radio advertising scripts or regional television or radio commercials to determine compliance or non-compliance. This is an unhappy situation for a variety of reasons, including that we have frequently let it be known, over the years, that we do have a viable Monitoring Program. Moreover, we believe that local television and radio broadcasts contain a large amount of deceptive advertising. The advertisers responsible for this material are completely escaping regulation.

In 1971, we plan to have a staff of six engaged in performing the monitoring function. Here again, we do not plan to utilize lawyers, but hope to develop a nonprofessional staff which will operate under the general supervision of a middle-grade attorney (GS-12 or 13). Here again, the shift from part-time professionals to full-time nonprofessionals should actually give us a more expert job than the present system of utilizing transient law students.

3. An Affirmative Input Program

Seldom should the Federal Trade Commission be caught by surprise and learn from the news media for the first time of a flash fire consumer issue for which a hurried reaction must be fashioned. Even more rarely should the Commission be presented from outside sources with a consumer issue which presages a significant program of action for the Agency. Perhaps it is method of a kind to contain innovations and to move only on those marketplace problems that become serious enough to create a wave of public or political insistence for remedial action. However, such a policy, or lack of policy, forfeits agency control of programing and expenditures of manpower and funds.

Although an arm of the Congress, the Federal Trade Commission should be giving leadership to marketplace issues within and, when the need is clear, *without* its charter. In sum, more consumer protection proposals should originate in the Federal Trade Commission.

In addition to the complaints and problems, as well as the actionable cases and issues to be garnered via the mail and monitoring of advertising, forecasts can be gathered of needed future action programs and early warning intelligence of consumer issues by taking positive steps on a systematic basis to stay in constant communication with those persons, organizations, and institutions who generate new ideas, who discover problems, and who will turn to the Federal Trade Commission if there has been an established pattern of dialogue and association. Such cultivated relationships will create affirmative input for the Agency and, attentively managed, will provide skills and strengths impossible to otherwise procure and retain as an Agency resource. In other words, a public affairs and information function in the Bureau is proposed for this centrally important task.

Manned by trained consumer information specialists who know today's consumer issues, this function would be charged with disseminating Federal Trade Commission consumer information (see below) and the concomitant duty of *gathering* and *distilling* consumer intelligence from: all sources, including as a minimum the following:

1. The graduate facilities of the universities (with emphasis on law, economics, business administration, sociology, and public administration); labor unions; trade associations; individual manufacturers; and businesses.

2. Groups or associations of veterans; retired persons; home economists; farmers; health authorities; consumers; environmental and conservation experts.

3. Organizations and institutions such as Brookings Institute; the Urban Coalition; Council of State Governments; National Association of Counties; National League of Cities; Conference of Mayors of the United States; American Society for Public Administrators; American and Federal Bar Associations; National Legal Aid and Defenders Association; American Trial Lawyers Association; National Conference of Commissioners on Uniform State Laws; and National Association of State Departments of Agriculture.

4. Congressional staffs and all other departments and agencies of government having consumer programs.

The staff required to perform this function is small in comparison to the gains to be achieved. We believe that the Program should be headed by a top person with a record of interest and competence in the consumer protection field. In all likelihood, he would have a graduate degree in a nonlegal field. A supporting staff of five professionals selected for special skills or education in writing, social science and consumer economics with clerical help would complete the group. The total number of new positions requested is ten. A start on this Program could begin in 1970 by diversion of positions authorized for a similar function within the Office of the Executive Director.

B. THE ENFORCEMENT PROGRAM IN 1971

As we said earlier, the Enforcement Program can be defined as the detection, investigation and correction of deceptive acts and practices on a case-by-case basis. Organizationally speaking, this Program is entirely conducted by our present Divisions of General Practices and Food and Drug Advertising. Unfortunately, the lawyers engaged in this Program are not permitted to devote their entire time to it, but must engage in other time-consuming activities such as letter writing and report writing. We hope that adequate staffing of other organizations within the Bureau in 1971 will relieve our enforcement attorneys of these "outside" duties.

This presentation departs from the approach historically used in budget justification for an Enforcement Program. In the past, the enforcement divisions' justification has consisted of a "laundry-list" of proposed casework neatly segregated into categories such as analgesics, weight-reducing plans, cigars, automobile tires, and the like. While some description of the subject matter to be pursued is no doubt necessary, complete dependence upon this system of budget justification should be eschewed as lacking in both validity and utility. It is invalid because it is forgotten as soon as it is written. No attempt is ever made to allocate two-and-one-quarter manyears to games of chance, two manyears to sewing machines, and so on. For the past several years, the division chiefs have been occupied with trying to clean up a one-year to eighteen-month backlog of old cases with the result that new projects are attacked only as time permits. The former procedure is completely lacking in usefulness insofar as planning is concerned since it gives no indication of the capacity or capability of the enforcement staff to handle new matters. It doesn't give the Commission, our Director, or our Screening and Planning Officer any clue as to the divisions' ability to perform new assignments.

The new system of budgeting and planning which we propose is based upon the premise that Deceptive Practices' enforcement is a bottomless pit possessing an ability to soak up and utilize an infinite amount of manpower. With very little, additional effort in the Input Program, we could very quickly open ten thousand seven-digit files. The economy is expanding at a fantastic rate, and in all probability the number of actionable deceptive practices grows at approximately the same rate as the GNP. Since we cannot possibly ever hope to bring action against all violators, the question arises "How much enforcement does the Commission desire?" Perhaps a better way to put the question would be "How much enforcement does the situation require?"

To answer these questions, we must start off with the basic premise that the answer reached is going to be arbitrary. There is no exact formula or methodology in existence which will give a dependable answer. The only statistical indicator which we have as to the prevalence of deceptive practices is the number of applications for complaint received via the mailbag. While it admittedly has imperfections too numerous to discuss here, we find ourselves in the position of the man who knowingly played in a crooked poker game because it was the only game in town. Thus, imperfect as it is, we must use the mailbag since it is the only yardstick available.

Of course, there are a myriad number of ways in which the number of applications for complaint received can be employed to arrive at a figure representative of the number of enforcement actions (i.e., seven-digit investigations) which constitutes an adequate enforcement job. Perhaps the ADP analysis of this input will help when it becomes available during the next fiscal year. For now, however, we believe that the best approach is the historical-statistical one of examining the ratio between seven-digit cases opened and applications for complaint filed over a period of years. This procedure assumed that all case openings stemmed from the mailbag and assumes further that only meritorious matters were opened. Of course, neither of these assumptions is one hundred percent true.

As a statistical-base period, we selected the four fiscal years, 1964 through 1967. The most recent years, 1968 and 1969, were rejected as not typical since the Bureau has drastically curtailed case openings since fiscal 1967. There was no particular reason for not going back beyond 1964, except the necessity to expedite this presentation. Perhaps a longer base period will produce a result with greater statistical validity. Be that as it may, analyses of the four years actually utilized revealed that during the period, 19,345 applications for complaint were received, and 2231 seven-digit investigations were initiated. The cases-opened figure is about eleven and one half percent of the total applications received.

We estimate on the basis of a straight-line projection that 1971 will produce 13,333 applications for complaint. Applying the eleven and one half percent to this mailbag total, we arrive at the figure of 1533 as the number of cases which should be opened during fiscal 1971 in order to keep pace with last practices.

To calculate the attorney-workforce which will be required to carry on an enforcement program of this magnitude, we again use the historical, statistical approach. However, in this instance, the calculation is pragmatic and involves no assumptions or variables. The base-period utilized is fiscal 1964 through fiscal 1969. Over this period of time, an average of forty-seven enforcement attorneys produced an average of 649 completed investigations per year. Thus, we can assert rather firmly that the average enforcement attorney can produce 14 completed investigations per year.

Simple division of 14 into 1533 shows that we need one hundred and nine attorneys to handle a docket turnover of 1533 cases per year. This is an increase of fifty-three attorney positions over the presently authorized enforcement force of fifty-three lawyers. In actual fact, the *Workload and Manpower Reports* for the first three quarters of fiscal 1969 show an average of only forty-two attorneys working on enforcement. The actual number on board is about thirty-six at this writing.

A one hundred and nine man attorney-force will require a clerical force of about thirty-four, an increase of seventeen over present strength.

As of March 31, 1969, the enforcement divisions had on hand a total of 785 investigations, equal to 18.6 cases per attorney. About ten percent of these matters contain a field recommendation for complaint. Thus, one can readily see that our policy of holding down the number of seven-digit numbers opened must be continued through 1970 and into 1971. Assuming that seven-digit investigations opened should be equal to eleven and one half percent of total applications for complaint filed, we should have opened 1024 investigations in 1969. In actual fact, we will open less than 180. Does the difference of about 840 cases represent an enforcement gap? We think it does. While we are, of course, not arguing that all of the unopened matters would have revealed an actionable wrong, we urge that you really can't tell from the application alone and must investigate to find out.

Last year, at the initial budget meeting before the Commission, we were urged by one of the Commissioners to examine our operation and determine the size docket which can be promptly and properly handled by the personnel of the Bureau. The answer to this question is found in the statistics just discussed. We can handle approximately 14 cases per enforcement attorney per year. Assuming that a one-year turnover is desirable, the present staff can handle approximately 600 cases in a reasonably prompt manner. A caveat or two is in order—this figure assumes that the enforcement attorney will be permitted to work full-time on casework; it also assumed that at least forty-two attorneys will be engaged in full-time casework and that the necessity for actual litigation remains at the present, low level. A sudden need to try a couple of dozen cases would knock this figure into a “cocked hat”. However, the figure of 600 cases in an optimum docket is a good planning figure, and we hope to decrease it to this level and hold it there. We won’t be responsive to the country’s needs, but at least we’ll be current. To be both responsive and current, we need an additional fifty-three enforcement attorney’s positions in fiscal 1971.

C. THE COMPLIANCE PROGRAM

As reported above, the Compliance Program of the Bureau is grossly understaffed, and is falling ever further behind in its work. The Division now has a total of eleven professionals including the Division Chief. Its 1969 allotment of professional positions is twelve. We estimate that this Program must be staffed with fifteen professionals in order to remain current. This represents an increase of three over its allotted strength and four over its actual, present strength.

It should not be overlooked that one of the prime responsibilities of the Division is to maintain surveillance over more than 5000 orders involving deceptive practices. At the present time, there is no formal program to check compliance with orders issued by the Commission over the years where initial and supplemental compliance reports have been approved. It is in this area where the Division must, for the most part, rely upon complaints from the public, competitors, Better Business Bureaus and the Commission’s advertising survey.

The Division of Compliance recommends that a compliance survey be made of outstanding orders. Such a survey has not been made for more than fifteen years. To be manageable, the survey should be highly selective and be conducted in close cooperation with the operating divisions in the Bureau of Deceptive Practices and the Bureau of Industry Guidance. For example, if the Division of Food and Drug Advertising establishes a project involving hearing aid devices, the Division of Compliance should survey all orders in this field. The outstanding orders could then be evaluated in the light of present-day practices and, where appropriate, recommendation could be made for the modification of these orders to reflect the current Commission position. This would be consistent with the often expressed view that insofar as possible, competitors should receive equality of treatment. In those cases where violations of old orders are found and the Commission has not altered its position with respect to the proscribed practices, penalty proceedings could be initiated or voluntary compliance could be achieved by way of supplemental compliance reports. The Division feels that this survey procedure also should be followed when new trade regulation or trade practice rules are promulgated.

Surveys of the type outlined above would serve to command respect for rules and guides and would impress upon respondents involved in formal proceedings the importance which the Commission attaches to the activities in question.

The contemplated survey would affect all ages and incomes of the population, would involve practically all industries (not necessarily at one time) and would be both regional and national in scope. The proportion of the consumer dollar favorably affected by such a survey would, beyond doubt, be substantial.

In order to institute a survey program, a minimum of three additional attorneys would be required. It is estimated that during fiscal 1971, approximately 150 orders would be surveyed. Experience from the survey conducted fifteen years ago justifies the estimate that twenty-five percent of the cases surveyed would result in penalty investigations and that approximately fifty percent of those investigations would result in civil penalty proceedings. The remaining cases

would involve the processing of additional, supplemental reports of compliance or the review of reports of compliance investigations.

In summary, we recommend an increase of six in the allotted professional complement of this Program. Three additional clerical positions in addition to the three now allotted should also be added.

D. THE TRUTH-IN-LENDING PROGRAM

By the close of fiscal 1970, it is hoped that this Program will have a full complement of one hundred fifty employees on board and trained. The Program will shift emphasis from educational efforts to enforcement. The goal is to achieve across-the-board compliance by all lenders.

The planned Enforcement Program will emphasize examination of those creditors who are least likely to make the disclosures required by the statute. Businesses in this category are the smaller loan companies, the smaller new-and-used car dealers, the ghetto area appliance, furniture and clothing stores, the rural or small town merchants of all types and the home improvement contractors. These are the business which make most of their sales on credit and which usually exact the highest rate of finance charges.

Fiscal 1971 may well see an avalanche of truth-in-lending applications for complaint. The staff has devised a procedure for processing consumer and competitor complaints which does not involve the tedious use of the seven-digit number procedure utilized by other divisions within the Bureau. The procedure will include an adequate record-keeping system for statistical and other purposes.

We are not requesting an increase in the one hundred and fifty position allotment for this Program.

E. THE PACKAGING PROGRAM

While, like truth-in-lending, emphasis in this Program will shift from education to enforcement, we have here an "open end" statute and a substantial amount of effort must be expended in the area of discretionary regulations covering such subjects as characterization of size, coupons, bonus and economy-pack sales, ingredient listing of composite commodities, and nonfunctional slack-fill.

In view of recent developments, i.e., the filing of the injunction suit by the National Retail Merchants Association and others against the Commission's Interpretation of "consumer commodities" and bills and proposals to amend the statute, many of the questions involving interpretations, definitions, and procedures which we hoped would be out of the way by the close of 1970 may well remain up in the air by 1971. In other words, our crystal ball is somewhat clouded at this time with respect to this Program. However, in view of the fact that the present staff, working overtime cannot keep up with the present day-to-day workload, we can surely forecast that additional positions are needed for 1971. We estimate that no less than ten professionals will be needed to carry on the Washington functions in 1971. This is an increase of five positions over the present staff.

Enforcement activities to bring packagers in compliance with the statute will place an additional workload upon the field offices and upon the enforcement attorneys in this Bureau. At this point, we have no experience upon which to base a prediction as to the size of the truth-in-packaging caseload. Therefore, we hope to be able to handle it with the one hundred and nine enforcement attorneys requested for 1971.

In summary, the truth-in-packaging Washington force should be increased in 1971 by five professional positions. The present clerical force of three should be increased by two.

F. THE SCIENTIFIC ADVICE AND ASSISTANCE PROGRAM

As stated in the 1970 section, we hope to augment the scientific staff during fiscal 1970 by five. Two of the professionals to be hired are replacements for Mr. Irish and Dr. Hall. Hopefully, the other three positions can be filled as part of the twenty-three position allotment for the FDA Drug Evaluation Program. This prospective increase of five medical officers would raise the scientific profes-

sional staff to thirteen. This figure includes the two chemists working in the cigarette laboratory.

In a memorandum attached to this presentation, Dr. Dobbs presents the very persuasive argument for increase in the scientific staff to approximately thirty-two positions in 1971. The present Bureau management endorses the programs outlined in Dr. Dobbs' memorandum but feels that an increase in the staff to the level he recommends would not be wise for politics. We are mindful of the criticism leveled at us in past Bureau of the Budget confrontations for pursuing scientific pursuits which could be handled by other government agencies or contracted privately. A scientific staff of that size would doubtless subject us to criticism that we are "overlapping" functions provided by other government bodies.

However, there is a definite need for additional scientific disciplines within this Program. We do not have a pharmacist on board at this time and lack experts in the fields of mechanics and electricity. To fulfill these needs, and the need for additional medical personnel, the Bureau management recommends a further increase in 1971 of six scientific positions.

G. THE REGULATORY PROGRAMS FOR 1971

1. The FDA Drug Evaluation Program

No justification for this Program is required, and we do not anticipate that any additional positions beyond the twenty-three allotted in the 1970 budget will be required.

2. Special Projects and Programs

a. Old projects

Cigarettes.—It is simply impossible to predict the maximum manpower requirements of the Program in 1971. However, continued surveillance of the industry and work associated with the laboratory will continue to demand the services of at least two attorneys, two chemists, and the fulltime services of a doctor. This estimate envisions the enactment of the trade regulation rule and the emergence of a host of compliance problems.

Automobile warranties.—In July, 1969, we will submit a recommendation that the staff be authorized to negotiate assurances of voluntary compliance requiring the industry to take affirmative steps designed to foster: (1) production of automobiles of a quality commensurate with the quality of vehicle advertised; (2) specific performance under the terms of the warranty; and (3) action to require their dealers to make satisfactory warranty repairs through adequate service facilities.

Assuming adoption of our recommendation and successful negotiations of the assurances in fiscal 1970, oversight and enforcement of the requirements of the assurances will require the full-time or two attorneys in 1971.

Surveillance of this Program in fiscal 1971 should involve: (1) the accumulation of data through a scientifically selected sample of the owners of cars of model years 1967-1969; (2) Federal Trade Commission follow-up on percentage of consumer complaints; (3) monitoring and evaluation of advertisement, commercials, display posters and materials including the warranty; (4) study and evaluation of industry actions taken effecting the warranty; and (5) an expected requirement to prepare and submit to Congress annual reports.

Magazines.—The bureau will continue to utilize at least one full-time attorney on this Program during fiscal 1971. The trial period for the PDS Code will end, making necessary a report and recommendations. Cash sellers not under the Code present a continuing regulation problem. We will doubtless have to give increased attention to this branch of the industry.

Softwood lumber.—This project will continue into fiscal 1971 based on estimates of the fundamental difference of opinion as to proper standards between the Federal Trade Commission and the Department of Commerce. In advocating the consumer viewpoint for accurate disclosure of lumber dimensions and characteristics, the Commission is championing the views of Congress. The workload

in this area will increase particularly if the Commission moves towards a trade regulation rule requiring mandatory grade and size marking. In view of the evident, continuing nature of this matter, the Bureau will require one attorney on the project through fiscal year 1971.

b. New programs

Affirmative disclosure.—The principle of affirmative disclosure in a statutory sense was set in motion by the enactment of "Truth-In-Lending". It seems reasonable to anticipate that if there is to be full disclosure as to the cost of credit, there will also be demands for full disclosure (product information) as to the characteristics of the product to be financed. The continuing drive for equality between buyer and seller in the marketplace will mean an important, new program area for the Federal Trade Commission on the general subject of affirmative disclosure.

A minimum of three attorneys can be utilized in this Program area during fiscal 1971.

Consumer products standards.—Product standards, including safety standards, is one of the most important frontiers yet to be defined in the area of consumer protection, clearly within the Federal Trade Commission's charter and closely akin to affirmative disclosure. Consumer groups have been insisting in increasingly strident tones since 1961 that standards be devised and made available to assist them in making intelligent choices in the marketplace. A White House task force in the waning months of the last Administration looked into the considerations of releasing product information as developed by the government in connection with its procurement function. The tentative objective of the task force was to identify those products in common civilian use and for which government standards had been developed which could be restated in laymen's language for the private citizen. The justification for such disclosure on the part of the government is to be found in the view that the citizen taxpayer, in paying the cost of the government's testing activities, is entitled to be the beneficiary of such information as well.

The likelihood of the extension of the life of the National Commission on Product Safety and its anticipated findings and current interest that the Federal government should move in the direction of increased responsibility for the development of mandatory product safety standards assists in validating the assumption that there will be increased activity in this portfolio during fiscal year 1971. The Federal Trade Commission is already on record with respect to the National Commission on Product Safety in expressing an interest in certain categories of household products that should be investigated.

The Bureau is planning to develop a study for Commission approval which will state the alternatives by which a product standardization program can be developed. The Department of Commerce evidently cannot be relied upon to carry the initiative in this area although the National Bureau of Standards would likely have the primary responsibility for any Federal program that would be imposed. It is assumed that the reason for the lack of action in this area by the Department of Commerce is generally the opposition of business to such a program. The difficulties inherent in this project should not deter the Commission from attempting it.

The Bureau is of the view that the Commission should be concerned about obtaining full safety in the matter of radiation and that a manufacturing technology should be developed in the public interest which would have as its objective, a "fail-safe" or "zero-defect" standard. The Federal Trade Commission should stay in close contact with Federal public health authorities with respect to all consumer products that may harm the person. In this area, in addition to color television, there are other potentially harmful products, i.e., products which utilize high-frequency sound, shortwave energy radiation, etc.

Moreover, increasing attention must be paid to the problem of improper servicing of such consumer products which can result in insidious injuries.

Three attorneys are required for fiscal year 1971.

Establishment of Federal Trade Commission Consumer Advisory Council.—It is proposed that the Federal Trade Commission establish a Consumer Advisory Council to advise the Commission on consumer matters generally and the relationship of such public issues to the mission of the Commission with particular emphasis on major problems containing long-range considerations.

The Council should meet three or four times a year or as called by the Commission and, among other things, recommend appropriate programs of action for the Commission and supply advice on particular problems as requested. Composed of private citizens, the members should be selected for their eminence in the field of law, economics, education, business, and consumer affairs generally. While working for and supplying input to the Commissioners, the Bureau would provide staff support for the Council when in session, suggest its agenda as guided by the Commission, and prepare publications arising out of the Council deliberations. Such a device would furnish the Commission with needed assistance on troublesome problems of national importance.

Conceivably, outstanding former Commissioners might serve very useful purposes on such a Council. The benefits to be gained from this window to the public would be highly desirable and of modest cost, budget-wise.

National Consumer Conference or Institute.—During fiscal year 1971, it is proposed that a national conference be convened for three days with an agenda covering all aspects of consumer protection. It is suggested that attendance be by invitation only and limited to the seating capacity of the Commission hearing room. The participants presenting the Program, who should have an advance agenda, would be drawn from the Government, business, universities and consumer spokesmen. The invitees would also be selected for their ability to provide input from the floor. It would be expected to publish the proceedings. Hopefully, this project might become an annual event of the Federal Trade Commission.

The budget implications would be small since most of the participants would defray their own expenses, but the planning, advertising, and logistical support for the conference could occupy one professional and one clerk-stenographer for sixty to ninety days.

Consumer legislation program.—Over one hundred consumer bills speaking to a wide-range of consumer issues have been introduced in the 91st Congress. This number, plus the numerous sponsors some of the bills enjoy, is but another manifestation of the substantiality of consumer interest.

Legislative activity at all levels of Government is fashioning new marketplace law on consumer rights and the reciprocal duties of the vendor. Such activity is not only due to the new awareness of consumers, but is also occasioned by the impersonalized relationships now generally extant between seller and buyer. Mass advertising, vast and ponderous distribution systems, and merchandising techniques that contain but little of the person-to-person ingredients, give rise to the needs for new controls and new standards.

In addition to aggressively sharing in increased efforts to get states and cities to provide consumer laws and reforms where hopefully, most of such grievances can be settled at the doorstep level, the Commission should develop an affirmative Consumer Legislation Program directed to the preparation and presentation of new national legislation. This Program would be directed to:

- (1) The planning, developing, preparing, and proposing of legislation necessary to fully implement the rights of consumers;
- (2) The preparation of reports to Congress and Commission testimony;
- (3) Securing clearance from the Bureau of the Budget; and
- (4) Supplying, when requested and to the extent resources permit, consumer legislative drafting and consultative services to the states, local governments and private groups.

Personnel in the Program would maintain close relationship with those committees of Congress having consumer charters and advise the Commission of Congressional interests in consumer policies, plans and programs.

For fiscal year 1971, it is proposed that one attorney and one secretary be assigned to this function for the duties indicated above.

Consumer education.—This function envisages over-all responsibility for providing assistance and consultative services in the development and planning of consumer programs providing leadership and developing long-range plans for nationwide programs in coordinating with federal and state education authorities with the objective of developing and promoting consumer education materials. The Program will aim at stimulating the development of experimental programs in conjunction with educators, administrators, and interested community, civic and professional groups.

Personnel will work with graduate facilities interested in creating interdisciplinary schools, workshops, educational conferences and seminars on consumer

affairs and bring to bear on such innovative efforts the skills and expertise of the Federal Trade Commission in the area of marketplace problems.

Staffing: The consumer education function should be headed by a prominent professional educator with a Ph. D in the field of consumer economics. He should be assisted by a junior similarly qualified to provide for depth and continuity of this important function. Two secretaries will be required to support the heavy output required.

IV. BUREAU MANAGEMENT

The role of this Bureau, the programs which are administered and which should be administered are complex, extremely varied and wide in scope. As a result, a single Bureau Director and Assistant Director find themselves stretched too thin. They find it impossible to be experts on packaging and truth-in-lending with the complicated rules, regulations and procedures associated with these programs and effectively and intelligently administer and supervise all of the enforcement activities, including compliance and the wide-ranging regulatory programs administered in the Division of Special Projects.

Moreover, the Commission rightfully expects that the top management personnel of this Bureau will intelligently and fully perform the basic executive functions such as planning, personnel management, budgeting, program innovation, administration, and the like. These functions are not being fully performed at this time, and it is unlikely that this situation will change unless the current organization and procedures are changed. A Director and Assistant Director forced to operate principally as "chief reviewers" do not have the time or energy to give proper attention to executive duties.

Obviously, some changes are in order. There is nothing wrong with this Bureau that cannot be cured by an infusion of money and talent. And, the place to start is at the top. The Army is but a rabble without commanders, and the character and ability of the commander shapes the unit. An executive staff adequate in numbers and ability cannot be formed under the present strictures. Why would a live-wire, top-quality Grade 15 attorney in the Commission or elsewhere in Government assume the woes and labor of one of our Division Chiefs' jobs for the same salary he is now making? What does the Commission think of the morale problem at the young lawyer level when he discovers that the work he is engaged in rates a Grade 15 Chief while the work being done by his friends and youthful peers in our sister bureau merits a Grade 16 Chief. A small thing? Don't you believe it! Morale is made up of many small things.

This Bureau needs an additional Assistant Director position, and it needs Grade 16 allotments to head each of its major units. The two Assistants (Deputies?) should be given autonomy over the programs they manage to relieve the Director of the routine matters and give him the time he requires for top administrative-policy considerations.

Two new positions are needed, a Grade 16 Assistant or Deputy and a Grade 7 secretary.

To carry out the programs outlined in this paper will require an increase over present strength of approximately one hundred and ninety-two positions.

We hope we have presented a responsible and realistic picture of the Bureau's needs for fiscal 1971. We respectfully request authorization from the Commission to proceed immediately to prepare a budget justification, consistent with this presentation, for submittal to the Bureau of the Budget.

Respectfully submitted,

LESLIE V. DIX,
Assistant to the Director.
WILLIAM W. ROGAL,
Assistant Director.

FRANK C. HALE,
Director, Bureau of Deceptive Practices.

MEMORANDUM

JULY 2, 1969.

Subject: Supplemental Statement of BFO Budget Estimates for Fiscal 1971 submitted to Executive Director under date of June 20, 1969.

To: Commission.

From: Chas. R. Moore, Acting Director, Bureau of Field Operations.

During my appearance on June 25, 1969 before the Commission in connection with the Budget Estimates of the Bureau of Field Operations for Fiscal 1970 and 1971, the Bureau was directed to submit a supplemental statement embodying information in various areas of interest to particular Commissioners.

Commissioner Jones desired information as to the average time it takes the field office to investigate a deceptive practice matter. There does not appear to be any statistics which will give this information in exactly the form Commissioner Jones desires. If the Commission wishes this information in the future, the Division of Data Processing can be instructed to restructure their operations and tabulations to reflect the performance of the field offices in this manner.

In the meantime, as a substitute for the information requested by Commissioner Jones, there are attached as Exhibits A and B, tabulations showing the 7-digit workload of the Field Offices respectively for Fiscal 1968 and for the 11 months of Fiscal 1969 from July 1, 1968 through May 31, 1969 as prepared by Mrs. Jean Walker of the Office of the Management Officer. The tabulations for Fiscal 1968 show that the deceptive practice workload of the Field Offices totaled 1,343 cases (i.e., 1,216 matters from the Bureau of Deceptive Practices and 127 cases from the Bureau of Industry Guidance) as compared with 558 cases from the Bureau of Restraint of Trade. The 1,134 cases completed by the Field Offices during Fiscal 1968 include 819 deceptive practices matters (750 from Bureau of Deceptive Practices and 69 from Bureau of Industry Guidance) and 299 Restraint of Trade matters from the Bureau of Restraint of Trade.

Similarly, information for the 11 months of Fiscal 1969 ending May 31, 1969 is as follows:

DECEPTIVE PRACTICES

Workload:	
BDP.....	911
BIG.....	124
Total.....	<u>1,035</u>
Restraint of trade:	
BRT.....	467
Completions:	
BDP.....	542
BIG.....	85
Total.....	<u>627</u>
Restraint of trade:	
BRT.....	238

The foregoing statistics would indicate that the workload and completion of cases represents a ratio in excess of 2 for 1 for deceptive practice matters as compared to restraint of trade matters. There is little specialization among the field attorneys. Most of them handle all types of cases. Therefore, deceptive practice and restraint of trade matters may be investigated substantially simultaneously on the same trip.

We attempted to get figures on the total number of deceptive practice matters and restraint of trade cases, respectively, which were worked on during the fiscal year. Since the investigations of all cases are not completed in a fiscal year and work on many are carried over into the succeeding fiscal year, the Data Processing Division did not have figures which would lend themselves to such a breakdown. However, the Division of Data Processing does prepare statistics showing the hours, reported by all field attorneys in each category of work. Tabulations for Fiscal 1968 and for the nine months ending March 31, 1969 of Fiscal 1969 are attached as Exhibits C and D, respectively. These exhibits disclose that during Fiscal 1968, 135,544 man hours were spent by the Field Offices on functions in the deceptive practice area (or 58.9%) as contrasted with 94,768 man hours in the restraint of trade area (or 41.17%). During the 9 month period of Fiscal 1969 for which statistics are presently available, 104,048 man hours were spent on deceptive practice functions (or 63%) as contrasted with 61,042 man hours on restraint of trade matters (or 37%).

The average numbers of all types of cases completed per attorney in the field offices for the past few fiscal years are as follows:

	Average number of attorneys	Total number of cases	Completions per attorney
Fiscal 1966.....	155	1079	6.95
Fiscal 1967.....	154.38	1129	7.31
Fiscal 1968.....	162.5	1134	6.97
1969 (11 months).....	154	1873	15.67

¹ Total number of cases and completions per attorney are for 11 months. Figures previously cited at Commission meeting were for 9 months of fiscal 1969.

Commissioner Nicholson requested information as to special projects other than those listed in our previous submission, which the field offices investigated. There were recently two other special investigations. One involved the checking of retail establishments to determine whether non-drug and non-cosmetic soaps are labeled as to net weight. One or two attorneys in each of 11 field offices spent about a day's time each in this investigation, which was made in June 1969 on an expedite basis for the Division of Special Projects. The other special investigation was directed by the Commission. This was a survey of the extent of mispricing and unavailability of items in food chains in the District of Columbia metropolitan area. Twelve attorneys assigned to this investigation by the Washington Area Field Office completed it in two days.

We have not had occasion to keep a record of all special investigations, as such. There may have been others, but the ones we have listed are the only ones we can recollect at this time.

Recapitulation.—To recapitulate and highlight some of the information set forth in our submission under date of June 20, 1969, attention is called to the work the field offices do in connection with the taking of affidavits of voluntary compliance and negotiating consent settlements. This is additional work in the handling of cases which has devolved in the past few years upon the field offices and has increased their responsibilities and the time it takes to effectively complete the investigation and disposition of such matters.

The field offices negotiated or participated in the negotiation of over 400 consent settlements, from July 1, 1968, through June 25, 1969. These include 170 affidavits or letters of voluntary compliance and 239 consent orders. Of the consent orders 76 were in deceptive practice cases, 7 in restraint of trade matters and 3 in Industry Guidance cases. There were also consent orders in 153 textile and fur matters which were administratively handled by the field offices, although the actual negotiations were conducted largely by the textile and fur investigators who are under the supervision of the field offices.

The informal contacts with the public showed a pronounced increase. During the 9 months ending March 31, 1969 there were 11,875 public contacts as contrasted with 9,455 for the same 9 months in fiscal 1968. These contacts included telephone, written and personal communications with the public. These contacts are time consuming but perform a very essential service.

For Fiscal 1971, the Bureau of Deceptive Practices is requesting an increase of 77 "enforcement" attorneys over the present 49, for a total of 126 attorneys. This is a 155% increase in the enforcement attorneys of that bureau who generate work for the field offices.

The Bureau of Restraint of Trade is also requesting an increase of 71 attorneys over the present 73 or a total of 144 (plus 20) in the three divisions (i.e., General Trade Restraints, Discriminatory Practices, and Compliance) that is a 97% increase.

The Bureaus of Deceptive Practices and Restraint of Trade together are requesting 270 attorneys in the enforcement areas that create work for the field offices. This represents an increase of 146 attorneys (i.e., from the present 122 men to 270) or 121%. (See Exhibit E.)

The Bureau of Field Operations is requesting 380 attorneys in the field offices for Fiscal 1971, an increase of only 100% over the 190 attorneys tentatively allocated to the field for Fiscal 1970. The Bureaus of Deceptive Practices and Restraint of Trade estimate that they will enter 1800 new investigations during Fiscal 1971. These new investigations, together with a backlog in the field offices of an estimated 500 cases at the end of Fiscal 1970, make a possible 2300 cases that the field may be called upon to investigate in Fiscal 1971 that have largely originated from these two bureaus. This does not include the new in-

vestigations that the Bureau of Industry Guidance will also request the field offices to make. We have no way of estimating the amount of field work the divisions of BIG will generate for the BFO, but from past experience this will possibly be another 100 or more cases.

In the past, six positions have been allocated to the headquarters staff of the Bureau of Field Operations. One of these is now vacant due to the death in July 1968 of Mr. Samuel L. Williams, the then Director of the Bureau. Since the work load of the headquarters office of the Bureau has increased substantially, it is recommended that this vacancy be filled as soon as possible in Fiscal 1970. In the meantime, we are making use of an attorney from the Washington Area Field Office, on a rotating basis, to help with the work in the Bureau headquarters. It is also requested that an additional attorney position be included on the headquarters staff of the Bureau for Fiscal 1971. This would make 7 positions for the headquarters office of the Bureau for Fiscal 1971. The proposed increase in the field office staffs would make this addition at headquarters essential.

Respectfully submitted,

CHAS. R. MOORE,
Acting Director, Bureau of Field Operations.

EXHIBIT A.—FIELD OFFICE 7-DIGIT WORKLOAD—FISCAL YEAR 1968

	BDP	BRT	BT & F	CG & BE	BIG	Total
Pending July 1, 1967.....	584	314	1	1	22	922
Received during period.....	632	244	13	4	105	998
Total workload during period.....	1,216	558	14	5	127	1,920
Completed during period.....	750	299	13	3	69	1,134
Total pending June 30, 1968.....	466	259	1	2	58	786

EXHIBIT B.—FIELD OFFICE 7-DIGIT WORKLOAD—JULY 1, 1968, THROUGH MAY 31, 1969

	BDP	BRT	BT & F	GC & BE	BIG	Total
Pending July 1, 1968.....	466	259	1	2	58	784
Received during period.....	445	208	4	1	66	726
Total workweek during period.....	911	467	5	3	124	1,510
Completed during period.....	542	238	5	3	85	873
Total pending May 31, 1969.....	369	229			39	637

EXHIBIT C.—NUMBER OF HOURS CHARGED BY FIELD OFFICES TO VARIOUS ACTIVITIES, FISCAL 1968

	Hours
Activity:	
A Sec. 5.....	57,446
B Sec. 2(a).....	19,511
C Sec. 2(c).....	8,039
D Sec. 2(d).....	5,857
E Sec. 2(e).....	R.T. 864
F Sec. 2(f).....	1,261
G Sec. 3.....	827
H Sec. 7.....	935
I Export trade.....	28
Total.....	94,768
P Sec. 5.....	133,604
Q Insurance.....	4
R Sec. 12.....	245
S Wool.....	D.P. 440
T Fur.....	205
U Flammable fabrics.....	596
V Fabrics Identification Act.....	450
Total.....	135,544
Y Special projects.....	850
Z Several or all mission objectives and speeches.....	3,978
91 Supervision.....	3,615
94 Effort not in other functions.....	481
Total.....	239,236

EXHIBIT D.—NUMBER OF HOURS CHARGED BY FIELD OFFICES TO VARIOUS ACTIVITIES, 9 MONTHS OF FISCAL 1969
JULY 1, 1968 THROUGH MARCH 31, 1969

	Hours
Activity:	
A Sec. 5.....	34, 044
B Sec. 2(a).....	13, 120
C Sec. 2(c).....	4, 367
D Sec. 2(d).....	R.T. 6, 071
E Sec. 2(e).....	4, 469
F Sec. 2(f).....	1, 510
G Sec. 3.....	731
H Sec. 7.....	527
I Antitrust.....	2
L Export trade.....	201
Total.....	61, 042
M Truth in lending.....	1, 495
P Sec. 5.....	102, 500
Q Insurance.....	D.P. 19
R Sec. 12.....	56
S Wool.....	259
T Fur.....	429
U Flammable fabrics.....	109
V Fabrics Identification Act.....	181
Total.....	104, 048
X Financial reports.....	8
Y Special projects.....	252
Z Several or all mission objective and speeches.....	2, 386
91 Supervision.....	3, 094
94 Effort not in other functions.....	343
Total.....	171, 173

EXHIBIT E.—1971 ESTIMATE FOR HEADQUARTERS "ENFORCEMENT" ATTORNEYS IN BUREAUS OF DECEPTIVE PRACTICES AND RESTRAINT OF TRADE

BUREAU OF DECEPTIVE PRACTICES

	Attorneys requested for fiscal 1971	Present attorneys	Increase of 157 percent
Enforcement.....	109	38	126
Compliance.....	17	11	—49
Total.....	126	49	77
Present BDP enforcement attorneys.....		49	
Present BRT enforcement attorneys.....		73	
Total.....		122	

BUREAU OF RESTRAINT OF TRADE

	Attorneys requested for fiscal 1971	Present attorneys	Increase of 97 percent
General trade restraint.....	64 (+20)	25	
Discriminatory practice.....	52	29	144 (+20)
Compliance.....	28	19	—73
Total.....	144 (+20)	73	71 (+20)
Enforcement attorneys requested by BDP.....			126
Enforcement attorneys requested by BRT.....			144 (+20)
Total number of enforcement attorneys requested.....			270 (+20)
Present number of attorneys.....			—122
Increase in number of attorneys requested or 121 percent.....			148

1971 BUDGET ESTIMATE FOR THE BUREAU OF FIELD OPERATIONS AND REVIEW OF ITS 1970 REQUEST

The Bureau of Field Operations, with its 11 field offices, is the investigative arm of the Commission. It does not originate or initiate any programs, areas, or industries to which it will direct its attention. This is done largely by the Commission itself and the enforcement bureaus. The Bureau of Field Operations primarily discharges its responsibilities by conducting the investigations selected, negotiating settlements where appropriate by assurances of voluntary compliance or consent orders, and by performing such advisory, public relations, and educational activities as will enhance the effectiveness of the enforcement efforts of the Commission. The case load of investigations referred to the field of course occupies the major share of the attention of the field office staffs. Yet the other phases of the work of the field office share equally in importance, if not in the amount of time devoted thereto.

Since the Bureau of Field Operations does not initiate programs and areas of investigative attention, we cannot outline probable programs that the field officers will be undertaking in Fiscal 1971. Our budget projections, therefore, will of necessity be predicated on past experience as to manpower performance in case work, special projects, and other activities of the field offices, together with a consideration of the projections of the enforcement bureaus as to programs that will be initiated during fiscal 1970 and 1971 and their estimate of the manpower needs to generate and carry forward such program projections. Discussion of the various phases of this bureau's work for fiscal years 1970 and 1971 follow.

1969 FISCAL YEAR PERFORMANCE

The Bureau of Field Operations had a work load of 1593 cases for the first 11 months of the fiscal year 1969 and completed 935, leaving a backlog of 658 cases on June 1, 1969.

While there has been some reduction in the number of cases entered for investigation, particularly by the Bureau of Deceptive Practices, and referred to the field offices for investigation, the complexity of the cases that were referred to the field office for investigation with the attendant increase in the evidentiary requirements more than compensated for the lack of numbers in the demands made upon the manpower of the field offices. Many of these cases also involved industry-wide considerations. In addition the field offices have been called upon to undertake special expedite projects and surveys which have necessitated the assignment of a large number of attorneys to such investigations. Some of these are still in progress as we near the beginning of Fiscal 1970. Among these projects and the manpower thrown into the assignment are:

- (1) Educational indoctrination of creditors and others in connection with Truth in Lending—11 field offices have been involved since March 10, 1969 and some 37 attorneys.

- (2) Survey of automobile (Monroney) sticker prices as contrasted to the actual sale price of automobiles to consumers. This survey is being made under a 30 day deadline with 33 attorneys in 5 field offices.

- (3) Survey of the operations of the PDS Code (paid during service magazine subscription solicitors code). This involves 11 field offices, four of which are to make an in depth investigation with a 60 day deadline. 18 attorneys are assigned to this matter.

There have been many other first priority matters, some of which involve Congressional interest where one or more field attorneys are called upon to drop everything they are doing and proceed at once with an inquiry into a particular alleged predatory area practice in the sale of bread, milk, gasoline, TBAs or other products. Statistics have not been kept on all instances, but they have occurred with great frequency. An example of one of these concerns cigaret advertising and the involvement of the advertising agencies in the preparation of advertising programs for the tobacco company clients. Two attorneys were assigned to this investigation on an emergency basis.

Some instances of industry wide investigations of considerable magnitude include:

1. Tire and bus cases involving the long term leasing of tires by bus companies from the tire manufacturers and the competitive effects thereof.

2. TBA cases—compliance (and denovo) investigations of Commission orders prohibiting consignment selling of TBA products of tire manufacturers through oil company dealers under agreements whereby the oil companies receive overriding commissions on the deal.

3. Home improvement. Some 80 cases were sent to the field offices.

4. Volkswagen investigations to determine whether used Volkswagens are being imported into the United States and sold as new cars.

5. Reciprocity cases. At the instance of the Commission, the field offices have been conducting extensive investigations into the practices of large industrial concerns to require reciprocity from its suppliers and customers. Seven of these cases were completed in Fiscal 1969 with nine still pending at the close of the fiscal years.

6. Eight field offices have made investigations into the advertising rate structure of some 19 newspapers for possible discriminatory and other illegal practices.

7. LP Gas industry investigation. One attorney has been tied up almost two years exclusively on this matter.

In connection with its case work in fiscal 1969, the field offices have negotiated affidavits or letters of voluntary compliance with respondents in 170 matters. The field offices have also assisted in the negotiation of consent orders in an additional 230 matters.

The burden and length of investigations have been influenced by increased necessity of resorting to subpoena and the motions to quash that often follow issuance of subpoenas. During fiscal 1969 it was necessary to obtain subpoenas in 31 cases.

During fiscal 1969, the field offices regularly conferred with and addressed various types of consumer groups and they maintained regular contacts with legal aid organizations. One attorney in each field office has been designated to maintain contacts with legal aid organizations. The Kansas City, Los Angeles, and Seattle Field Offices conducted Consumer Protection Seminars which were well attended.

Field offices also maintained close liaison with Better Business Bureaus, Chambers of Commerce, the State Attorneys General and various other state and local authorities. During the first nine months of Fiscal 1969, the so-called informal activities of the field offices involved 10,724 telephone, written and personal communications with the public, speakers were furnished on 161 occasions and 990 other contacts were initiated by the field offices for a total of 11,875 public contacts. This compares with 9,455 for the same 9 months in fiscal 1968.

REVIEW OF FISCAL 1970 REQUIREMENTS

For fiscal 1970 the Bureaus of Deceptive Practices and Restraint of Trade estimate that they will initiate or reopen respectively, 1000 and 325 formal investigations. What of B.I.G.? For the past several years, the Bureau of Restraint of Trade, particularly, has found it necessary because of staff shortages in the field, to conduct some of the investigations it would otherwise have referred to the field offices. Therefore, it is estimated that the new and reopened cases forwarded to the field offices for investigation by these two bureaus during fiscal 1970 will approximate 1200 or more cases. We are also receiving a growing number of cases from Industry Guidance and the Bureau of Textiles and Furs.

Based on past experience, particularly fiscal 1969, and also predicated on the many new projects that have been proposed in the 1970 Budget estimates of all the Bureaus serviced by the Bureau of Field Operations, it is expected that the field offices will receive numerous industry-wide investigations and special projects which will involve personnel from more than one field office and possibly as many as all 11 field offices. It is anticipated that the educational aspects of Truth in Lending which the field offices are presently engaged in will extend well in Fiscal 1970 and continue to use the services of a large number of field office attorneys at least through September. The extent to which the field offices will be called upon to undertake enforcement efforts under the Truth in Lending statute and regulation has not been clearly indicated. For that reason it is impossible to make realistic proposals relative to the Bureau of Field Operations' needs for that purpose in fiscal 1970.

The increase in the Commission's dedication to, and awareness of, consumer affairs and problems will affect the emphasis in the application of the field offices to these responsibilities. The concomitant response thereto in the field will require the utilization of more manpower in this area.

It is anticipated that the field offices will be involved to a greater degree in evaluating, investigating and solving many complaints of a less serious nature from consumers and others thereby eliminating the need for referral of all such matters to headquarters for attention. This will utilize additional manpower. The program can be initiated by use of one attorney in each of the 11 field offices.

The Assistant General Counsel for Federal-State Cooperation, proposes that as the Federal and State cooperation matures, it should be administered more and more through the field offices. As he points out, considerable involvement has already been attained by the field offices in this endeavor. He mentions particularly, the field offices in Los Angeles, San Francisco, Chicago, Boston, Kansas City, Seattle as having developed valuable contacts, techniques, skills and leadership in this area. It will be necessary for one or more men to be designated in each field office to handle this accelerating program.

The hiring of some 40 new attorneys, together with those heretofore hired in fiscal 1969 and any others that may be necessitated by vacancies from resignations, transfers, etc. during fiscal 1970, will place an added burden on the more experienced attorneys in each field office, who are already spread thin in some offices. It takes a year or more for a new attorney with application to approach full effectiveness, and until that happens, new attorneys tend to pull down the total performing of the field office staffs. Further, the field offices are serving as a training and staging area for the enforcement bureaus. A substantial number of trained attorneys annually transfer to other bureaus of the Commission.

As of May 31, 1969, the 11 field offices and two sub-offices were manned by 150 attorneys (including the 11 attorneys in charge) and 83 stenographers, clerk-typists, etc., for a total of 233 positions. This is 34 positions below the 267 positions allocated to the field offices for Fiscal 1969. The foregoing positions do not include the six positions allocated to the headquarters office of the Bureau of Field Operations. Only 5 of those were filled after July 1, 1968 as a result of the death last July (1968) of the Bureau Director, Samuel L. Williams. (Staff members from Washington Area Field Office temporarily assigned to assist since July 1968.)

The field offices commenced Fiscal 1969 with 154 attorneys. Within a month or so thereafter the number of attorneys had been increased to 170. Thereafter, stringent hiring controls were imposed by the Budget Bureau. The field offices have lost up to June 10, 1969, through resignations, transfers, etc. 31 attorneys. This represents a loss of 20% of the attorneys on duty as of July 1, 1968. In the same period 24 new attorneys were hired to replace in part the foregoing vacancies. With the result, as indicated, there were 150 attorneys in the field offices as of May 31, 1969.

Under the advance commitment program one new attorney is scheduled to report for duty before the end of the current fiscal year and 21 additional attorneys or attorney trainees have accepted employment with reporting dates from July 14, 1969 through October 6, 1969. Three attorneys in the field offices have requested transfer to other headquarters bureaus and it is anticipated that such transfers will be approved and consummated early in Fiscal 1970.

If all the attorneys committed for employment with the field offices report for duty and if the attorneys who have indicated a desire to transfer to headquarters, do so, the field offices will have approximately 170 attorneys by the middle of October. From previous experience, however, we can assume that some of the proposed hires will not show up for duty.

Since the Fiscal 1970 appropriation for the Federal Trade Commission has not as yet passed Congress, the specific number of positions to be finally allocated to the field offices have not been determined. However, the 1970 budget estimates carried a request for 267 positions for the field offices plus 6 positions for the headquarters office of the Bureau of Field Operations. This figure does not include the 20 advanced commitments due to report for duty with the field offices early in Fiscal 1970 and which were provided for elsewhere in the 1970 budget of the Commission (truth in lending). This makes a total of 293 positions

tentatively scheduled for the Bureau of Field Operations for Fiscal 1970, of which 287 will be in the field.

It is proposed to divide the 287 field positions as follows:

Attorneys presently employed.....	150
Attorneys reporting as of October 1969.....	20
Additional attorneys allocated.....	20
Total	190
Steno-clerical employees presently employed.....	83
Additional steno-clerical employees.....	14
Total	97
Total field staff	287
Headquarters staff.....	6
Total positions for Bureau of Field Operations	293

It is proposed to fill the additional 34 attorneys and clerical positions as soon as the restraints presently imposed on recruitment will permit. The full complement of positions tentatively authorized probably will not be able to promptly perform the Bureau of Field Operations work load for fiscal 1970.

It is anticipated that the bureau will go into the 1970 fiscal year with a backlog of approximately 700 matters. In the past several years the attorneys in the field have averaged about 7 completed cases per year per man. At this rate it would take 100 or slightly more than half the entire projected field attorneys staff for fiscal 1970 a year to dispose of the backlog.

It is not possible to anticipate in advance and in the abstract the allocations of manpower that will be required in each investigation, survey or other areas of endeavor in which the field offices will be engaged prior to an examination and evaluation of the scope and requirements of particular investigations. Because of the nature of all the demands placed upon the Commission, the Bureau of Field Operations cannot expect to have long advance notice of the various special investigations that it will be called upon to handle in 1970. For instance, in connection with the three special surveys heretofore outlined in our 1969 activity, the Bureau of Field Operations had no way of anticipating the manpower needs for such surveys and the bureau was given short notice of the assignments. The Commission will appreciate that the receipt on short notice of extensive special investigations makes difficult the adherence to orderly schedules of work and that some important functions and activities of the field offices must frequently be pushed aside temporarily, with the attendant delays such action necessitates. The field offices have to maintain the flexibility and resilience necessary to overcome these problems.

It would not appear unreasonable to say, therefore, that the 190 attorneys and 97 steno-clerical employees presently proposed for the Bureau of Field Operations for Fiscal 1970 is a most conservative allocation to effect a reasonably prompt response to the demands of the backlog, the prospective new cases, the special surveys in all the areas that the Bureaus of Deceptive Practices, Restraint of Trade and Industry Guidance propose to move and develop, the consumer counseling, the pursuit of the Federal State Cooperation programs and other liaison with State and local governments, as well as interested trade and business associations and groups who are vitally affected by the activities of the Commission, the training of new attorneys, etc.

BFO 1971 BUDGET ESTIMATE

The work of the Bureau of Field Operations and its field offices is not only broadening in scope but deepening in intensity. In recent years, both the Commission and the courts have been applying increasingly complex economic criteria in determining whether given acts or practices violate the Federal Trade Commission Act, the Sherman Act, the Clayton Act and other antitrust statutes. The enforcement bureaus of the Commission, particularly the Restraint of Trade and Deceptive Practices, are being directed by the Commission to establish "pri-

orities" among the cases they select for investigation, i.e., to choose from among all the possible cases that could have been brought, those that promise the highest possible return to the consuming public for each dollar spent on enforcement. The basic method being used for estimating the amount of potential public interest in a restraint of trade matter necessitates the determination of:

- (a) The total sales volume of the industry;
- (b) The monopoly price currently being charged for the product (or, if it is the threat of future monopoly that is involved, the price that is reasonably to be expected if it should in fact become monopolized); and
- (c) The competitive price that would reasonably be expected to prevail if the industry should be made effectively competitive.

A somewhat similar procedure is being proposed in estimating the potential public interest in deceptive practice cases, i.e., how much "overcharge" consumers are paying in cases where they have been deceptively persuaded either (a) to buy a product they would not have bought at all if they had known the truth about it, or (b) to pay more for a product than they would have paid if they had known the truth about it. The real loss to consumers in this latter situation is the difference between (a) the price paid, and (b) the fair market value of the item in question, e.g., what comparable products are selling for in reputable establishments in the same community.

The field offices will be increasingly called upon to develop the kind of economic data needed in establishing "priorities" and in resolving such highly technical issues, similar to those in recent cases decided by the Supreme Court and also by the Commission, which turn on such economic matters as "concentration ratios," "product differentiations," "barriers to entry," and the like. The Bureau of Restraint of Trade is now couching many of its investigative requests primarily in terms of the "structure-conduct-performance framework now used by both economists working in this area and by the Supreme Court in its recent restraint of trade cases. This is a system of analysis in which the competitive effects and thus the legality of a particular practice depends not only on the practice itself (excepting, of course, the *per se* offenses) but on the structural setting in which it occurs.

The more technical requirements being placed on the field offices in the restraint of trade area can be summarized somewhat as follows: in any case where "injury to competition" or a "lessening of competition" is the gravamen of the offense charged, i.e., all restraint of trade cases except those involving one of the *per se* offenses (and to some extent in those cases as well), a sound assessment of the degree of consumer interest involved in a matter cannot generally be made without a development of at least the following major characteristics of the markets involved:

I. The Market

- (a) Geographic market.
- (b) Product market (substitute products, if any).
- (c) Sales volume.

II. Structure

- (a) Concentration.
- (b) Product differentiation (brand preferences).
- (c) Barriers to entry (disadvantages facing newcomers).

III. Conduct

- (a) Collusion (if present).
- (b) Price leadership (if present).
- (c) Predatory and exclusionary practices (if present), including product differentiation, price discrimination, sales below cost, exclusive dealing, etc.
- (d) Mergers.

IV. Performance

- (a) Monopoly pricing (estimate of how much the current price exceeds the competitive price).
- (b) Profits (after tax), as a percent of stockholders equity for substantial number of years—5 to 10 years.
- (c) Advertising/sales ratio (advertising expenditures as a percent of the company's sales).
- (d) Suppression of new technology (if present).

All of these characteristics have been considered by the Commission and the courts in the more recent cases and it is becoming increasingly clear that the bureau and its field offices, if they are to adequately perform the heavy support role assigned to them, must be prepared to meet these new investigative demands by developing appropriate programs to instruct its field office personnel in the techniques for gathering and analyzing data of this character and also in investigating and assessing the public interest in such cases.

By way of illustrating the magnitude of the task that will be facing the Bureau of Field Operations and the field offices in the next few years, the Bureau of Restraint of Trade's budget proposal for Fiscal 1971 contemplates a number of investigations in some of the country's largest and most highly concentrated industries, including steel, chemicals, breakfast cereals, office copying machines, gasoline, auto parts, retail food, soft drinks, television networks, and the like. Investigations of this character will obviously require the highest order of skill and technical ability the field offices can provide.

We support, of course, the suggestion that the field offices should have greater autonomy and exercise their initiative without intensive long distance supervision, in answering businessmen's questions, in handling consumers' complaints or requests for aid, in working together with State enforcement agencies and local agencies and media to identify the problems and solutions to them, and ultimately in investigating and disposing of the violations going on in the backyards of the field offices. We propose to gear up the field offices to take on the full responsibilities the greater autonomy in such matters would place upon the field office staffs.

It is expected that the Bureau of Field Operations will have a workload of some 2300 cases during Fiscal 1971. The Bureau of Deceptive Practices is requesting 89 new attorneys for Fiscal 1971 in the areas that generate work for the field and this is more than 153% of the 58 average attorneys in this area during fiscal 1969. With this increase in manpower it anticipates that it will expand the cases initiated for investigation to 1500 cases. The Bureau of Restraint of Trade is outlining proposed programs and projects, which if effectuated would entail a tremendous expansion in its workload, particularly in those areas that likewise generate the most work for the field offices. From these areas it is anticipated that there will be some 300 cases initiated for investigation. This makes a possible 1800 new cases which may be referred to the field together with a backlog in the field which we estimate will have been cut down to some 500 matters, giving the field offices a possible total workload of some 2300 cases.

In the light of all of the foregoing, it is estimated that the Bureau of Field Operations will require an increase of 100% in the number of field attorneys for Fiscal 1971 over those estimated for 1970, or an increase of 190 attorney positions for a total of 380. A steno-clerical force of 152 would be required to service the 380 attorneys, or an increase of 55 over the number proposed for 1970, making a total of 532 positions for the field offices. Headquarters staff of the Bureau of Field Operations would remain at 6 positions.

MEMORANDUM

JUNE 20, 1969.

Subject: Review of allocations of funds for fiscal 1970 and basic plans for fiscal 1971.

To: Commission.

From: General Counsel.

The Commission's directive of June 4, 1969, concerning preliminary planning proposals, requires units "to not only prepare justifications for requests and allocations of funds for Fiscal 1971 but also to cover allocations of funds . . . for fiscal 1970." This requirement is particularly appropriate for the Office of General Counsel. It permits up-to-date comment on the proposal for Office funding now pending before the Congress; and its multi-year planning approach enables the Office to project proposals consonant with the recently ordered reorganization of the Office.

The pending proposal for Office funding in fiscal 1970, aside from the fact that it is based upon an Office structure no longer relevant, is inadequate in the following ways: It focuses exclusively upon Office response to demands for services. It is affirmative only in the fact that it anticipates continuance or an increase in demand for the same services the Office has performed in the past. It does not recognize the fact that while this Office is first and foremost a service organization, it, nevertheless, should and must, propose initiation of projects to further the overall goals of the Commission.

The two-year planning proposal outlined below is an Office proposal as opposed to a collection of proposals by the various administrative units within the Office. It is in keeping with the Commission's purpose for ordering Office reorganization. The Office is to be a cohesive unit of generalists, each of whom is ready to immediately specialize, or specialize after a minimum of training, in any area of the Office's mission. While, for purposes of administration, there are three continuing offices functioning under the direct supervision of the General Counsel (Litigation, Legal Services and Legislation/Federal-State Cooperation), the professional complement of these units will vary throughout the year as Commission demands require.

Thus, the planning proposal calls for a fixed commitment only in regard to the assignment of attorneys to the Office and avoids fixed commitments to units in the interest of maintaining a continuing reevaluation of projects in the light of initial results and confrontation with unanticipated demands.

I. PROJECTS

In addition to meeting Commission demands for legal advice and representation before the courts, as described *infra*, the Office intends to commence in fiscal 1970 several projects meant to affirmatively advance the overall goals of the Commission. None of the projects is outlined in the funding proposal presently under review by the Congress.

1. *The drafting of a legal procedure which will prevent commission infringements of constitutional rights in consumer credit protection act investigations*

It is understood that the Commission's Truth in Lending section anticipates directing the bulk of its investigative effort at small finance companies, the ghetto "easy credit" retailers, and the readily movable credit offerors. In view of the *per se* nature of the statute's provisions, it is reasonable to expect that a great majority of the matters will be handled through assurances of voluntary compliance and consent orders. In neither of these procedures does a proposed respondent admit his guilt. However, under the Consumer Credit Protection Act, the signing of an assurance of voluntary compliance or consent order places an individual in a very vulnerable position regarding the criminal provisions of the Act.

Section 112 of the Act calls for imprisonment and/or fine in the case of willful and knowing violation of the statute's provisions or any regulation issued thereunder. It would appear, therefore, that in many instances violation of the provisions of a voluntary assurance or consent order would establish a *prima facie* case for criminal prosecution.

It is not unreasonable to anticipate in such cases defenses based upon alleged infringements of basic Fifth Amendment rights. Approximately two-thirds of the personnel allocated to enforcement of the new statute will be non-lawyers stationed in the field to examine credit practices of individual businesses.

Accordingly, the Office intends to develop a basic procedure for Commission employees charged with enforcement of the new statute which will guarantee against unwitting infringements of basic rights.

The project would commence immediately after Commission approval and would be completed by September 1, 1969, if not sooner.

2. Expansion of office efforts on the Federal-State Cooperation project

Personnel assigned to the Federal-State Cooperation project since its inception in October 1965 have numbered but one attorney and one clerk-stenographer. The return on this investment, in benefits to the Commission and to the public, has been prodigious. Through contact with state administrators of deceptive and unfair practice laws, and conferences with legislators and prospective administrators in states not having such laws, the attorney supervising this project has, with generous help from experts in other bureaus and offices of the Commission, created a very favorable climate regarding state reception of Commission offers of cooperation.

This program shows strong promise of developing effective policing of local and regional complaints of deceptive and unfair practices. If accelerated, this program should do much to alleviate the Commission's being inundated by the contents of the "mail bag" and should permit the Commission to concentrate on orderly planning and execution of programs to deal with unfair and deceptive practices of national scope.

The consumer protection movement grows stronger with each day. More than ever before, state legislators and officials are interested in enacting or enforcing statutes protecting consumers from market deceptions. Given the favorable relationship presently obtaining between the Commission and the states, it would be folly to not expand Office efforts on the Federal-State Cooperation project.

Expansion of Office effort in this area has been, in recent years, unsuccessfully proposed to the Bureau of the Budget. The initial projection for fiscal 1970 serves as the most current example. However, in my opinion, Budget Bureau rejection does not mean proscription. Once funds have been allocated by the Congress, the Commission, under Reorganization Plans 8 and 4 may reallocate resources as required by the public interest.

A. Increasing the outward flow of referrals.—Within the past ten years, twenty-six states have enacted consumer protection laws. Some of these statutes are equivalents of the FTC Act; others are not as strong. However, there has been, in recent years, a growing willingness and capability on the part of these states to effectively handle Commission referrals.

There are, understandably, (at this time) conditions attached to state actions on Commission referrals. We are encouraged to provide technical information and advice which will enhance the successful prosecutions of the referred matters. Thus, referrals do not fall within the "form letter" category of effort.

Matters referred to state officials in calendar year 1968 numbered 121, an increase of 21% over the previous year. Through more effort, principally directed at analyzing matters in their preliminary stages, referrals would be increased to 200 in fiscal 1970, and to 400 in fiscal 1971.

B. Drafting and Promoting Consumer Legislation.—During 1970, the Office would aim at obtaining enactment of, or improvement of, general consumer protection laws in eleven states where proposals for such legislation are, with Commission assistance, already being actively pushed by the Attorney General or another state official. The states are as follows: Arkansas, Florida, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, and West Virginia. In fiscal 1971, the Office would encourage such legislation in ten additional states where legislative proposals are in embryonic stage, or where legislation is particularly needed because of low income concentrations. (Alabama, Georgia, Mississippi, Montana, Oklahoma, South Carolina, Indiana, Virginia, Tennessee and Montana).

The greater goal of such efforts would be the enactment of effective legislation by each state. This will not be achieved by the end of fiscal 1971; nor for that matter, can the Office guarantee enactment of any consumer legislation.

However, increased effort in this area would advance legislation, or at least the interest of state officials in consumer legislation, in each of the above-named states. Contacts, offers of assistance, and assistance would be repeatedly extended to these states.

In addition to keeping drafts of models, general consumer laws current with developments in the states, the Office should, and must, prepare model laws to complement or displace Commission jurisdiction in the consumer credit and fair packaging areas. Such effort would commence in fiscal 1970 and continue in 1971. At least, preliminary attention to the drafting and promotion of model state laws complementing Commission jurisdiction in regard to textiles, furs and flammable fabrics would be made in fiscal 1971.

C. Expansion of Liaison with State Officials and Agencies.—Until now, the Office's liaison effort has focused primarily upon the National Association of Attorneys General. While the Office must continue to "lobby" or assist the members of this Association, it is believed that Commission liaison with the various Attorneys General is now such that primary attention should be paid to other groups of state officials, such as the U.S. Conference of Mayors, the National Association of Counties, and the National District Attorneys Association. For effectuation of the Commission's overall goals regarding Federal-State Cooperation, municipal and county ordinances might well be more important than state statutes.

The Office would begin its effort on the local area in 1970 and accelerate it in fiscal 1971. Its goal would be generally similar to that explained above for state legislation. Initial individual contacts and assistance, aside from approaches and services to the national associations, would be made and rendered to those officials concerned with the administration of large cities and urban counties.

3. *A continuing program to more effectively utilize, and to expand, commission authority to mitigate injury to consumers and competition resulting from deceptive practices and restraints of trade*

While the Commission is empowered to arrest anticompetitive practices in their incipency, experience demonstrates that accomplishment of this mission is virtually impossible in many areas of the Commission's work.

The basic approach to defense against charges of monopolization, attempt to monopolize, predatory pricing practices and false advertising and marketing is greatly influenced by the profitability of the practice involved. This factor is weighed against the possible extent of treble damage actions. The result is, frequently, either the defense of delay or the defense of abandonment (close the record as soon as possible). Empirical knowledge has confirmed, *ad nauseum*, a marked preference for the former approach to defense against Commission charges. Presently, a classic example of this proposition is being enacted before the Commission (*Koppers Co.*).

However, the adverse impact of "full blown" restraints and unfair and deceptive practices can be reduced, and to the end of recommending ways in which mitigation of consumer and competitive injury can be accomplished, a concentrated effort by this Office is proposed for fiscal 1970 which will continue beyond fiscal 1971.

The project would be approached from four areas of the Office's mission: legal research, inter-bureau liaison, litigation and legislation. The Assistant to the General Counsel would coordinate the program.

The program would concurrently follow two avenues; each with short-term and long-term objectives.

One avenue of approach would concern injunctions. Its lesser goal would be more effective employment of the Commission's present injunctive powers. Its greater or ultimate goal would be the expansion of Commission authority to enjoin unlawful practices.

The second avenue would concern expedition of Commission proceedings before hearing examiners and the courts. Its short-range objective would be a definitive analysis of the reasons for present delay in such matters and recommendations for the alleviation, if not the elimination, of such delay. The long-term goal would be the implementation, and revision as experienced dictated, of the proposed procedures.

A. Injunction Employment.—Under Sections 12 and 13 of the Federal Trade Commission Act, the Commission upon a "proper showing" can enjoin, prior to administrative hearings, the continued use of advertising and representations

concerning a food, drug or cosmetic product when the Commission has reason to believe that such representations are misleading. Under the provisions of Section 5(c) of the agency's organic statute, the Commission can, after its decision on a matter, obtain from a circuit court an injunction *pendente lite* if necessary to prevent injury to the public or to competitors. And, at least in regard to proceedings under Section 7 of the Clayton Act, the Commission can utilize the All Writs statute to obtain preliminary injunctions.

During the past fifteen years, the Commission has issued a considerable number of complaints involving charges of false advertising of food, drug and cosmetic products. Undoubtedly, during the same period, a substantial number of deceptive practices and unfair methods of competition were continued for years after Commission cease and desist orders, finally ceasing after exhaustion of all appeals to the courts. Yet, only four injunctions have been sought since 1955.

The program would proceed from the following basic presumptions:

(a) if reasonable doubts concerning Commission injunctive authority are encountered, they should be resolved through litigation;

(b) if imaginative theory offers a reasonable prospect of overturning an old case or fitting a case within a narrow holding, litigation should be recommended; and

(c) if changes in Commission policy or procedure offer the prospect of mitigating public injury through an increased use of injunctive proceedings, they should be tried.

Thus, all past procedures and present assumptions concerning Commission injunction efforts and powers would be systematically questioned. Was past inactivity the result of inattention by this Office and/or the operating bureaus? Was it due to a reluctance to confront narrow court decisions with imaginative and aggressive effort? Are there valid questions of law in these areas, which should be explored? Could the Commission through changes in procedure, such as the delegation of authority to the General Counsel on some matters, expand the use of its injunctive powers?

For example, in Section 12 matters the question of what is a "proper showing" has not been conclusively resolved. It has been successfully argued that an injunction is required merely on the basis of the reasonable belief of the agency. Other courts, however, have applied strict equity standards, taking into careful account the impact of an injunction without bond on the business of the respondent. The matter should be resolved. Initially, it would appear that the best test cases would involve false advertisements that might lead to physical harm.

With further regard to Section 12 matters, the Office would study the legal feasibility and possible effectiveness of Commission delegation of authority to the General Counsel to file injunction proceedings upon completion of a *prima facie* case by counsel supporting the complaint.

Possible new approaches to employment of the All Writs statute would be explored. Does a security agreement always preserve court jurisdiction, or do years of ownership of the acquired firm (albeit restricted ownership) irreparably injure competition and render divestiture token relief? Could the statute be employed to enjoin predatory price practices? Would Commission delegation of its authority to bring proceedings under the All Writs Act promote the Commission's mission?

The Office would maintain a close working relationship with the operating bureaus concerning possible injunction proceedings. Through continuing liaison with the trial bureaus, it would seek to maintain current knowledge concerning the continuance of the practices being challenged. In the event that the practices are continued after Commission entry of an order to cease and desist, the Office would seek injunctions under Section 5(c) of the Federal Trade Commission Act "to prevent injury to the public or to competitors *pendente lite*."

The Office would continue to review pending bills calling for extension of Commission injunctive powers, and would, when required, offer recommendations to the Commission for strengthening such proposed legislation. Its effort in this area would go beyond response to congressional proposals. It would draft Commission proposals for legislation. In connection with the Commission's operating bureaus, it would develop statistics and projections that would support the "dollar value" to the public of a Commission injunction.

The Office would also seek appropriate forums for the Commission to present argument for the necessity of authority to mitigate injury to consumers and competition. It would keep the Legislature aware of the Commission's efforts

in the area of injunctive relief, revising its presentations depending upon the success or failure of Commission litigation.

B. Expedition of Adjudicatory Proceedings. Initial emphasis in this area would involve appellate proceedings. What is the incidence of court delay? How could we reduce such delay? Is the Office ever at fault? Shouldn't the Office vigorously oppose all extensions of time and never request extensions for the Commission? Shouldn't the Office build a record for Congress, and perhaps the courts, in this area?

In those matters not calling for injunctions *pendente lite*, motions would be made requesting expeditious review of the proceedings pursuant to Section 5(e) of the Federal Trade Commission Act: "Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited." Court denial of such motions would not mean discouragement of their use by the Office. We would succeed in some matters and the public would benefit. We could consistently lose all such motions, but the public would still benefit through the compilation of a record which might subsequently be found to be persuasive by the Congress.

Subsequent attention in this area would focus on: (a) the expedition of subpoena and Section 6(b) enforcement proceedings; (b) suits against the Commission for declaratory and injunctive relief; and (c) analysis of the Commission's rules for adjudicatory proceedings for the purpose of facing recurrent problems with realistic revisions or interpretations.

As explained, *infra*, there are good reasons for expecting a sharp increase in subpoena and special order enforcement matters. Since the *Guignon* decision of the 8th Circuit such proceedings have increased; and there is reason to believe that enforcement of compulsory process determinations by the Commission has been delayed. Office effort in this area requires careful analysis. Our cooperative program with the Department of Justice should be similarly scrutinized. If there is fault in the Office's approach, it will be rectified. If it develops that the Department of Justice has been laggard, the Commission should be asked to intervene on the strength of a full bill of particulars.

A somewhat similar approach would be taken in respect to injunctive or declaratory suits against the Commission. Initial concern would focus on the proceeding's potential for delaying Commission action. Litigation argument would stress the public need for speedy resolution of the Commission's proceeding to which the declaratory complaint was ancillary. Every effort, including negotiated compromises, would be explored to remove the barnacles delaying hearings on Commission complaints.

The Commission's rules governing adjudicatory hearings would be continually reevaluated. Principal attention in this area would center upon pretrial matters; proceedings which lately appear to contribute to, rather than prevent, delay. Should Commission discovery be more liberal? Should the rules call for "two-phase" discovery: one prior to hearings; and the other commencing upon completion of the case in chief?

II. BASIC SERVICES

1. Litigation

The immediately pending workload in this area is relatively light. As of this writing, the Office is preparing appellate briefs defending Commission decisions in seven matters. Additionally, appellate argument is anticipated in two other cases. In most of these matters, two attorneys are assigned to a case (in each, a grade 15 assisted by a grade 14, except for one case in which two grade 15 attorneys are assigned).

Decisions are being "awaited" in eight cases. In similar "waiting" posture are six matters in which adverse decisions have been rendered against respondents which may or may not be the subjects of petitions for *certiorari*. In the same area, is one matter in which the Commission has requested the Solicitor General to seek *certiorari*.

With respect to enforcement of subpoenas and Section 6(b) orders, there are five matters pending before the courts on motions by the Department of Justice. Papers have recently been transmitted to Justice in two other cases, and in another, the Office is anticipating answering an appeal from a district court enforcement order. Additionally, two matters involving court orders for limited discovery are pending before the Commission with recommendations by this Office and papers are being prepared for transmittal to Justice in two recent cases.

Eight suits *against* the Commission complete the present posture of Commission litigation. Three of these complaints have been moribund for approximately a year. (They will be expeditiously reexamined and concluded.) Immediate Office demands in this area of litigation call for one appellate brief, two appellate arguments, and an argument before a district court. However, the most recently filed suit against the Commission (explained *infra* involves the initial "test case" under the Fair Packaging and Labeling Act. It promises considerable effort.

Fiscal 1970 input into the appellate area of the Office's litigative efforts should be minimal. One matter recently determined by the Commission should result in appellate review. There are seven matters pending before the Commission, one of which has been tentatively decided in favor of the respondent. With respect to matters pending before hearing examiners, five cases may possibly result in final Commission determinations by the end of fiscal 1970. Thus, the maximal, additional input is eleven cases. A liberal projection would be eight new matters; four of which will not reach, by the end of the fiscal year, the point where the respondents' briefs are due.

Appellate defense of Commission cease and desist orders should sharply increase in fiscal 1971. Discounting matters presently in consent negotiations, there are approximately eleven restraint of trade matters in which appeals to the Commission could be perfected in time for Commission decisions during fiscal 1971. With regard to deceptive practices complaints which usually take considerably less time to adjudicate, it is noted that the operating bureau believes that it will litigate 75 cases in fiscal 1970.

The Commission may expect to be sued more frequently in 1970 and 1971. The Fair Packaging and Labeling Act and Consumer Credit Protection Act, because of their newness and vast coverage, invite suits for declaratory and injunctive relief. The recent complaint filed by the National Retail Merchants Association should not be the only probe on the question on what constitutes a "consumer commodity." The Commission's trade regulation rule proceedings are also expected to generate suits both during hearings on the proposed rules and after promulgation of any rules.

For several reasons, the number of subpoena and Section 6(b) order enforcement proceedings should be expected to increase substantially over the forthcoming two-year period. First of all, the *Guignon* decision of the 8th Circuit has provided respondents with a new delaying tactic. Realizing that we must process subpoena papers through the Department of Justice which, after review, assigns the matters to the various U.S. Attorneys, respondents appear to be buying time by opposing compulsory process. From early 1967 until the fall of 1968, the only subpoena enforcement proceeding handled by the Office involved *Guignon*. Since the *Guignon* decision became final, the Office has been called upon to process *nine* matters involving a total of *twenty-three* subpoenas.

The other reasons for anticipating a rise in subpoena enforcement actions are: the number of industrywide investigations proposed by the operating bureaus; and the fact that there are several multi-respondent complaints presently either approved by the Commission or in preparation by the staff. In the latter respect, Office experience indicates that a multi-respondent action usually generates subpoena problems and injunction suits against the Commission.

In accordance with the Office's third project, an affirmative approach toward injunctions would commence in 1970. It would be reasonable to expect several proceedings under Section 5(c) during the two-year period. Our present knowledge of the Division of Food and Drugs Advertising's docket does not permit a projection regarding Sections 12 and 13 matters. However, in view of the Commission's new premerger notification proceeding and the predicted sharp increase in mergers, the Office should have occasion to seek several injunctions under the All Writs statute.

2. Legislation and Federal-State cooperation

At the present, the Office has an accumulation of unreviewed bills. A concentrated effort will be made to eliminate this backlog. Therefore, it may take some time before the Office can deliver on its promises to reduce emergency considerations by the Commission and to provide advance background information on legislation.

The Office has prepared an average of 100 reports per year over the past two Congresses. This is in addition to comments on "enrolled bills" which must be submitted to the Bureau of the Budget within 48 hours after the request.

In fiscal 1970, the Office must learn how to separate the wheat from the chaff. Quite often congressional staffers automatically request agency comments on bills unrelated to Commission activities, or which are "backburner" matters unlikely to ever receive consideration by the Congress. Such matters place unnecessary burdens on the Commission and reduce available time for the consideration of legislation affecting the Commission's overall goals. With respect to the latter, the Office expects that the recent reports of antitrust study groups and the pending ABA inquiry will lead to a number of bills pertaining to consumer protection laws, mergers, and other areas of Commission interest.

In calendar year 1968, the Office responded to 344 requests from state officials and agencies for advice and assistance concerning deceptive practices and restraints of trade. The proposed expansion of the Federal-State Cooperation project should increase such requests threefold by fiscal 1971.

3. *Legal services*

The pending fiscal 1970 allocations for the recently abolished units would be assigned to accomplishment of the Office's function of providing legal advice to the Commission, individual Commissioners, and the operating bureaus.

A number of promises have been made in this area of the Office's mission. The fulfillment of these promises initially requires more efficiency and diligence as opposed to increases in personnel. However, as the Office of Legal Services improves the quality of its services, it should generate a greater demand for advice and assistance. Moreover, the Office intends to anticipate Commission needs and undertake affirmative projects.

In calendar year 1968, the Office of General Counsel handled a total of 50 special assignments. Since May 13, the Office has been assigned 30 matters calling for legal advice. Requests for advice should be expected to continue at this rate, and even increase, as the Office intends to actively offer legal assistance to the operating bureaus. In the coming two years, the Bureau of Industry Guidance will be proposing a number of significant Trade Regulation Rules, and the Bureau of Deceptive Practices will be enforcing two new statutes. Both bureaus should have particular need for assistance on questions of law and procedure.

III. MANPOWER REQUIREMENTS

The pending fiscal 1970 proposal for Office funding is identical to the Office budget for 1969. It calls for the services of thirty-two attorneys. This projection should be sufficient if, as requested in my memorandum to the Commission of June 6, all vacancies are filled. (Excluding temporary details, there are four professional vacancies in the Office.)

Assuming that present vacancies will be immediately filled, Office personnel would be initially deployed in fiscal 1970 as follows:

Office of Legislation and Federal-State Cooperation.—Five attorneys. The Assistant General Counsel and one attorney would initially concentrate their efforts on federal legislative matters. Mr. Gotschall and an assisting attorney would concentrate on the Federal-State Cooperation efforts of the office. The other attorney would assist in both areas.

Office of Legal Services.—Nine attorneys.

Office of Litigation.—Sixteen attorneys. This represents a reduction of two from the present complement. Assignment of personnel to this Office will be made on the basis of the following presumptions: (a) a grade 15 or grade 14 attorney should be expected to simultaneously handle two appellate or district court matters in addition to assisting on subpoena matters; and (b) briefs in opposition to petitions for writs of *certiorari* are, in the great majority of cases, routine assignments.

Consistent with the view that the Office is a cohesive unit of generalists, attorneys will be redeployed within the Office as Commission needs require.

At this writing, it is estimated that six additional attorneys will be required for effective performance of the Office's mission in fiscal 1971. As explained above, demands for legal services should greatly increase. With respect to litigation, heavier workloads are anticipated in the appellate and subpoena enforcement areas; and the Commission will probably be embroiled in a multitude of district court proceedings concerning the new statutes and the pending Trade Regulation Rule proceedings. The Office's efforts regarding the proposed affirmative projects should reach the crucial stage where attainment of goals can be accomplished by the injection of new momentum.

Respectfully submitted,

JOHN V. BUFFINGTON, *General Counsel.*

MEMORANDUM

JUNE 20, 1969.

Subject: Appropriations Request for Fiscal Year 1971.

To: Commission.

From: Chalmers B. Yarley, Director, Bureau of Industry Guidance.

This memorandum is furnished in response to the Commission's directive of June 4, for the purpose of providing the Commission with an overview from the Bureau Director's office of the proposals of each of the Divisions. In this connection, it should be pointed out that the objectives and means of implementing a policy planning program cannot be applied to the Division of Advisory Opinions for the reason that the primary work of that Division relies almost entirely on requests directed to it from outside of the Commission. Accordingly, the programs discussed here relate to proposals of the Division of Industry Guides and the Division of Trade Regulation Rules.

The Bureau's *major* proposals for both Fiscal Years 1970 and 1971 were initially submitted to the Commission in the basic planning document, the Program Memorandum, in accordance with Bureau of the Budget Bulletin No. 68-2 (July 18, 1967), as well as internal directives. On July 31, 1968, a complete budget justification for FY 1970 was submitted. However, in the interim, action by the Commission, Bureau of the Budget and the Bureau of Industry Guidance itself, have necessitated some change in the program for 1970 Fiscal Year. Likewise, since submission of our Program Memorandum for FY 1971, changing conditions require that the Commission be provided with updated material for consideration in connection with that document. The pertinent information and the views of this office are listed below by program year:

FISCAL YEAR 1971

In connection with the major programs for this Bureau set forth in the Program Memorandum, it should be noted that the document submitted to the Commission was developed as the direct result of intra-bureau discussions with the various Divisions for the purpose of developing an over-all program for the Bureau. As a direct consequence of these discussions, the programs set forth therein were arrived at as the result of a weeding out program within the Bureau. The major suggested programs were not, therefore, a mere summary and transmittal of Division suggested programs, but rather a distillation of programs suggested by the Bureau sub-divisions.

It should also be noted that the manpower requirements set forth in connection with each major program should not be viewed as a request for an increased manpower allocation to the Bureau in the sum of manyears programmed for expenditure in all of the programs. Statement of manpower requirements are merely intended to represent that portion of available manpower which, it is anticipated, will be consumed in connection with the development and implementation of each major project. The requested manpower allotment, both within the Divisions themselves and within the Bureau, was determined only after a complete review of all programs, including those being carried forward from previous years as well as the demonstrated need for a reserve contingent of available manpower to carry on the foreseen but unplannable day-to-day projects which, necessarily, must be provided for. A summary of such requirements appears at the conclusion of this presentation.

DIVISION OF INDUSTRY GUIDES

One major change in the program of this Division for FY 1971 has already been made as a result of recent Commission action. Project number three in Category I of the Program Memorandum (New Programs At Current Manpower Levels) envisions staff action to prevent the deceptive advertising of franchise offers through the concurrent development of a consumer pamphlet and advertising Guides. However, by minute dated May 23, the Commission directed submission, as soon as possible, of a consumer bulletin concerning franchising. Accordingly, the work entailed in preparing this portion of the Bureau's proposal has been moved forward to FY 1970. Consideration was given to moving the entire program forward to the forthcoming fiscal year. However, two facts argue against such a move: (1) neither the Division nor the Bureau itself has been authorized an increase in manpower for FY 1970, and (2) the problems involved in writing a set of Guides affecting franchising arrangements extend beyond

deceptive advertising. As Commissioner Jones indicated in her budget circulation of May 27, certain restraint of trade problems have been identified in this area and, in order to effectively deal with the entire problem of franchising, it will be necessary to coordinate the Bureau's activities with those of the Bureau of Restraint of Trade for the purpose of determining whether action should proceed along parallel lines simultaneously, whether one Bureau should defer to another in its activities, or whether the seriousness of the problem is sufficient to warrant the Bureaus proceeding separately with the Bureau of Industry Guidance devoting its efforts to developing a set of Guides dealing solely with the deceptive practices aspect of the problem.

In connection with the foregoing, it is the view of this office that this project should not be deferred beyond the program year. While we agree with the obvious rational of the Commission to the effect that the consumer pamphlet will be of immediate benefit and should be promulgated and circulated as quickly as possible, it is also felt that Guides affecting franchising arrangements should also be developed. As indicated in the Program Memorandum, this is an area which has ballooned and burgeoned in a fashion similar to conglomerate mergers. In the case of the latter, the Commission saw fit to issue guidelines. This Bureau is of the opinion that franchisors, as well as franchisees, are in need of Commission guidance. As a consequence, we further feel that action should be inaugurated to give guidance in the deceptive practice field of this program and, in consultation with the Bureau of Restraint of Trade, work out the best method of dealing with the obvious problems in the anticompetitive area. However, as further indicated in the Program Memorandum, preliminary information made available by the Department of Commerce and the Small Business Administration appears to demonstrate that, especially among minority groups, much of the difficulty lies in the inducement by franchisors to enter such arrangements. While we are well aware that the Joe Namaths, Col. Harland Sanders and Howard Johnsons of this world are surrounded by competent legal counsel in drafting franchising agreements, it would appear that need may exist to provide such counsel (if not theirs then those of lesser lights) with adequate and complete guidance as to the permissible perimeters to be considered in advertising the availability of franchises. Should it be necessary to initially do so without reference to restraint of trade problems which exist, it is our view that the public interest would be benefited. Moreover, if a reconciliation of the problems facing the Bureaus of Industry Guidance and Restraint of Trade cannot be reached during the intervening twelve months prior to the beginning of the program year, subsequent amendment of a set of advertising guides to include provisions covering anticompetitive practices would not appear to be inappropriate.

Commissioner Jones has also indicated that there may be some overlapping of project 2 in Category I of the Bureau's Program Memorandum dealing with the objective of obtaining disclosure in advertising and/or by labeling of important product information for various consumer products. By memorandum dated April 25, 1969, the Bureaus of Restraint of Trade and Economics, in consultation with this Bureau, made suggestions to the Commission in connection with the staff papers of President Johnson's Cabinet Committee on Price Stability. It was reported that the Committee's staff had suggested that the Commission should consider using its power to "compel affirmative disclosures of strategic product information that is inherently deceptive when omitted from advertising." Commissioner Jones suggests that the Bureau of Economics may not be in a position to go forward with this project in FY 1971 and for this reason, additional consideration should be given to the project. In all candor, we must advise that in the period of time allotted prior to the presentation of this memorandum for consideration during the budget review, we have not conferred with the Bureau of Economics on this matter. However, it should be pointed out that the primary thrust of this Bureau's project for the program year involves a feasibility study to determine the application of Section 5 to the problem and, upon completion of this project, or concurrently with it depending upon available manpower, a study to identify products or product lines which, because of their nature, would require affirmative action to compel necessary disclosures.

The proposal makes provision for subsequent industry guidance proceedings if it is determined that the Commission should take affirmative action in this area. Therefore, in the initial stages of the project at least, during consideration of the substantive questions of law, it would not appear that participation by the Bureau of Economics would be required. By the same token, it would seem that

help from the Bureau of Economics would be of great assistance during the product identification phase of the program. However, we do not mean to indicate that, absent the availability of assistance from the Bureau of Economics, work in the Bureau of Industry Guidance must be terminated. On the contrary, application of the proposal to the vast quantity of consumer products currently on the market will require considerable study and evaluation. Therefore, in the initial phase of the product identification program at least, the Bureau of Industry Guidance could proceed independently of the other Bureau and lay the groundwork for subsequent joint action on the part of both Bureaus. For instance, it would appear from the nature of the proposal that the Commission may wish to avail itself of the information developed by the President's Committee on Product Safety as well as the National Bureau of Standards. This portion of the program could be carried forward to place the Commission within the ballpark, at least, with subsequent inter-bureau activity to make a final selection of products to attain the economic goals of the program. In view of the foregoing, therefore, staff action along the lines indicated above will be commenced during the program period unless Commission direction to the contrary is indicated. By minute of June 4, the Commission directed that a small internal task force be created for the purpose of initiating a product identification program in which several Bureaus will participate.

The task force will provide the vehicle for inter-Bureau coordination to insure that efforts are not being duplicated. (It should be noted that this project has arbitrarily been assigned to the Division of Industry Guides for the purpose of manpower allocation. However, there is every possibility that if industry guidance proceedings are instituted, they may involve both guide and rule proceedings, in which instance the trade regulation rule division will participate in the project.)

The foregoing is a discussion of but two of the major programs for this Division. It is anticipated that the major program for FY 1970, involving warranties and guarantees for major home appliances, will be carried forward through 1971 and, in all probability, for many years beyond. As this project is developed in 1970, we have no doubt that provision for additional manpower may be necessary to make the program effective. In addition, as may be seen from the appended manpower allocation breakdown (Appendix A), other new programs involving deceptive practices have been programmed for FY 1971, as well as certain compliance projects intended to make effective new and/or revised Guides adopted by the Commission during Fiscal Years 1969 and 1970. Moreover, because no additional manpower has been provided for FY 1970, certain projects deemed to be lacking in priority have been postponed until the program year under consideration (See Appendix A).

DIVISION OF TRADE REGULATION RULES

As in the case of the Division of Industry Guides, events developing subsequent to the preparation of the Bureau's Program Memorandum now dictate an amendment to that document so as to make it conform to plans before us at the present time as opposed to the situation as it appeared two months ago. Since submittal of the Program Memorandum, the Commission has taken action directly affecting project 1 in Category I, through issuance of a Notice of Public Hearing in connection with the price advertising of automobiles. While this project was proposed with knowledge of the possibility of investigational hearings in September, the project deals not with those hearings, but with the formal trade regulation rule proceedings which undoubtedly will follow. At this juncture, it would appear that the Bureau would be remiss in planning to delay such formal proceedings until FY 1971. The scheduled date of the hearings certainly dictates an extended effort on the part of the staff to commence formal activity prior to July 1, 1970. However, since it is uncertain what obstacles may be encountered during the course of the public hearings, the possibility of formal action being delayed until FY 1971 must be considered. In this regard, it must be noted that almost seventeen months passed from the time that the Commission began hearings in the tire industry until the issuance of revised Guides for that industry. Because of the size of the public record in that proceeding, together with the diverse questions involved, considerable time was expended in a study of the public record and preparation of recommendations by the task force established by the Commission for the project. Further time was expended in a determination as to whether regulation would be best accomplished through rules or industry guides and, in connection therewith, there was the need for coordination of the activities and views of the Bureau of Deceptive Practices

and the Bureau of Industry Guidance. In spite of all this, it is felt that lessons were learned in this proceeding which will be of benefit in this new matter and will assist in a more expeditious development of the automobile matter.

There seems to be no doubt that this project will continue into FY 1971 and, perhaps, beyond. However, since Bureau of the Budget Bulletin No. 68-2 envisions that the Program Memorandum concern itself only with major *new* programs and not with ongoing programs from the previous Fiscal Year, it is suggested that provision be made for replacement of the automobile price advertising program in the likely event that the formal aspects of this program are commenced in FY 1970. In this regard, it is recommended that as an alternative, project 2 of Category II (Additional Programs at Increased Manpower Levels) be elevated to Category I status for the purpose of planning. This latter project, involving efforts to protect consumers with respect to excessive efficacy advertising claims of oral antiseptics and dentifrices appears to be of significance, especially in view of the potential oral health hazard which may be perpetuated in connection with the dentifrice products, to warrant early consideration.

As a substitute program in Category II, intended to supplant the above-mentioned program, it is recommended that a program involving the anti-competitive practices in newspaper advertising be substituted. The justification for this program will be found in Appendix C attached hereto.

With respect to the automobile price advertising project, Commissioner Jones in her May 27 memorandum advised that this project may overlap similar work in the Bureau of Deceptive Practices. However, as indicated in the Notice of Public Hearing, the investigational hearings are designed to lead to some form of rulemaking proceeding. It is the opinion of this office that one or more rules will ultimately be developed as a consequence of the hearings while, at the same time, it may be necessary to institute litigation in those problem areas which cannot be reached through rulemaking.

Therefore, it is not felt that the areas of activity of the two interested Bureaus overlap, but rather run parallel. With attorneys from each Bureau assigned to the project, active coordination of the specific activities of each Bureau is being and will be fully implemented so as to avoid any redundancy or duplication of effort.

In addition to the foregoing, as indicated in the Program Memorandum, this Division will undertake two additional major programs (projects 1 and 3 of Category II) in the event that additional manpower is allocated. However, it should be noted that the Division is currently operating with three attorneys less than has been authorized for the Division and that no increase in manpower has been authorized for FY 1970. (A fourth attorney will be resigning from this Division in the near future.) Therefore, even on a projection basis, the validity of any program in FY 1971 will be conditioned on the carryover projects from 1969 and 1970.

DIVISION OF ADVISORY OPINIONS

The requests for opinions have shown some increase during the past several years, but such increase has not been of any startling magnitude. Instead, the major effort of the Division in recent years has been reflected in the statistics indicating a very substantial increase in the number of opinions prepared and transmitted to the Commission for consideration, with a corresponding drop in the number of staff level opinions rendered. It is expected that some increase in requests, on the order of that experienced in previous years, will occur during the program year.

SUMMARY AND MANPOWER REQUEST—FY 1971

As may be seen from the attached Appendices (A and B), programs have been planned in both the field of consumer protection and maintaining competition. In terms of new and carryover programs for FY 1971, the Bureau plans to allocate 22 men in the Divisions of Trade Regulation Rules and Industry Guides to the field of consumer protection and 13 to the area of anticompetitive work.¹ These figures, of course, are based on the ability of the Bureau to reach its authorized manpower limit for FY 1970, plus the requested increase in manpower set forth below.

In connection with the requested increase, it should be pointed out that no increase in personnel was granted for Fiscal Years 1969 and 1970. During 1969,

¹ Does not include Division of Advisory Opinions.

as will be the case in '70 and '71, planned and pending rule and guide proceedings have been on the increase. As a consequence, necessary compliance activity must also be increased in order to make new rules and guides effective, otherwise the entire industry guidance program will become a sham. Accordingly, the requested increase in manpower allocation reflects a need for additional attorneys to assist largely in compliance activity, thereby freeing experienced personnel for work on the new projects.

This request for additional manpower is less than has been placed before the Commission by this Bureau in recent years. We feel the need is justified for the reason that both the 1970 and 1971 programs have been closely reviewed to insure that "make work" projects sometimes known to be inserted in a budget request solely for the purpose of appearing to justify a request for increased manpower are not present. We fully believe that much of this Bureau's program over the next two years can be accomplished in the time indicated through full utilization of manpower presently authorized. However, authorized manpower limits are largely meaningless if, in fact, personnel are unavailable. We hope, with the increased emphasis which the Commission has recently placed on its recruitment program, such manpower will become available as needed. Accordingly, it is requested that the Bureau be authorized 3 additional attorneys at grade GS-11 and 1 additional clerk-stenographer for FY 1971, the attorneys to be assigned as follows:

Trade Regulation Rules, 1 attorney.

Industry Guides, 2 attorneys.

In addition, while no specific increase is requested for the Division of Advisory Opinions, the possibility of the retirement of one of the senior attorneys in that Division may require that the manpower allocation for the Bureau be temporarily increased for a short period during the Fiscal Year in order that a replacement may be brought in for training purposes prior to the departure of the senior attorney.

FISCAL YEAR 1970

The program for this year has been altered, although not radically, from that which was proposed twelve months ago. This is due in part to the fact that no increase in manpower has been authorized for the year, as well as the fact that events during FY 1969 caused us to initiate programs which were unforeseen twelve months ago, but which, having been started, will be carried forward into '70.

Division of Industry Guides

The programs involving proposed new guides concerning *deceptive television demonstrations* and *deception in mail order land sales* have been eliminated entirely, the former because of the Commission's action in the Campbell Soup matter and the latter due to impending Congressional action in the field. In addition, proposed projects concerning the *paint industry* and revision of several sets of existing guides have been eliminated due to manpower limitations and because these projects were not of the highest priority. Likewise, the projects involving *lawn and garden power equipment* and *food-freezer plans* were not considered to be of the highest priority and were removed from the '70 program. However, because the problems involved appear to be important enough to warrant Commission attention, these two projects have been moved back to FY 1971. The proposal to deal with the word "wholesale" in a guide apart from the *deceptive pricing guides* has been eliminated due to the fact that the Commission's order in the Federated Nationwide Wholesalers Service case was overturned by the Court of Appeals.

With respect to new programs, as previously mentioned, a portion of the project involving *franchise agreements* has been moved forward from FY '71 to the program year. In addition, work is currently underway on projects involving *use of the word "free"*, *feather and down products*, *wigs*, *over-the-counter drugs*, which it is anticipated will result in the promulgation of guides in '70 as well as inauguration or compliance programs. Likewise, provision has been made for a special project to revise that portion of the *Guides for the Watch industry* dealing with the question of foreign origin.

The Commission is well aware of the activities of the past several years in the field of home improvement swindles. From time to time consideration has been given to writing guides for this industry. However, it is now felt that because of the type of marginal operator generally to be found engaged in such swindles, guides would be of little, if any, value. Nevertheless, it is felt that some action should be taken in this area and, therefore, a consumer pamphlet

dealing with all of the practices which have come to the attention of the Commission will be prepared. It is felt that by placing the consumer on notice, the Commission will have taken a further step toward eradicating the abuses in this industry.

All of these programs fall within the area of consumer protection. Activity will also continue in the anti-competitive field. Provision must be made, of course, for evaluation of the recently promulgated guides affecting *promotional allowances and services* so that at the end of the eighteen month period provided for by the Commission, the staff will be in a position to render a substantive report to the Commission. New guides dealing with restraint of trade problems in the *toy industry, tobacco auction markets and broadloom carpet industry* will be prepared and transmitted to the Commission for consideration.

Available figures for the first nine months of FY 1969 indicate that staff activity in connection with preparation and rendering of guide interpretations has increased astonishingly as compared to the previous year (358 in FY '68 compared to 610 in FY '69). This is primarily due, we believe, to the increased number of new guides recently promulgated by the Commission. While we have no gauge by which to accurately project what may occur in this area in FY '70, we are anticipating that such activity will at least remain at the current level.

DIVISION OF TRADE REGULATION RULES

The program of this Division has undergone substantial modification to give greater emphasis to those projects worthy of priority treatment as well as to tailor the program to the manpower authorized, although not presently available, for this unit. Action on the projected programs involving *power tools, permanent press wearing apparel and chemical silver cleaners* has been postponed indefinitely until the President's Committee on Product Safety has completed making its recommendations. In addition, until the internal task force on price stability has defined the project assigned to it, any action by this Division would appear to be premature. The project involving *metal cookware* has been eliminated and transferred to the Division of Industry Guides for consideration in connection with a similar matter in that unit. The projects involving *radio and television antennas and automobile air conditioners* are being dropped entirely because they merit only low priority consideration. The projects involving the *magazine and book distribution industry and dry bakery products industry* are being deferred until FY 1971 in order to free available manpower for work on new projects which are presently going forward and will be of major concern during the program year.

New projects which have been added to this Division's program and which are largely carried over from FY '69 involve the proceedings dealing with *games of chance, paperback reprint rights, credit cards, automobile pricing, gloves and leather products*. In addition, provision must be made for necessary support activity on the Commission's activity to update the *cigarette* rule. Likewise, special projects to study and perhaps commence rulemaking proceedings to alleviate problems in connection with *functional discounts and gasoline octane ratings* must be provided for.

Manpower

No increase was authorized by the Bureau of the Budget and it is felt that with the revisions in planning indicated above, the Bureau's program can be fully implemented within the framework of personnel presently authorized. During FY 1970 a total of 23 attorneys will be assigned to work in the consumer protection field, while the program to maintain competition will require 9 attorneys.¹

CONCLUSION

In addition to the specific programs set forth above and in the Program Memorandum, it is necessary that we make provision within the Bureau to provide support for the General Counsel's office in connection with its Federal-State cooperation program. As this program is broadened, this Bureau will process requests for advice and assistance in interpreting guides and rules emanating from state enforcement bodies. Since we are wholly unable to estimate the amount of manpower needed, no request for additional personnel is being made. Only after the extent of this Bureau's activity in the area has been determined, will we be in a position to assess manpower requirements. In the meantime, provision will be

¹ Does not include Division of Advisory Opinions.

made within the current and requested manpower allotment to provide the support necessary.

Commissioner Jones, in her May 27 memorandum, requested that we further elaborate on the various statements of strategy in the Program Memorandum for the purpose of indicating how much of each total program will be achieved in FY 1971 and how much will be carried into succeeding years.

1. *Automobile Price Advertising*—as indicated above, work is already going forward on this project in preparation for the investigational hearings to be conducted in September. The next step, initiation of one or more formal rulemaking proceedings, will begin immediately following the closing of the public record and analysis thereof to determine the most effective course of action. At this point, until a determination is made as to the number of rulemaking proceedings to be undertaken, we are not in a position to accurately project the termination of the project. However, barring unforeseen circumstances, if formal rulemaking proceedings can begin prior to July 1, 1970, it would seem reasonable that this entire project, in the formal stages at least, can be terminated prior to the close of FY 1971. Such an estimate, however, does not envision extensive compliance activity which may become necessary at the conclusion of the formal stage with the issuance of a rule or rules and run beyond the program year, nor does it envision the need for further public hearings which may be required in connection with specific rule proposals.

2. *Product Information*—It would appear that the portion of this program dealing with a study of the application of the statute and identification of products and product lines to be dealt with would definitely be completed prior to the close of FY 1971. This is especially true in view of the appointment of the internal task force to begin immediately to look into the project. Consequently, if the task force proceeds steadily in its efforts during the forthcoming year, by 1971 we may well be in a position to commence industry guidance proceedings. The duration of the industry guidance effort would then largely depend upon the type of proceedings, rules or guides, whether it will be necessary to work on a product-by-product basis or whether we will be able to effectively deal with entire product lines in a single proceeding and the extent to which the Commission wishes the program to apply. Consequently, we should acknowledge the fact that manpower commitments in connection with this program may extend well beyond FY 1971.

3. *Franchise Offers*—This, again, is another program which has been partially updated so as to commence work on one phase in FY 1970. It would appear that guides in some form would be issued in FY 1971 and a compliance program initiated. This presumes that even though problems in the anti-competitive area cannot be resolved between this Bureau and the Bureau of Restraint of Trade, a guide dealing with the deceptive aspect of the problem will still be forthcoming. Compliance activity presumably would extend at least into FY 1972 because of the size and increasing growth of this industry.

4. *Electrical Home Appliance Industry*—If commenced early in the program year, the guide writing portion of this program should be concluded within six months time. However, compliance activity will occupy considerably more time and undoubtedly extend beyond FY 1971 since such activity entails a survey of all industry members to insure that they have a *written* plan covering all of the products falling under the proposed rule.

5. *Oral antiseptics and dentifrices*. Upon completion of the relatively short study program projected for this proceeding, it is our present view that formal activity would be of relatively short duration. The available preliminary information indicates that the proceeding would not be expanded beyond the problem areas defined in our Program Memorandum. Accordingly, it seems reasonable that the entire proceeding could be completed during the program year. However, as previously indicated in this memorandum, this entire program may be moved forward to FY 1970, depending upon the progress experienced in the automobile pricing matter.

6. *Special Care Labeling*—We do not feel in a position to estimate the duration of this project at the present time. As stated in the Program Memorandum, this is another area in which a product identification project must be undertaken. Moreover, prior to making any commitment in manpower beyond the initial study phase, it is felt that the Commission itself will have to make a determination as to whether it should enter this area. At the present time, it would seem that implementation of this program may well await disposition of the current project involving special care labeling of textile products. By the same token, during the course of its studies, the task force on price stability may find that

the instant program should be included with the broader program under consideration. Therefore, due to the aforementioned factors, it would seem that any attempt to project the duration of this program would be wholly arbitrary on our part.

Commissioner Jones also requested that we further spell out alternative methods of achieving the goals set forth in the basic planning document. In virtually all of the programs enumerated above, the alternative to industry-wide action would appear to be the case-by-case litigation approach. However, as each project develops within the Bureau it may be that the project would best be disposed of by horizontal transfer from one Division to another in that final determination would indicate proceedings in the form of guides rather than rules or vice versa would be most expeditious. In this connection, the alternatives open to this Bureau are essentially limited by the guidance techniques available to it, other than the basic alternatives set forth in the Program Memorandum. However, should as yet unforeseen alternatives become available during the course of the development of each of the programs we shall evaluate them completely and, in the event that it should be determined that an alternative be adopted which would radically alter what we have proposed, submit the matter to the Commission for its consideration and determination.

Among the subjects raised in Commissioner Nicholson's memorandum of June 10 was a suggestion that manpower requirements be designated in man-years rather than dollar allocation. Inasmuch as the cost of programs in this Bureau is basically salary, we have followed his suggestion and not placed a dollar value on each program. As Appendices A and B demonstrate, this format more clearly sets out our exact requirements. In this regard, assignment of time expended has been made by quarter, half and whole man-years on the presumption that to attempt to project manpower allocations at this distance on anything less than a quarterly period would be completely arbitrary.

APPENDIX A.—DIVISION OF INDUSTRY GUIDES—PROGRAMS FOR FISCAL YEARS 1970 AND 1971

Projects	Type of action	Estimated man-years—	
		1970	1971
Deceptive franchise agreement negotiations.....	Guide and consumer pamphlet promulgation.....	0.5	1.0
Deception in referral selling.....	Promulgation of guides and compliance.....	.5	.5
Pet food industry.....	Compliance.....	.5	.5
Ladies' handbag manufacturing industry.....	do.....	.5	.5
Free film industry.....	do.....	.5	.5
Decorative wall panel industry.....	Guide promulgation and compliance.....	.5	.5
Household furniture industry.....	Guide revision and compliance.....	2.0	2.0
Toy manufacturing and wholesale distributing industry.....	do.....	.5	.5
Athletic goods.....	do.....	.5	.5
"Earn money at home" offers.....	do.....	1.0	.5
Cut carpet sizes.....	do.....	.5	.5
Household metal cookware.....	do.....	.5	.5
Simulated stone marble and related products industry.....	do.....	.5	.5
"Do's and don'ts" for advertising copywriters.....	Preparation of handbook.....		.5
Guarantees and warranties for major home appliances.....	Preparation of guidelines and compliance.....	2.0	2.0
Lawn and garden power equipment industry.....	Guide promulgation and compliance.....		.5
Food freezer plans.....	Preparation of a consumer bulletin.....		.5
Tobacco auction markets.....	Guide promulgation and compliance.....	.5	.5
Broadloom carpet industry.....	do.....	.5	.5
Use of the word "free".....	do.....	.5	.5
Feather and down industry.....	Guide revision and compliance.....	.5	.5
Wig industry.....	Guide promulgation and compliance.....	.5	.5
Over-the-counter drug industry.....	do.....	.5	1.5
Product information.....	Study and I.G. proceedings.....		1.0
Home improvement industry.....	Consumer pamphlet.....	.5	
Revision of industry guides.....	Revision and compliance.....	1.0	
A. Private home study schools.....			
B. Watch industry.....			
Day-to-day compliance.....		6.0	6.5
Activity, special projects.....			
and assignments, interpretive.....			
Work under guides.....			
Total Man-years.....		21.0	23.0
Total Man-years presently authorized.....		21.0	21.0
Total increase requested.....		0.0	2.0

APPENDIX B.—DIVISION OF TRADE REGULATION RULES

Games of chance.....	Rulemaking and compliance.....	1.0	0.5
Paperback reprint agreements.....	do.....	.5	
Unsolicited credit cards.....	do.....	.5	.25
Gloves and leather products.....	do.....	.5	.25
Automobile pricing.....	Investigation, rulemaking and compliance.....	2.0	1.0
Light bulbs.....	Rulemaking and compliance.....	1.0	.25
Analgesics.....	do.....	1.0	.5
Economic poisons.....	do.....	1.0	.5
Home entertainment equipment (wattage).....	do.....	.5	.25
Magazine and book distribution.....	do.....		1.0
Antiseptics and dentifrices.....	do.....		.5
Dry bakery products and vend pak.....	do.....		1.0
Automobile lubricants and crankcase additives.....	do.....		.5
Electrical home appliances.....	do.....		1.0
Newspaper advertising rates.....	do.....		1.0
Special care project.....	Study and possible I.G. proceedings.....		.5
Day-to-day compliance activity, special projects and assignments, interpretive work under rules.....		3.0	3.0
Total Man-years.....		11.0	12.0
Total Man-years presently authorized.....		11.0	11.0
Total increase requested.....		0.0	1.0

APPENDIX C

(Substitute Program—Fiscal Year 1971)

Goal: To correct possible discriminatory rate structures and advertising charges in the newspaper advertising industry. (Maintaining Competition)

The Bureau of Restraint of Trade has underway an investigation of advertising rate practices of major newspapers in eight principle metropolitan areas in which the Commission has field offices. The investigation seeks to ascertain the extent of possible discrimination in and disparity between "national" and "local" advertising rates charged by such newspapers to the two different classes of advertisers.

Strategy: Subsequent to completion of the investigation, this Bureau will confer with the Bureau of Restraint of Trade for the purpose of determining the extent of possible law violations and whether: (1) the Bureau of Restraint of Trade intends to institute adjudicative proceedings, (2) whether the practices are of such a nature as to require treatment on an industry-wide basis and, (3) whether adjudicative or industry guidance procedures would be the most effective and expeditious manner to dispose of the possible law violations. In the likely event that the practices in question are found to be industry-wide in nature and the guidance procedures determined to be the Commission's most effective means of dealing with the problem area, a trade regulation rule proceeding will be initiated and formulated in accordance with the conclusions of the investigation for the purpose of developing, in as short a time as possible, a proposed rule for presentation to the Commission and subsequent release for industry comment. In the event that a final rule can be adopted and is promulgated by the Commission, a compliance program will be instituted for the purpose of insuring meaningful correction of the forms of discrimination covered by the rule.

Basis: The size of the total advertising budgets for national and local newspaper advertisers is of such magnitude as to be of important economic significance within the advertising industry. It would appear that the Commission's role in maintaining competition would be enhanced by the proposed activities. It further appears that swift and effective Commission action may possibly be essential to insure and protect equality of advertising and promotional allowance rates in this industry.

Manpower: Until completion of the investigation and the extent of the questioned practices evaluated, no solid projection of manpower requirements can be made. On a tentative basis, however, it is anticipated that the full time assistance of one experienced attorney will be required for at least six months to formulate a rule. As to the compliance aspect of the project, here also we have a problem of projection until the extent of possible law violations can be determined. Nevertheless, experience would seem to dictate the necessity for assigning one attorney to the compliance program for a period of from 6-12 months in order that such program be effective.

Completion Date: If the project can be commenced early in the program year and depending upon the difficulties which may be encountered during the rule-making phase of the project, it is tentatively planned that completion will be accomplished by the middle of FY 1972.

MEMORANDUM

JUNE 20, 1969.

Subject: Budget Plans for Fiscal 1971.

To: Commission.

From: Henry D. Stringer, Director, Bureau of Textiles and Furs.

I have carefully reviewed the budget proposals for 1971 prepared by the Divisions of Regulation and Enforcement.

There is really no need to comment upon the proposals of the Enforcement Division because based upon statistics in the past it has been shown that its work load "feeds," so to speak, upon the volume of work produced in the inspection programs of the Division of Regulation.

The proposals of the Regulation Division point up the areas where the inspection programs will be needed, i.e., the extended coverage of the Flammable Fabrics Act, as amended; the textile import situation; and the troublesome areas in the fur industry. Also pointed out is, what in my opinion, the woefully inadequate inspection programs under each of the Acts in question. I think the proposals are realistic and sound in approach.

In connection with Commissioner Jones' comments with respect to an alternative to the inspection work I wish to advise that when I first came with the Commission in September, 1943 the inspection program under the Wool Products Labeling Act of 1939 was being set up.

The Wool Act became effective on July 15, 1941. Shortly after that time a form letter was sent to all of the manufacturers and distributors of wool products other than those in the retail field. This form letter requested samples of labels and advice as to whether the records of fiber content required under the Act were being maintained. It became evident that handling the matter by correspondence was not sufficient. The labels submitted could be corrected as to *form* but there was no way of knowing whether the labels were *substantively* correct. It became evident that an inspection program would have to be set up to determine if a manufacturer or distributor was correctly labeling the merchandise manufactured so sold by him. This could only be done by checking his records. Over the years the value of the inspection work has been evident. Violations in the thousands have been found and many orders to cease and desist as well as assurances of voluntary compliance have been obtained.

It is my understanding, and this was prior to my employment by the Commission, that discussions were had with representatives of the Food and Drug Administration as to how they policed the labeling of products subject to their laws. The labeling requirements are somewhat similar and as the Food and Drug Administration had found it necessary to have inspectors handle their work it was decided that the same approach would have to be taken with respect to the Wool Act. It is equally applicable to the Textile, Fur and Flammable Fabrics Acts.

I might say that during the 1950's the Commission policy was to concentrate on formal cases and do less inspection work under the laws administered by the Division which preceded this Bureau. This let up in policing resulted in a substantial increase of misbranding by manufacturers and removal of fiber content labels by retailers.

To illustrate, approximately 50% of the cases arising under the Flammable Fabrics Act are based upon information, samples of fabrics and wearing apparel obtained by our field investigators. As always, work under the Flammable Fabrics Act has our highest priority and we would agree with the statement recently made by Doctor Tribus (Assistant Commerce Secretary for Science and Technology) when speaking with respect to statistical information on clothing burns at a recently held Symposium on Measurement of Flammability that he did not want a mountain of corpses before the standards were strengthened.

We feel the same way, that is we should prevent dangerously flammable clothing or fabrics from reaching the market or if on the market having them removed from sale before we receive a complaint when there is serious injury or death.

We have pointed out in the preceding paragraph as to what might happen if we relied upon complaints under the Flammable Fabrics Act and only differing as an economic fraud, the same can be said with respect to misbranding under the Wool, Fur and Textile Acts. The consumer as well as most merchants are

simply not sufficiently familiar with textiles and furs as to know when goods purchased or sold by them may be misbranded. As a consequence very little of our work is predicated upon complaints from the outside.

In conclusion I might say that the work of this Bureau is not confined to enforcement procedures. The writer and other employees in the Bureau, including our investigators, are often called upon to participate in programs before home economic groups in the educational field and programs of education for the elderly and needy. We also participate in trade association meetings and we work with such prestigious groups dealing in textiles as the American Association of Textile Chemists and Colorists and the textile sections of the American Society for Testing Materials. In other words, in addition to our enforcement work we are also in the educational field and working with businessmen who are engaged in the textile and fur industries.

Respectfully submitted,

HENRY D. STRINGER,
Director, Bureau of Textiles and Furs.

MEMORANDUM

JUNE 19, 1969.

Subject: Budget plans for fiscal 1971.

To: Commission, via Henry D. Stringer, Director, Bureau of Textiles and Furs.
From: Harold S. Blackman, Chief, Division of Regulation.

The Commission is aware of the general responsibilities carried on by the Division of Regulation, Bureau of Textiles and Furs, so that much mention may be omitted at this time in order to set out the plans which we have for fiscal year 1971.

Our inspection activity, discussion of problems with those concerned, pointing out errors of omission or commission, explaining in lay language the requirements of several laws and rules which have been delegated to us for administration by the Commission, in short attempting to secure the greatest possible degree of voluntary compliance at the least possible cost to government and industry in use of manpower time and time expense, is the very heart of our work. We feel it can only be fully performed by the presence of the investigator at the premises in question, be it a fiber producing plant, a processing plant, a weaving or knitting mill, a manufacturer of finished products (either textile or fur), an importer or jobber or a retail store. We can physically see, examine and handle the products, examine records, see how the label (or invoice) is made up and attached to the goods, determine whether such label is accurate and complete, is properly applied so it will remain on the product until sale, and usually if advertising and invoicing (where covered) are performed by the person or firm being inspected a full check can be made on the accuracy of such matters.

In addition to our field investigators, the primary subject of this memorandum, we have in the headquarters office, attorneys, examiners and clerical personnel to direct and back up our field work. Our attorneys follow up field inspections, write to and confer with principals, attorneys, trade association executives and others to keep our inspection work progressing. In headquarters we have 2 advertising examiners whose function is to examine and write upon deficient newspaper and magazine advertisements, catalogs, and from time to time written television material of the nature shown on television screens in connection with advertising under the Textile Act. Radio advertising is covered by the Fur Act, but not the Textile Act. These examiners cannot obtain a full picture of the products advertised, even though they perform very capably by correspondence.

Other pertinent parts of our operation are the issuance of registered identification numbers, the maintenance of a public file of continuing guaranties and the record room where scores of thousands of active files are kept. A disposition schedule, approved by the Archives, providing for destruction of certain file materials is currently being used.

During fiscal 1970 it is anticipated that the Secretary of Commerce under the Flammable Fabrics Act, as amended, will have designated certain categories of textile products which are hazardous and that the Department of Commerce will have provided standards of flammability for such products. The Department of Commerce, we are informed, will probably issue such standards for floor coverings in the very near future. In addition it is contemplated that additional standards for children's clothes as well as some types of bedding will be issued.

Such action by the Department of Commerce will call for inspection in several areas where the Bureau of Textiles and Furs has not had occasion to call. The plans of the Division for the enforcement of the amended Flammable Fabrics Act are to contact and work closely with state and local fire marshals and chiefs so that when fires involving fabrics occur in the categories specified by the Department of Commerce the Division's investigators will be called in to determine if the Flammable Fabrics Act has been violated. This program we believe is what the Congress and President Johnson expected when this amendment to the Flammable Fabrics Act was passed.

In connection with the increase of our investigational staff as set out in the 1970 Budget Justifications the additional investigators to be used under the Flammable Fabrics Act, their work of course will not be confined to that Act but all of them will be thoroughly schooled in all of the other statutes with which we work so that they will be available for any place within the territory assigned to them for immediate action upon matters arising under the Flammable Fabrics Act.

Whether Rule 36 under the Wool Products Labeling Act is sustained or not the problem that gave rise to this regulation is still with us and probably will become more pressing rather than less. Those importers who might be a little bit short on principles will, no doubt, read the Court of Appeals' decision as a license to bring in goods from abroad with little or no concern for the fiber content set forth on the labels. Further, with imports increasing in an ever greater volume, there will, without question, be more and more misbranded goods included.

The Bureau of Textiles and Furs plans to assign resident investigators to the New York Customs' office in Manhattan and at the Customs' office at Kennedy Airport with the consent of the Bureau of Customs, to peruse entry papers of imported fabrics and textile products under the Wool Act, the Textile Act, and the Flammable Fabrics Act. Investigators at other ports of entry will check imports at the respective Customs' offices on a daily or weekly basis as appears to be necessary. Questionable entries will be sampled at Customs or at the place of business of the importer and later tested.

In this manner it is hoped to overcome any failure of Rule 36 and to stem the influx of misbranded merchandise from abroad.

Despite the continuing emphasis on the proper labeling of artificially-colored mink, misbranding is rampant in the fur industry. There are large profits to be made in misbranding fur products as natural when, in fact, they are dyed or color altered. The Bureau is presently working on this matter and will continue to throughout fiscal year 1970. However, in all probability, the problem will still be prevalent in fiscal year 1971.

The Bureau's enforcement plans in this matter are to examine the records of the mink dressers periodically to ascertain how they are dressing mink skins that lend themselves to dyeing, then check the invoices of the dressers to determine their customers. The customers will then be inspected and the lots of skins noted at the dressers checked to ascertain if the fur garment manufacturers are labeling their fur products correctly. This is a time-consuming process but it has been successful in the past in uncovering much misbranding.

Passing off dyed mink garments as natural is a serious fraud on the consumer, as the selling price of a natural mink garment is one-third to one-half higher than a similar dyed garment. Further, mink garments that are dyed will oxidize in time and will lose their rich dark color, to the damage of the purchaser. By such actions the unscrupulous manufacturer is unjustly enriched and his law-abiding competitor is subjected to unfair competition.

Another area of fraud in the fur trade, but one the Bureau has not had the personnel to date to cover, is the passing off as new, used fur garments or garments manufactured from used fur. With increased personnel it is hoped that a drive may be made on this problem in fiscal year 1971.

Many women trade in used fur coats when purchasing new ones. If the coats are in good or fair condition they are sold to dealers who purchase used garments. It is believed by the Bureau that in many cases a new lining is put into the garment and any obvious repairs made, and the secondhand product is then sold as new. Also along this same line, used fur in fair condition taken from old garments is remade into garments, which should, under the Fur Act, be labeled, invoiced, and advertised as "used fur", but the Bureau suspects large numbers of such garments are sold as new.

Many of the men engaged in this type of fraud conduct auctions or run special sales in local stores for a few days at a time and then move on. The nature of the problem makes it difficult to police and takes much more time to investigate than legitimate furriers located at fixed addresses. The investigation of this fraud requires a check of the used fur dealers' records and the tracing down of recent shipments of known used garments to retailers to determine how they are represented and sold to unsuspecting consumers.

The Fur Products Labeling Act requires the country of origin of imported furs to be shown on the labels attached to fur products and also on invoices covering such products. Large quantities of ranch mink are imported into the United States each year from Canada, Norway, Sweden, Denmark, Finland, Poland, and Japan. Last year this amounted to approximately 4,000,000 skins. Many of these skins are inferior to the ranch mink bred in this country, as mink ranching is a much older industry here than in the foreign countries and over the years our ranchers have developed finer strains of mink. Also, the feed

of the animals in the United States is better than in most foreign countries, resulting in finer fur pelts.

Although the number of imported mink skins is high, it is seldom that mink on fabric coats and suits show a foreign country of origin; and it is rare, if ever, that a full fur garment is found with a tag showing a foreign country of origin. A start was made this year on correcting this problem, but it was halted shortly after it started when the investigators were needed on the more pressing matter of the passing off of dyed mink as "natural." In the short time devoted to the program, several cases were developed against fur manufacturers engaged in this fraud.

Passing off foreign ranch mink as domestic is unfair to the consumer and definitely injures the domestic mink rancher who usually has a better product and whose labor and overhead is much higher than his foreign competitor's. It is hoped that by fiscal year 1971 the Bureau will have the personnel and time to concentrate on this type of misrepresentation.

In order to solve this problem it will be necessary to begin with the importers of foreign ranch mink and trace the skins, through skin dealers, dressers and manufacturers to determine if the end product is correctly labeled as to the country of origin of the imported furs. This of necessity is a time consuming process.

When the Budget Bureau started its PPB program, the Bureau of Textiles and Furs gathered statistics from the Census' Bureau of Business Statistics in order to establish a universe of mills, manufacturers, wholesalers, and retailers which manufactured and distributed wool, textile, and fur products. Against this universe the Bureau showed what its then current inspection totals were. In fiscal year 1967, inspection calls were made on only 7.5% of the mills and manufacturers, 2.4% of the wholesalers, and a mere 1.2% of the retailers in our universe. Since that time, four additional investigators have been added to the field staff, and inspection techniques and reports have been streamlined; and, as a consequence, the number of inspections have been expanded by approximately a third. However, since the last business census in 1963, the textile industry and distributing businesses have greatly expanded, and the percentage of inspection coverage is probably no greater now that it was in 1967. We think this is woefully inadequate.

At the end of May, 1969 in fiscal 1969 the Division's investigators had made 4,364 inspections under the Wool Act, 6,613 inspections under the Textile Act, 1,416 inspections under the Fur Act, 5,995 inspections under the Flammable Fabrics Act and 16 inspections under others making a total of 18,404. The concerns inspected had sales of over 15 billion dollars and had an inventory at the time of inspection of over \$1,600,000,000. The items inspected were 6,173,000 under the Wool Act, 63,256,000 under the Textile Act (in both cases the sampling method was used), 376,000 under the Fur Act and a total of 24,925,000 under the Flammable Fabrics Act with an aggregate of 94,750,000.

The following table shows an inspection summary for fiscal years 1969, 1970 and 1971 based upon figures for 1969 and projected to 1970 and 1971. There should be a corresponding increase in the number of items inspected under each of the several Acts. The figures are projected upon the 1970 Budget Estimates and a proposed increase of 20% in fiscal 1971.

MEMORANDUM

JUNE 18, 1969.

Subject : Fiscal year 1971 budget justification.

To : Commission, via Henry D. Stringer, Director, Bureau of Textiles and Furs.

From : Eugene H. Strayhorn, Chief, Division of Enforcement.

The Division of Enforcement is responsible for the investigation, analysis and effective disposition of serious violations of the Wool, Fur, Textile and Flammable Fabrics Acts. The Division consists of a staff of Attorneys, a laboratory staffed by two textile technologists and clerical personnel. It also has a compliance section which polices the cease and desist orders issued by the Commission under these Acts. The report of the compliance is attached hereto.

When a matter is referred to the Division of Enforcement, it is given an investigational number and assigned to a trial attorney. This trial attorney is then charged with the initiation and guidance of the investigation which is aimed at establishing the facts. He is assisted in this task by trained investigators in the various field offices throughout the country ; also he may call upon the laboratory for analytical tests to determine the composition of the products under consideration. Once the facts are in hand, the attorney then determines what action should be recommended in the matter. If complaint action is recommended, the trial attorney assumes responsibility for all phases of the litigation of the matter before the hearing examiner and the Commission.

In addition the trial attorney may in connection with an assigned matter :

- (a) Conduct settlement negotiations when a Consent Agreement is offered a respondent.
- (b) Recommend, where necessary, injunction or condemnation proceedings and upon approval, handle the matter in the appropriate court.

ENFORCEMENT GOALS 1971

The overall objective of this Division is to obtain the maximum compliance with the Acts it assists in administering within the limitation of the resources assigned to it. Constant review and evaluation of procedures is undertaken to accomplish this major goal. An example of the review and evaluation program is the development and adaptation of the 2.14 Constant Agreement program whereby the output of this Division has been materially increased.

INSPECTION SUMMARY FISCAL YEAR 1969, 1970, AND 1971

	Wool	Textile	Fur	F.F.	Other	Total
Number of inspections actually performed as of May 31, 1969.....	4,364	6,613	1,416	5,995	16	18,404
Total number of inspections projected for complete fiscal year 1969.....	4,659	6,855	1,632	6,304	21	19,471
Number of inspections projected for fiscal year 1970.....	7,500	9,845	2,750	10,750	30	30,875
Number of inspections projected for fiscal year 1971.....	11,830	13,370	4,450	17,325	50	47,025

The specific enforcement of each of the aforementioned acts is basically a repetitive operation with emphasis and concentration of effort from time to time being made in those areas which are the most active and afford the greatest possibility of deception. These areas are often dictated by the fashions currently popular with the public, as for example the recent fad for mohair sweaters.

For the year 1971 it is anticipated that there will be an increase in the number of enforcement matters under the Wool Act. With more inspections being conducted at the import terminals a greater number of cases are to be expected.

Investigation into the false and deceptive labeling and invoicing of furs which resulted from the Market and Manhattan Cases is expected to continue for the next 6 or 7 months with the resultant production of numerous cases and then gradually decrease. As soon as feasible, we intend to launch an investigation into the labeling of fur products as to country of origin. Since generally American mink pelts are superior to foreign pelts there is a great tendency on the part of importers to fail to disclose the foreign origin of such skins. This investigation when launched should produce a number of formal cases.

Recent information indicates that the Department of Commerce will promulgate several new standards for the testing of products and related materials. This in turn will materially broaden the coverage of the Flammable Fabrics Act and correspondingly will increase the enforcement load of this division although the extent of such increase cannot be determined at this time.

PLANNING FACTORS

1. Based on past experience data accumulated since 1962—Division of Regulation inspectors will, on the average be expected to initiate four (4) formal cases per year.

2. The trial attorney's of this Division are expected, on the basis of past experience to dispose of an average of 24 cases per year per attorney.

3. It is considered desirable, as an average, to handle all cases in a period of one year. Although some cases will remain on the Docket for longer periods and many may be disposed of in a shorter period; the target to be achieved in this plan is disposition of cases on the average in one year.

4. It is expected that for FY 1970 this division will have on hand, exclusive of the Compliance Section, 11 trial attorneys, 7 laboratory technicians and 1 secretary (these figures represent the 1970 budget as approved by the Budget Bureau).

5. As of July 1, 1969 this division will have a Docket of 245 formal cases for disposition.

FISCAL YEAR 1971

1. Assuming that the 1970 Budget is approved this Bureau will have 92 investigators by June 1970 or an increase of 49 over the July 1969 number of 43. Thus we may anticipate that this Bureau should produce a total of 268 new cases.

2. This division therefore will have a total of 513 cases to consider. In order to maintain the disposition of cases within the one year criterion the division will have to dispose of 256 of these cases.

3. Given the number of attorneys as 11, we can plan on disposing of 264 of these cases. This will leave a total docket at the beginning of 1971 of about 250 cases.

4. Although as of July 1, 1970 the Division of Regulation can expect to have on hand 92 inspectors and during FY 1971 to increase this number by 20%, it seems feasible to assume that during FY 1971 that division will have inspectors producing cases amounting to a total of about 400. This with out docket as of July 1970 of 250 will make a total of 650 cases to be considered in 1971.

5. To stay within our guideline or disposing of our cases within one year on the average, we will have to dispose of 325 cases during 1971. At the rate of 24 cases per attorney per year we will need 14 attorneys to accomplish this task or an increase of 3 attorneys during FY 1971. It is anticipated that no increase in laboratory personnel will be required in 1971 over the 7 authorized for FY 1970.

COMPLIANCE SECTION

The Compliance Section of the Division of Enforcement obtains compliance with Commission cease and desist orders as they are issued under the four Acts administered by the Bureau, directs and analyzes investigations of suspected violations of orders, and refers through the Commission to the Attorney General such violations as warrant proceedings for civil or criminal penalties in the Federal District Courts. During Fiscal Year 1969, the Section had an authorized staff of four attorneys, an attorney supervisor, one secretary and two transcriber typists.

FY 1969 commenced with 105 active compliance cases. During the year 130 new orders¹ and 31 reopened compliance cases² brought the total assignment to 266 cases. Of this number 118 were closed, leaving a carry-over of 148 cases³ at the beginning of FY 1970.

During the year the five-attorney compliance staff accounted for the disposition of 23.6 cases per man. Two factors are significant in considering such per-

¹ Increase of 110% over previous year.

² Increase of 72% over previous year.

³ Increase of 41% over previous year.

formance. Inasmuch as the Division of Enforcement has been fully utilizing the consent settlement procedure, only a limited investigation of a respondent's practices is generally conducted. In some instances this requires more instruction and explanation by the Compliance Section in securing compliance with the particular Act or Acts involved, than if the respondent had been subjected to an intense and detailed investigation.

Further, in cases under the Flammable Fabrics Act the Commission has emphasized the necessity of directing respondents to recall from customers wherever possible any products which have been found to be dangerously flammable and has directed the staff to determine that such recall has been effected. This procedure is especially time-consuming.

Effective enforcement of the Acts administered by the Bureau requires a vigorous compliance program. Where the Commission devotes the effort and expense to obtain an order to cease and desist, compliance must be obtained and maintained. It is desirable that as new orders are issued, satisfactory compliance reports be obtained promptly. As of July 1, 1969, there will be pending 62 initial compliance cases⁴ more than six months old.

In instances where serious violations of orders are found, full enforcement necessitates proceedings for civil penalties, not only for the effect on the offending parties but also to operate as a deterrent against others who may be involved in similar practices.

At the close of FY 1969, seven civil penalty suits will be pending in various United States District Courts, three under the Flammable Fabrics Act, three under the Wool Act and one under the Fur Act. One of these cases seeks penalties of \$145,000 and another seeks \$110,000. This phase of the Compliance Section's work is particularly exacting and time-consuming. It requires the preparation of the complaint to be filed in court and a fully documented trial memorandum, and it necessitates assisting and cooperating with the United States Attorney throughout the proceeding.

During the past year four of the above civil penalty cases were commenced. Some other matters which might have resulted in penalty cases had to be handled administratively because of staff limitations.

There are approximately 1,600 outstanding orders issued under the four Acts administered by the Bureau. As more and more concerns are placed under order to cease and desist, an increasing number of inspection reports from the Bureau's investigators and complaints from competitors relate to existing orders and require compliance investigations. In FY 1969, 31 such cases will be reopened for compliance checks.

Of the 148 cases pending at the close of FY 1969, 39 of them will be reopened matters, and 24 of these will be more than six months old.

DESIRABLE GOALS

(1) The Commission, several months ago, directed the staff to notify respondents, as orders are issued, that respondents are to be in full compliance within 60 days after the order is served upon them. Further it has directed the staff to inform the Commission of those respondents who at the expiration of the 60-day period have not submitted a report showing full compliance.

Accordingly the progress in the 62 initial compliance cases that are more than six months old does not meet the Commission's requirements. Though in very few cases can a satisfactory compliance report be obtained in 60 days, during FY 1970 a substantial decrease should be brought about in the number of cases in which full compliance is not achieved promptly.

(2) On July 1, 1969, three civil penalty cases will be in the process of preparation for certification to the Attorney General. During FY 1970 there should be at least a 50% increase over the four civil penalty matters commenced in the past year.

(3) The 24 reopened cases which are expected to be pending for more than six months at the end of FY 1969, reflect a field in which it is anticipated there will be improvement.

(4) The expected increase in the number of inspectors during FY 1970 (an increase of 49 over the 43 for FY 1969), will result in significantly more cases

⁴ Cases in which the respondents have not yet filed a satisfactory compliance report.

which will require reopening for compliance checks. Such personnel increase, along with an expected addition of two trial attorneys, should result in more orders for FY 1970 than were issued in the previous year.

The Compliance Section has earmarked 35 cases in which it considers compliance checks should be run.

In FY 1970, the following compliance activity is projected:

Carry-over of cases pending July 1, 1969	148
Anticipated new orders for fiscal year 1970	130
Anticipated reopened cases during fiscal year 1970 ⁵	50
Total work load for fiscal year 1970	328
6 attorneys for fiscal year 1970,	
24 cases per attorney	144

Carryover anticipated July 1, 1970	184
------------------------------------	-----

⁵ Based on .77 cases developed per inspector, 43 inspectors plus cases produced by the 49 allocated for fiscal year 1970.

Assuming during fiscal year 1971 a 20 percent increase in the number of investigators—and interpreting this increase, it is expected that there will be a total of 100 inspectors in a productive capacity in 1971 and the following compliance activity is anticipated:

Carryover of cases pending July 1, 1969	184
Anticipated new orders for fiscal year 1971	165
Anticipated reopened cases during fiscal year 1971 ⁶	77
Total work load fiscal year 1971	426
Total attorneys for fiscal year 1970	6
Increase required in Compliance Attorneys for fiscal year 1971 to maintain status quo	4
Disposition for 10 attorneys for fiscal year 1971, 24 cases per attorney	240
Carry-over projected July 1, 1969	186

⁶ Based on .77 compliance cases developed per inspector, 92 inspectors plus cases produced by 18 additional expected for fiscal year 1971.

Respectfully submitted,

EUGENE H. STRATHORN,
Chief, Division of Enforcement.

MEMORANDUM

JUNE 4, 1969.

Subject: Fiscal year 1971 budget.

To: Frank C. Hale, Director, Bureau of Deceptive Practices.

From: Michael J. Vitale, Chief, Division of General Practices.

Attached hereto is this Division's fiscal year 1971 budget report to be submitted to the Commission.

Respectfully submitted,

MICHAEL J. VITALE, *Chief, Division of General Practices.*

FISCAL 1971 BUDGET

I would like to take a practical and realistic approach to our budget request. Too often we engage in conjecture and in crystal-ball gazing. Before we can decide on where we are going, we should first look at where we have been and what we have done. In this connection let me first orient you to our present operation, both from the standpoint of personnel and casework.

I. PERSONNEL

This Division presently consists of twenty attorneys including the Division Chief. The semi-autonomous D.C. Consumer Protection Group, which is now a part of this Division, consists of eight attorneys (two of whom have advised me orally that their resignations are forthcoming). There are five secretarial and clerical persons assigned to the Division at the present time. The breakdown in grades for all attorneys is as follows:

GS-16 -----	1
GS-15 -----	7
GS-14 -----	6
GS-13 -----	6
GS-12 -----	1
GS-11 -----	7
Total -----	28

As is noted by the grade breakdown, the personnel in this Division are of varying degrees of experience and competency, and only approximately 50 percent actually qualified in both experience and competency to carry on any assignment—including trial and appeals to the Commission.

One of the acute problems of this Division has been the unusual turnover of attorneys, particularly the younger ones (many of whom seemed to become disenchanted with the Commission). For example, as of September 1965 when this Division was merged with the Division of General Advertising, the professional staff was:

Average number of attorneys as of 9/30/65-----	35
Actual number of attorneys as of 9/30/65-----	32
Present number of attorneys assigned-----	¹ 24
Actual number of attorneys-----	20

¹Of those attorneys included, *two* are on leave without pay; *two* are detailed out of the Division; *one* is on extended sick leave; and *one* has submitted his resignation to be effective June 21, 1969. These statistics exclude the D.C. Consumer Protection Group, which was assigned to the Division, November 1, 1968, and consists of eight attorneys (two to resign shortly).

During this period of time, this Division—excluding the D. C. Consumer Protection Group—gained approximately 27 attorneys and lost approximately 35, so that we have had the movement of approximately 62 attorneys during a four-year period. These changes entail reassignment of cases, training programs, and often result in the delay in disposition of cases and loss of benefit of personnel during the training period. A certain amount of these changes would normally take place and would not ordinarily be a part of this report. However, because of the unusual number of attorneys leaving, we feel the efficiency and the operation of this Division has been severely affected and should be reported on any budget statements. In my opinion, it has become a factor to be considered in any

budget request. Within a period of several weeks, I will have lost eight attorneys (one of whom is on extended sick leave) and gained two young, inexperienced attorneys.

II. CASELOAD

At the present time, this Division has approximately 629 investigations pending, including those in the field; 69 complaint matters pending; 15 assurances of voluntary compliance awaiting disposition; and 39 closings. In addition, there are 14 cases in the Consent Order Division and 13 cases at various stages of trial.

Many of the investigations in this Division usually involve matters unrelated to an industry or a project; however, because of the similarity of either the practices or the product, there are investigations characterized as "industry-wide projects" (these matters have been generally handled on a case-by-case basis). The following list includes such projects which are set forth in the order of their importance:

1. Automobile industry

In the last several years, the Commission's attention has been called to various facets of the pricing practices of automobile manufacturers and their dealers in connection with the sale of new cars. At least ten investigations were opened and one order of the Commission reopened. The Commission has determined to hold comprehensive public hearings on this subject of new car price advertising with a view towards drafting trade regulation rules in this area of the economy. The hearings will encompass standard-optional equipment changes and their effect on the purchaser; comparison of new model car prices with "comparably equipped" former models; price advertising of new cars involving displayed optional equipment; dealer advertising of huge savings on trade-ins and otherwise; the determination of the manufacturer's suggested retail price or the "Monroney sticker" price. These hearings will affect not only domestic manufacturers but also foreign car manufacturers who compete in the American market. As indicated above, these hearings will be an in-depth approach to the whole spectrum of automobile pricing. Depending upon the success of the hearings, we would estimate *two to three* attorneys would be needed.

2. Automobile tires

As a result of Commission action, this Bureau was given responsibility for enforcement of Guide 15 (pricing) of the Tire Advertising and Labeling Guides. Some 22 investigations have been initiated and eight have been closed on the basis of assurances of voluntary compliance. The problem of questionable price advertising by tire marketers will be one of some duration and will extend through the next two years at least. Depending on the cooperation of the industry, we would need *two to three* attorneys.

3. Games of chance

An enormous amount of time was spent by at least two attorneys in this Division preparing reports, answering Congressional letters, conducting investigations. One attorney participated full time in the public hearing. As an off-shoot of the Commission action in this area, we opened some 10 or 12 files, most of which were eventually returned from the field with a recommendation for closing. Only one file thus far was returned with a recommendation for complaint and we are presently in the process of readying it for transmission to the Commission. The main issue in this particular case is "rigging" as well as other charges unrelated. Depending on the outcome of the Commission's final action and the cooperation of the industry, it is estimated that we may need a minimum of *two or three* attorneys to continue with this work.

4. Home improvements

In the past fiscal year, we have obtained five consent agreements; we have issued investigational subpoenas in three cases; and a recent decision was rendered by the Commission in one case. We have approximately 60 cases under investigation and are continuing to handle these on a case-by-case basis. There is an intense public interest in this area and even if Congress did not grant us the additional money requested, we plan to use *two to three* attorneys.

5. Earnings

a. *Chinchillas*.—Approximately ten matters have been disposed of by cease and desist orders. We have 35 current investigations in the field. We are continuing to enter cases for investigation. The practices employed by chinchilla promoters border on the fraudulent, victims often times investing their entire savings. We have made, and are making, a determined effort to scrutinize the practices of persons or firms engaged in the sale of chinchillas to the general public since a great number of them misrepresent earnings, production, quality, value, etc. of chinchilla breeding stock. To continue in this area, a minimum of *two* attorneys would be required.

b. *Franchises*.—Most of our activity involves the sale of water repellant paints by means of franchise dealerships. We have obtained orders against two companies and two additional companies are in litigation. We are also negotiating for a consent agreement in another case. These matters are handled on a case-by-case basis, the public interest being significant because the dealers invest anywhere from \$500 to \$2,500. Companies involved have gross sales from \$125,000 to \$2,000,000 a year. Depending on the number of complaints we receive, at this point it is estimated that *one* attorney will be required to handle these cases.

6. Sewing machines

During the past 20 years, false and misleading advertising and deceptive acts and practices by manufacturers, distributors and retailers of sewing machines have been the subject of an ever-increasing volume of formal and informal Commission actions. Prior to 1953, such matters involved for the most part pricing, guarantee and foreign origin issues. In recent years, sewing machine sales have been extensively promoted by sham contest promotions and the classified ad gimmick. Such bonus give-aways and "bargain" offers are advertised to obtain leads to gullible persons, whose interest can be switched to purchasing readily-available, high-profit sewing machines. Since 1950, the Commission has issued 64 complaints. The sham contest promotions of sewing machines was the subject of Advisory Opinion Digest No. 70. In addition, the Commission promulgated a Trade Regulation Rule relating to the misuse of the term "automatic" as descriptive of household sewing machines which became effective July 15, 1966.

We have referred the merchandising practices of 48 sewing machine dealers to State enforcement officials. The total number of home sewers, who spend an estimated 1.25 billion dollars a year on patterns, sewing machines, fabrics, threads and notions, is approximately 40,000,000 according to some industry spokesmen. The most recent Bureau of Census figures of sales of industrial and household sewing machines manufactured in the United States amounted to \$117,000,000. In 1965, annual sales reached an estimated 1,860,000 units, with Japan supplying 62 percent of the total.

It is planned that an increasing number of complaints will be directed at the practices of both distributors and retailers of a particular line or make of industry products. By this "class action" method of seeking orders requiring distributors and their retailers to abstain from questionable practices, actions against a large number of retailers will be unnecessary. An example of this procedure is the recent proposed complaint against *Riccar America Company*, File No. 662 3758, currently the subject of consent negotiations. It is estimated that between *two* and *three* attorneys would be required.

7. Fictitious pricing

a. *Greeting Cards*. This project involves pre-ticketing with fictitious retail selling prices by manufacturers and distributors of Christmas cards. Twenty-one investigations have been established and proposed consent agreements have been sent to all these companies. This matter will extend into the next fiscal year and a minimum of *two* attorneys will be required.

b. *Fishing Tackle*. This project involves the use of fictitious retail prices in catalogs and on pre-ticketed merchandise furnished dealers. We have conducted an industry-wide investigation covering 11 major manufacturers of fishing tackle and we have at hand from each either an assurance of voluntary compliance or an executed consent agreement. These will be transmitted to the Commission. Estimated annual sales of firms investigated was \$100,-

000,000 or 43 percent of total fishing tackle sales in the United States, including imports. The time of *one* attorney will be required to complete this project.

8. *Door-to-door salesmen—encyclopedias, housewares, etc.*

This is a constant battle on the distributor level of door-to-door sales of encyclopedias and related educational books. Most of the major publishers are already under Commission orders. The distributors are using the same deceptive sales approaches that were banned in the case of the publishers. This operation must proceed on a case-by-case basis. In the last year, an order was issued in a contested case and we obtained one consent order. Currently there are two encyclopedia cases in the consent negotiation stage and one more that is before the Commission on complaint. There are several more cases in the field under investigation. While this is the major area for the practices of salesmen, there are cases that occasionally arise involving other products. It is estimated that this area would require at least *one* attorney.

9. *Correspondence and vocational schools.*

The practices usually misrepresent benefits to be obtained. Alleged deceptive practices by proprietary schools have continued to be the subject of Commission action. The ease of entry into this business has meant, and will continue to mean, that new schools are constantly being established, some of which will operate in a less than ethical manner. Approximately 22 investigations were pending at one time or another during the current fiscal year. Proposed respondents submitted consent agreements in five of these matters. Assurances of voluntary compliance were obtained in two others. Closing has been recommended in two others because proposed respondents had gone out of business. It is likely that we will continue to have activity in this field until such future time as all of the states have adequate laws regulating these schools. It is also likely that the level of activity will remain about the same. A minimum of *one* attorney will be required.

10. *Gold Medallion homes*

This is another industry-wide activity which affects all prospective home buyers. Originated by General Electric for the purpose of advertising General Electric products, it has been adopted through the National Association of Electrical Manufacturers by some 700-plus power and light companies throughout the United States to promote the use of electric power. It was ascertained that there were different minimum standards used by these companies in allowing contractors to use the "Gold Medallion" seal. Our effort has been directed to raising and, more particularly, unifying the minimum standards. So far, over 600 companies have agreed to the improved standards. Any company that does not agree to these uniform standards will not be allowed to use the "Gold Medallion" seal in their advertising. *One* attorney will be required.

PROJECTION 1971

It is anticipated that the following number of man years will be required to carry on future work of this Division:

1. To continue the aforementioned projects.....	24
2. To handle compliance of avc's.....	1
3. Congressional letters are averaging almost 100 per month and in many instances require a great deal of preparation.....	1
4. To handle the current caseload, exclusive of the aforementioned projects...	10
5. D. C. Consumer Protection Program.....	8
Total man-years.....	44
Current actual staff.....	28

This projection is based on our current workload and does not take into consideration any future matters that our Division of Screening and Planning may contemplate opening. Since the initiation of new investigations now takes place in that Division, we are now limited in determining future programs. In addi-

tion, there are the many Commission directives to the staff to undertake special matters which we are incapable of anticipating in the way of manpower requirements and do not appear on this projection.

As indicated above, the D. C. Consumer Protection Program has been operating as a semi-autonomous group. It has two formal cases pending; five consent agreements executed but not yet final; 22 investigational matters pending disposition; and 13 matters under investigation in the Washington Field Office. It is anticipated that it will take another year to complete these assignments. In addition, two attorneys have been used on a pilot program in consumer education.

It is my intention to shortly submit to the Commission a recommendation that this Group be dissolved and that the local cases be handled in the normal fashion and not isolated from the rest of the work of this Division. However, I intend to recommend that our pilot program of consumer education be continued. We have visited a number of public high schools in the Metropolitan Area and have presented talks and slides on the work of the Commission. So far, we have proceeded on the basis of individual invitations, but it is anticipated that we will be asked to furnish some assistance on a broader basis extending to several school systems in the Washington Area. At their request, a preliminary conference is also scheduled with representatives of the Montgomery County, Maryland, School Board. It is estimated that within two years this pilot program could develop a blueprint for a consumer education program that could be utilized throughout the country.

A factor to be considered in the allocation of the above personnel is the speed with which the Commission desires to pursue these matters. I dislike the admission, but the projection of attorney needs are based on the traditional time it has taken to complete a case. If we were to attempt to speed up our work, short of outright closings, we would require additional personnel so that the present number of attorneys would not be burdened with such heavy caseloads, permitting us to reach disposition of these cases much sooner than previously required. The above projections are all based on the assumption that the attorneys assigned to this Division are seasoned, experienced, and qualified to handle their assignments.

SUMMARY

We have an insufficient number of qualified attorneys to handle our current workload. It is anticipated that it would take a minimum of two years to clear our present docket without regard to undertaking any subsequent assignments.

MEMORANDUM

JUNE 20, 1969.

Subject: Budget justification of the Bureau of Economics for fiscal 1971.

To: William P. Glendening, Comptroller.

From: Willard F. Mueller, Director, Bureau of Economics.

BUREAU OF ECONOMICS

The principal responsibilities or objectives of the Bureau of Economics are (1) to review, study, analyze and make reports on economic developments affecting the structure, conduct and performance of the economy with the view to pinpointing actual or potential problems which may adversely affect competition, and to suggest appropriate corrective actions for such problems; and (2) to assist in the implementation of the Commission's law enforcement programs relating to antimonopoly and deceptive practices. In carrying out these responsibilities the Bureau's principal output is information and analyses which give direct support to the development and implementation of Commission actions associated with its efforts to maintain competition and protect the consumer.

For administrative purposes the Bureau is divided into the Office of the Director and three divisions, Division of Economic Evidence, Division of Industry Analysis, and Division of Financial Statistics.

OFFICE OF THE DIRECTOR

The primary function of the Office of the Director is to exercise general supervision over the operations of the Bureau.

The Statistical Services Section and the Stenographic Services Section, which provide statistical and stenographic services for the entire Bureau, are also in the Director's Office. In addition, five consultants working on the Automobile Insurance Report are attached to the Director's Office for administrative reasons only.

Due to the increase in the number of mergers, as well as increases in the demands for more and various tabulations of merger statistics, one additional employee is requested for the Statistical Services Section for fiscal 1971.

SUMMARY BUREAU OF ECONOMICS

Personal services	Number of positions		
	Fiscal year 1970	Present number of employees	Increase re- quested, fis- cal 1972
Office of the Director.....	38	37	1
Division of Economic Evidence.....	27	26	4
Division of Industry Analysis.....	29	27	4
Division of Financial Statistics.....	37	36	20
Total.....	131	126	29

INTRODUCTION—DIVISION OF INDUSTRY ANALYSIS

Personnel requirements with respect to the Division of Industry Analysis arise in the context of a research program designed to provide the necessary information and analysis associated with problems of policy planning and evaluation. These programs are designed first and foremost to assist the Commission in the implementation and development of competition and consumer protection programs. They are designed also to provide Congress and other interested Government agencies with information suitable for consideration of legislative and administrative reforms with respect to Government policy towards business. Below we indicate the highlights of our research programs projected for Fiscal Year 1971.

PROJECTED PERSONNEL REQUIREMENTS—FISCAL YEAR 1971

PLANNED RESEARCH PROGRAM

Item I. Maintaining Competition.

A. Effect of Conglomerate Mergers. This project is a follow up of our research program studying trends and patterns of conglomerate merger activity. A major part of the Division's resources in 1970 will be devoted to carefully de-

lineating the structural consequences of current merger movement and various key financial and performance characteristics of merging firms, including an in-depth review of nine large acquirers. In 1971 a follow up review will involve focusing on certain key industries whose over-all level of concentration (at the 2-digit level) has increased as a result of mergers, to determine what changes in performance characteristics might be associated with these structural modifications. Among the questions to be considered are: Do conglomerates spend less on research and new investment because of their emphasis on merger activity? Are there any advertising or product promotion advantages for conglomerate firms? Do conglomerates practice widespread reciprocity?

B. Studies of Major Concentrated Industries. Though a strong and well developed merger policy may be effective in preventing the emergence of inadequately competitive industries it has relatively little impact on industries which are already highly concentrated. Such industries may represent instances of significant departures from competition but currently are only sporadically the object of active antitrust enforcement programs. It is therefore useful to determine in what way the balance of antitrust enforcement might be shifted to impinge more directly on persistent competitive trouble spots in the economy. The Bureau has therefore proposed a long-term research program which would focus on a series of highly concentrated industries, long recognized to be ones in which competition is weak. The first industry to be examined in this program is the steel industry. Initial research would be undertaken in 1970 as soon as personnel can be shifted from the conglomerate study. The full program however is not likely to be implemented until 1971 at which time we plan to allocate five professional economists on a continuing basis.

C. Industrial Behavior and Market Structure. Recent research in the Bureau of Economics has indicated that there are divergent trends in concentration in the manufacturing sector of the economy. Most notably consumer oriented industries have on the average experienced increased concentration while producer industries have experienced decreases. To better define our understanding of the relationship between industry structure and performance it is useful to examine these two groups more carefully. If we can determine what key variables operate to modify industry structure and what their consequences for performance are we can better plan the priority and method of implementation of antitrust policy designed to maintain competition.

D. Advertising and Promotion Practices. Preliminary studies mentioned in C above indicate that product differentiation is an important variable in affecting long-term changes in market structure. Similar conclusions are indicated on the basis of our experience in relation to litigated cases. It is appropriate therefore to analyze more carefully factors contributing to effective product differentiation. Of particular concern are current advertising and promotional practices as they have developed in the context of the use of television and other mass circulation media and the multi product diversified firm.

Item II. Consumer protection

A. Affirmative Disclosure. The Commission recently directed the Bureau of Economics, in cooperation with other bureaus to implement a program of affirmative disclosure with respect to petroleum products. This is the first part of a program designed to encourage advertising and product promotion efforts which provide consumers with usable information on the quality and performance characteristics of products they purchase. This is a continuing program which will supplement our efforts to prevent deceptive advertising.

B. Truth in Lending. Still another aspect of affirmative disclosure is the requirement that borrowers be fully informed with respect to costs of borrowing. We anticipate a continuing role in assisting in the planning and implementation of our truth in lending program and stand ready to provide assistance in determining priorities.

C. Home Improvement. In the past several years we have been involved in a variety of ad hoc studies focusing on trouble spots from the standpoint of consumer protection. Which trouble spots should receive attention is always a difficult question. New problems continually emerge and the Commission's knowledge

of these problems develops accordingly. One area of current concern is the home improvements industry. Home owners appear to suffer from flagrant deceptive selling practices, exorbitant loan fees, etc. This is an industry of considerable size and a recent Presidential report on consumer affairs indicated that social welfare losses due to unfair competitive practices were very large. We propose therefore to undertake to analyze this industry and to attempt to determine what steps should be taken to improve performance.

Item III. Special and Statistical Reports.

A. Trends in Mergers. For some years the Federal Trade Commission has been looked to as a principal reliable source for data on trends in merger activity. In the past year we issued two special statistical reports on this topic and plan to maintain this program in the future as it is the principal element in our monitoring program to determine merger enforcement priorities.

B. Program Planning and Special Projects. Experience indicates that this area of the Division's operation regularly absorbs the largest portion of available manpower. Specific activities include: special ad hoc projects at the request of the Commission and at the request of other bureaus of the Commission involving the development and planning of enforcement programs; advisory assistance to individual commissioners on pending matters; analysis regarding economic implications of proposed legislation; preparation of testimony evaluating legislative proposals and evaluating information for such proposals. Though special projects other than those associated with the conglomerate study are currently sharply curtailed we are still involved in such things as: evaluating current trends in Webb-Pomerene activity, updating and revising the auto warranty program, and reviewing recent merger activity in industries affected by announced merger guidelines. These types of activities are a regular and continuing part of the Division's functions.

A COMMENT ON PRIORITIES

Implementation of the Division's planned research program for 1971 is conditional on two important considerations: (1) whether the total volume of personnel indicated in the attached table is in fact available and (2) whether the manpower requirements for special projects turns out to be reasonably accurate. In the past, personnel availability has been inadequate to maintain a large scale planned research program. Manpower limitations and the demands of special projects have caused us to sacrifice a number of planned programs. In general it is research that has a longer term and therefore less certain payoff with respect to antitrust enforcement that has been sacrificed. Projects of similar types would be sacrificed in the future given a shortage of personnel. In the 1971 budget these projects would include those listed under IC and D and IIB. The most important projects within our planned program for 1971 include Items IA and B and Item IIIA. Importance here is used to connote immediacy of impact with respect to short run policy formulation. From a long run standpoint, understanding the characteristics which condition structural changes in industry (Items IC and D) is very critical in evaluating antitrust enforcement priorities. However, since our first function is to assist in the planning and priorities of existing or new policy programs, our long-term research function must take second place.

The estimates attached are minimum estimates to perform the range of activities indicated. For example, projects IC and D as listed would involve each one economist and an assistant. These studies are quite complex and additional staffing of two to three senior level economists would be desirable to assure completion within a year. The estimate of eight economists for special projects also is conservative. Currently, half of our staff is involved in special projects at a time when we must sharply limit the range of subject and function coverage. We have never been able to engage in a full range of service activity for other bureaus to assist in planning and priority development, despite the fact that most of our staff work on such projects a good part of the time. To assume both a full service function within the Commission while maintaining effective long range research the Division of Industry Analysis could use a staff of between 40 and 50 professional economists.

TABLE 1.—PROJECTED MANPOWER REQUIREMENTS FOR DIVISION OF INDUSTRY ANALYSIS—FISCAL YEAR 1971

I. Maintaining Competition	
A. Mergers—Conglomerate impact of mergers on industry performance-----	5
B. Studies of major concentrated industries-----	5
C. Industrial behavior & market structure-----	2
D. Advertising & Promotion practices-----	2
II. Consumer Protection	
A. Affirmative disclosure-----	2
B. Truth in lending-----	2
C. Home improvements-----	2
III. Special and Statistical Reports	
A. Trends in mergers-----	3
B. Program planning and special projects-----	8
Total-----	31

DIVISION OF ECONOMIC EVIDENCE

During fiscal 1971 the Division of Economic Evidence will continue to concentrate about three-fourths of its manpower allocation on providing economic assistance to the legal bureaus and divisions in connection with investigation and trial of cases, as well as in the development and evaluation of economic data and preparation of studies related to actual or potential case questions. In addition, portions of the staff will be drawn into the Bureau's conglomerate merger project and the concentrated industry studies. The proportions may shift as time goes on, particularly as non-public hearings are held in connection with takeovers, and as detailed analysis is made of the special studies of nine large conglomerate firms.

Very heavy burdens are placed upon the staff of this Division because of the more than four-fold increase in the level of merger activity which has occurred during the past three years. It is also anticipated that in fiscal 1971, as the Bureau expands its studies of concentrated industries, the staff of the Division will be called upon to assist in such studies.

ACCOMPLISHMENTS, FISCAL 1969

About one-half of the Division work in this year was devoted to studies and reports with the remaining half given over to case work, both investigational and formal. The principal report published was on Games of Chance. Other reports prepared for staff use concerned acquisitions in the fertilizer industry and in the automotive parts industry. Studies include work on textile guidelines and identification of significant mergers. The biggest analytical job, however, concerned the study of conglomerate mergers which is continuing. Our best estimate is that approximately nine man-years were allocated to the above studies and reports in fiscal 1969.

Case work consumed the remainder of the Division's work time. The more important cases alleged violations of Section 7 of the Clayton Act and concerned firms in the cement industry, the automotive parts industry, and the coal industry.

At the investigational levels, acquisitions in the bearings industry, the food manufacturing and processing industry, the textile mill products industry and the apparel industry were among the more significant. Work was also done on compliance matters, covering the dairy industry and the coal industry among others. The Division's staff also devoted substantial time to Section 5 matters in the investigational stages and to working with the Bureau of Industry Guidance. Our best estimate would allocate about four man-years to Section 7 case work; approximately three man-years to Section 5 investigational work; and two man-years to working with Industry Guidance and miscellaneous work.

Within the Bureau of Economics, the Division of Economic Evidence has the primary responsibility for the Pre-merger Notification program. Preliminary experience with that program clearly indicates that at least two professional

people must be assigned. The Division's work under this program divides into two rather well-defined tasks. The first task is that of handling the day-to-day administrative work. Professional competence is needed here because many, if not most, of the queries from firms concern technical problems, such as SIC classification, definitions of sales, revenues, etc.

The second task involves the preparation of summaries and analyses from the data received. Here, professional competence is a requirement, since the data must be analyzed, summarized and presented in a manner that will maximize its usefulness, both for economic studies and for enforcement use. With the planned consolidation of the cement and food distribution merger reporting programs into the Pre-merger Notification project, the necessity for additional personnel becomes urgent.

But our preliminary experience with the Pre-merger Notification project is patently inadequate as a basis for forecasting man power needs for 1971. As yet, we have had no experience with refusals or defaults. We have not yet been able to correlate our work of listing mergers from published sources with the Pre-merger project, so as to spot incipient defaults. Nor have we had the time or personnel to prepare individual reports, showing market shares, entries and exits, etc., that could be used for case work. To achieve optimum value from the Pre-merger Notification program, the Division needs a permanent group to assure efficient summary and analysis of data received so that those data may be readily available in useable form to the Divisions of Mergers, and of General Trade Restraints in the Bureau of Restraint of Trade, as well as to the Division of Industry Analysis in the Bureau of Economics. Additionally, the program must be so administered and the records it generates so kept that the General Counsel's staff can have a sufficient basis for preparing for default proceedings, which surely will arise. Inadequate handling of the Pre-merger Notification project in its infancy can vitiate its usefulness.

It should also be emphasized that the marked rise in large mergers of the conglomerate type in recent years requires sophisticated probing and analysis by the staff of the Division of Economic Evidence, particularly since the recent turn in enforcement activity requires an alert staff of well trained economists, well versed in the theory of competition, which can formulate techniques through which meaningful and pragmatic analysis may provide important links between growing aggregate concentration brought about by conglomerate mergers and the structure, conduct and performance in particular markets. This is especially crucial where mergers involve the amalgamation of firms with leading positions in highly concentrated industries.

The Division's staff, already the smallest in the Bureau, and much smaller than that of the Division of Mergers, should be enlarged if conglomerate mergers are to be adequately analyzed. We, therefore, request at least four additional professional staff members for more extensive Section 7 analytical work and the programing of the Pre-merger Notification program.

ADDITIONAL PERSONNEL FOR FISCAL 1971

The Division in fiscal 1969 had 26 full-time employees and one part-time. Of the full-time employees 18 are professionals and 8 clerical. For fiscal year 1970 the same number of employees, namely 27, were allocated to the Division. As indicated above, our request is that 4 new professional employees be added to our allocation for fiscal year 1971 in view of the increasing responsibilities, particularly in connection with the pre-notification program, bringing the total professional employees in the Division to 22 which, added to the 8 clerical employees, would bring the total to 30. In addition, one part-time employee would be on the staff.

DIVISION OF FINANCIAL STATISTICS

One of the important missions of this Division is to make available to the Commission and to the public more and better statistical information about the structure of American industrial corporations. A significant step toward achieving this mission would be to centralize in the Division of Financial Statistics the reporting program now divided between FTC and SEC. This is the Division's request for fiscal 1971.

There are 87 multi-billion-dollar manufacturing corporations, according to the most recent FTC-SEC quarterly report. These 87 own nearly half of the total assets of all corporate manufacturers. Of the 569 firms which now own nearly three-fourths of all corporate manufacturing assets, 524 report to SEC and 45 to FTC. While FTC obtains each quarter information as to the ownership, sales, product mix, profitability, and the like of all large privately-owned manufacturing corporations, it does not have similar data for large publicly-owned firms.

Approximately 8,300 firms now report to FTC in the FTC-SEC quarterly financial reporting program. If the 2,541 firms which report to SEC were to report instead to FTC, economic information not heretofore available to FTC could be developed for use on a continuing basis. Such centralization, which would be extremely valuable to the Commission in improving investigational planning and deploying its resources, can be accomplished at a cost not exceeding 20 man years. Because of the need for this information and the very high rate of return of essential data at relatively low cost, this project should be given high priority, both in the Bureau's and Commission's budgets for fiscal 1971.

MEMORANDUM

FEDERAL TRADE COMMISSION,

May 19, 1969.

Subject: Appropriations request for fiscal year 1971. In re: Preliminary ideas and plans of the bureaus and offices.

To: The Commission.

From: Paul Rand Dixon, Chairman.

I recently distributed to the Commissioners the preliminary plans of the staff for the 1971 Appropriation request. The Commission by Minute of May 13, 1969, directed that meetings with the staff be scheduled for the latter part of June in order to discuss this matter.

It would be of great benefit to the staff in preparing for such meetings if the Commissioners would review the staff proposals and submit within the near future their views on such proposals so that the staff would have a reasonable time before the discussions to study the various views and could be responsive thereto at the time of the discussions.

We operate under strict time limitations fixed by the Bureau of the Budget in submitting to the Bureau our budget requests. I would hope that after the above discussions with the staff the Commission would then give the staff definite instructions for the preparation of the final draft of the budget request.

For your information, there is attached hereto a copy of my memorandum of March 20, 1969, requesting the preliminary plans from the bureaus for the 1971 budget.

PAUL RAND DIXON, *Chairman.*

MEMORANDUM

FEDERAL TRADE COMMISSION,

March 20, 1969.

Subject: Your ideas and basic plans for the fiscal 1971 budget.

To: Bureau directors and office heads.

From: Paul Rand Dixon, Chairman.

Improved investigational planning can help the Commission deal with trade regulation problems ahead of time, and it can place in better perspective the principal issues involved in how we deploy our resources. In some past years, however, the Commission has not had enough time allowed in the budget process to fully weigh the staff budget requests. In the main these staff justifications have been submitted to the Commission close to the deadline for forwarding the total Commission budget to the Budget Bureau.

To remedy this situation and to allow the Commissioners more time to size up your upcoming budget proposals, you are requested to prepare forthwith a basic planning document for your bureau (or office) covering the *major* investigations and other significant projects that you plan to undertake and justify in your budget request for fiscal 1971. Please hand in your program memorandum to me, via the Executive Director, by April 25, 1969, and try to keep the length of these documents down to around ten pages.

I want to stress that your statement should focus primarily on what you are going to do—limited by divisions to your six to ten most important projects—rather than on personnel requests. The Commission will appraise your investigational plans and make some decisions with respect to your proposed projects, and then you can proceed to detail and formalize your budget presentation and staff needs.

Investigational planning is not necessarily an attempt to improve operating efficiency, because doing the same old things more efficiently overlooks the point that more important things could be done. Your response memorandum should concentrate on the question that follows: What should you be doing that you are not doing? On this issue projected into fiscal 1971, you are asked to consider these questions:

(1) Are there any significantly monopolistic, anti-competitive, consumer deceptive or noncompetitive practices, structures or other phenomena which have not been but should be challenged?

(2) Identify such phenomena, analyze them economically and legally, and indicate in what industries they are present and to what extent or degree. If you

do not know the answer or complete answer to the question as to prevalence and degree, in what industries, analytically and by inference, are they likely to be found?

(3) What is necessary by way of interpretation of existing law to successfully challenge such phenomena?

We are aware that some of our resources will have to be used to investigate matters reported by outside complaints during fiscal 1971, or to probe huge mergers that occur during that period which we cannot now predict. Nevertheless, there is still considerable room for you to plan some important investigations that far ahead on your own initiative. Investigational planning does not mean processing and rearranging complaint letters for staff attention.

I will give you a few examples of investigational planning of resource uses for budgeting purposes independent of outside complaints. In the trade restraints area, the staff could scan the industry landscape of the economy to identify major industries whose structure and performance predispose them to price fixing or price discrimination or other illegal practices. Compliance investigations of significant orders could be planned in important product lines. In the deceptive practices field, heavy advertising outlays for various consumer-oriented products by large national advertisers provide some clues for planned investigations. Consideration should be given to ways and means for identifying problem areas.

The program memorandum that you present should take into account the foregoing planning guide lines and cover the following ground:

(1) Each bureau, division, and office should assume initially that it will have the same funds for fiscal 1971 as it has for the instant fiscal year. The program memorandum should provide a list and brief defense of each major project to be (a) continued and (b) started during fiscal 1971. In addition, projects should be included and so identified which would be added if a 20% increase were allowed in the budget for the bureau.

These projects should be arranged in the program memorandum on an industry basis and in order of priority, along with a brief note on the nature of the problems, the objectives of the project, its estimated dollar and manpower costs and the target date of completion. To afford the Commission more choice in deciding on its resource commitments, for each major project proposed the staff program memorandum should provide a similar brief statement on the next best alternative.

(2) The Bureau Director should consolidate and *evaluate* the division proposals.

This mechanism as outlined could provide the Commission with a timely and more rational basis for planning its annual program. There would be presented on a priority basis the major planned projects and their costs as well as the results of increases or decreases in budget funds.

PAUL RAND DIXON, *Chairman*.

MEMORANDUM

APRIL 30, 1969.

Subject: Ideas and plans of the bureaus and offices for fiscal 1971.

To: Chairman.

From: Executive Director.

Your March 20, 1969 directive instructed the bureau directors and office heads to inform you via my office of the major projects they intend to start or continue during fiscal 1971. I now have their replies which are attached herewith. I am also attaching a memorandum concerning these plans that I requested from the Office of Program Review.

I have examined the staff program memoranda and recommend their early presentation to the Commission. The staff plans can provide the Commission with a basis for shaping the direction and dimensions of our fiscal 1971 budget request. The Commission deliberations on these tentative staff plans can produce a useful set of Commission instructions that the staff would carry out to strengthen their formal budget proposals.

JOHN N. WHEELock,
Executive Director.

MEMORANDUM

APRIL 30, 1969.

Subject: Program evaluation of plans and projects proposed by the bureaus and offices for fiscal 1971

To: Executive Director.

From: Office of Program Review.

Pursuant to your verbal request of April 29, 1969, and in line with the program review function, this report comments on the plans and projects presented by the bureaus and offices in reply to the Chairman's March 20, 1969 instruction. The staff program memoranda are returned to you herewith along with a copy of my April 3, 1969 policy planning memorandum.

The essence of planning is to see opportunities and threats in the future and exploit or combat them as the case may be. Planning is choosing among alternative proposals for committing limited resources. The foundations of an organizational planning effort are the basic purposes of the organization, the specific objectives to be sought and planning studies of the economic environment.

To focus on primary objectives, the Commission needs initially to settle on a program structure. An adequate program structure, as outlined on the next page, must serve a dual purpose. It must be meaningful in terms of national goals; it must also function as a basis for the efficiency of Commission operations. To serve this dual purpose, it follows that a hierarchical program structure is required. Major programs must be identified with national goals and then broken down into significant sub-programs. At the bottom of the program structure pyramid, subprograms may be analysed in terms of dollars costs and some quantifiable results. The further up this pyramid one goes, the more difficult any precise quantification of outputs becomes.

A PROGRAM STRUCTURE OF THE FEDERAL TRADE COMMISSION

I. Maintaining competition

- A. Prevention of Unlawful Mergers
- B. Prevention of General Trade Restraints
- C. Prevention of Unlawful Price Discrimination

II. Consumer protection

- A. Prevention of Deceptive Practices
- B. Prevention of the Sale of Flammable Fabrics and Misbranding of Textile, Wool and Fur Products
- C. Fostering Business Self-regulation through the Issuance of Rules, Guides and Advisory Opinions

III. Economic research and program development

- A. Economic Fact-Finding Studies of Industries and Competitive Conditions
- B. Continuing reporting program on Manufacturing Industries

IV. Executive and administrative support

A. Executive Direction and Program Review

B. Financial and Administrative Management

There follows now some brief comments on the staff plans and proposals discussed within the indicated program framework:

I. Maintaining competition

The Bureau of Restraint of Trade report did not evaluate the division plans or rank priority projects considered from a bureau standpoint. For improved planning by major objectives, we need to get away from thinking in terms of Division involvements. The bureau memorandum did not coordinate and consolidate projects in different divisions dealing with the same industry and evaluate them as a whole.

On the division level, the Merger Division to its credit identified its priority projects, apparently on the qualitative basis of its experience and know-how. But it at least made a judgment and provided the Commission with some choices. The two listed highest priority industries for merger enforcement are grocery products and automotive parts.

I take issue with the relatively low priority given by the division to merger enforcement in the lumber and building supplies field. The Merger Division states that it has deferred investigations in these lines due to lack of resources. Considering the 30% rise in wholesale price of lumber in 1968, and the national goal to contain inflation, it seems mandatory that the merger staff get on at least the largest lumber consolidation and divert its staff now on non-priority projects.

The Merger Division planning memorandum did not state its investigational perspective on conglomerate mergers. Hardly any of the new conglomerates come close to the size and financial power of such long-standing conglomerates as General Motors, du Pont, and General Electric, as pointed out in the attached analysis by the program review office. How is the merger staff winnowing out the truce chaff among conglomerate mergers?

In the general trade restraints area, the reported top priority matter is the reciprocity project that involves several basic industries such as chemicals and paper products. But the division report did not make any proposal for a new investigation in fiscal 1971. This division did indicate interest in developing new planned projects by means of a joint legal-economic nucleus force to investigate and hold hearings in some industries that have structures conducive to trade restraining practices. I suggest the formation of at least one such unit in fiscal 1971, possibly covering a major joint venture in iron and steel. The Bureau of Restraint of Trade could create some elbow room for planned projects in the general trade restraints area by directing the weeding out of division projects that involve respondents with less than \$100 million assets.

In the discriminatory practice area, the division program memorandum proposes a new investigation in the appliance industry against induced discriminations advantaging large department stores, and I endorse this move. I have some reservations, however, about the division proposal aimed at retailer-owned co-operatives obtaining preferential prices from hardware manufacturers. This project reflects a complaint-letter orientation involving relatively small respondents.

Possibly some trade restraints staff might be used to advantage during fiscal 1971 in a planned project designed to curtail illegal practices that derive from financing by large manufacturers of inventory purchases and expansions of their franchised retailers and other customers. In a recent novel Supreme Court ruling the decision held that tie-ins of credit availability and product purchases are illegal on their face when a large manufacturer is able to make credit available to customers on more favorable terms than other competing manufacturers. The decision remanded to a Federal court a private treble-damage suit brought against U.S. Steel by a Louisville home-building concern.

But the program review role does not involve proposing specific *ad hoc* projects on short notice. The basic efforts of this office have been devoted to developing a planning system to put Commission planning on a more systematic basis. The bureau program memoranda should include, however, some inquiry as to what is next on the periphery of the relevant law it enforces. Then it could propose a challenging project that might push back the frontier of the law and make Commission action timely and effective.

II. Consumer protection

We understand that there are serious initial problems in establishing planning procedures in a bureau with expanding diverse responsibilities such as Deceptive Practices. The bureau planning memorandum contains a general statement on consumer problems and the bureau's role in mounting a consumer protection program. Neither the Bureau of Deceptive Practices nor Restraint of Trade, however, specify its six to ten bureau-wide priority projects to enable the Commission to determine the Commission's main strategy directions.

The planning document of the deceptive practices bureau notes (page 8) that a large majority of bureau resources are committed to "mandatory projects", such as the Fair Packaging and Labeling Act and so on. The statement seems to infer, and perhaps this inference is not fully warranted, that such mandatory commitments preclude planning. But even in such areas as packaging, industries and products must be selected for surveillance and legal actions by scarce manpower resources on the basis of some rational plan.

In food and drug advertising, new programs are proposed in such product lines as breakfast cereals, stimulants, and tranquilizers. In the general practices division area, the submittal supplies a listing of ongoing matters and no new projects. To make a rational judgment on committing resources to a particular project, however, the decisionmaker needs concrete information on what it will cost, what it will accomplish, how long will it take, and what is the magnitude of the relevant industry and the size of the proposed respondents.

As a way to strengthen planning in the deceptive practices field, the bureau might increase the use of doctors and borrow economists to serve on its planning unit in determining new investigations to start. To concentrate more of its legal staff resources on significant projects, economic tests should be used increasingly in opening new projects, such as, the size of the proposed respondent and the volume of product advertising. Priorities would be set for deceptions that pose serious threats to consumer health and physical safety and for the practices of large corporations. As a constructive proposal for fiscal 1971, the bureau and the Commission might consider investigating over-the-counter drug advertising in sleeping aids and cough preparations.

In the textile products area, the Commission should direct a substantial shift of its resources away from labeling inspections to affirmative investigations that could ascertain flammable fabrics violations using a large sampling of manufacturers. Existing staff resources could cover the entire universe of the textile industry by adopting scientific sampling techniques. The program memorandum of the Bureau of Textiles and Furs proposes projects on such practices as passing off dyed mink garments as natural and passing off used fur garments as new. These inspection projects warrant low priority as long as there are violations prevalent that involve the protection of life and the access of low income consumers to basic necessities priced above the competitive level.

In the industry guidance sector of the consumer protection field, the Commission now faces a frontal decision on whether or not to de-emphasize the hand-holding of business. Has the pendulum swung too far in the direction of non-litigation and consent settlements without divestiture or with divestiture of the respondents' least economic plants (Long Star Cement)? However, the program memorandum of the Bureau of Industry Guidance is useful and responsive to the Chairman's directive. New programs and public hearings are proposed to develop rules or guides in such lines as price advertising of automobiles and advertising of franchise offers—areas where antitrust complaints could be issued against the largest producers.

Turning now briefly to the General Counsel's program memorandum, we recognize its principal function as a legal support unit. Nevertheless, some worthwhile new projects could be planned in areas of new legislation, export trade and federal-state relations. To use an example, the General Counsel could open at least one investigation to determine whether the acts of an export association is in restraint of trade within this country or illegally depresses domestic prices of commodities of the class exported. The legislation staff could also plan to overcome some loopholes in existing Commission-administered laws or devise a new law to cover grey trade regulation areas such as refusal to deal.

III. Economic Research and Program Development

Except for omitting cost estimates of proposed economic projects, the economics bureau program memorandum appears responsive to the Chairman's request. New projects for fiscal 1971 to develop policy recommendations include economic studies of major concentrated industries: steel, automobiles, drugs, electrical machinery, energy industries and chemicals.

In addition, the economics bureau makes a basic proposal for centralizing the financial reporting program, now shared with the SEC, in the Federal Trade Commission. The program review office recommends that the Commission approve this proposal. Among its advantages, it would provide this Commission with critical information on a continuing basis covering quarterly changes in concentration in the major industries, as well as annual changes in who controls the largest corporate manufacturers.

IV. Executive and Administrative Support

In my memorandum of April 3 to the Chairman, I analysed the economic forces that are pertinent to policy planning. That report indicate that competition has undergone a mutation. The essence of the mutation, caused by concentration and other indicated economic trends, is the ability of producers in some spheres of production to affect prices. Then the report presented an investigational planning framework for the Commission based on Commission-initiated industry analyses.

JOHN J. HURLEY, *Economist.*

MEMORANDUM

APRIL 25, 1969.

Subject: Ideas and basic plans for fiscal 1971 budget.
 To: Chairman, via Executive Director.
 From: Bureau of Restraint of Trade.

Forwarded herewith are memoranda from each of the divisions of this Bureau pursuant to the Chairman's memorandum of March 20, 1969, dealing with significant projects planned or proposed for fiscal 1971.

With respect to the coverage of the submissions by the Bureau's three enforcement divisions, we would make certain initial observations: (1) A substantially complete critical survey of the universe of mergers (at least of the larger mergers) over a given time period, is accomplished in the conduct of section 7 enforcement, providing a readily usable basis for comparative evaluation of competitive impact in different industries and marketing environments related to particular acquisitions, mergers or merger trends. (2) In the instance of practices not similarly available to roll call, nor involving the same essential evaluation criteria for legal as well as planning of budget justification purposes, different considerations obtain. When the existence of particular unfair methods of competition are reasonably indicated, a number of other and separate criteria for planning purposes, not necessarily critical to the issue of law violation, must additionally be developed and evaluated, e.g., of what significance is the existing practice relative to the overall competitive situation within the affected industry? How debilitating to competition is the practice and what is the extent of its employment and range of effects? Is the practice one which if not dealt with at an early stage is likely to occasion a more costly confrontation later? What would be the consequences in particular markets or industries upon a failure or refusal on the part of the Commission to take any action? Accordingly, the projects of the Division of Discriminatory Practices and General Trade Restraints are differently derived and developed and do not rest upon a completely comparable basis as those originating in the division of Mergers. (3) Commission directed major projects in the non-Section 7 statutory areas comprise a large part of the manpower commitments of the Divisions of Discriminatory Practices and General Trade Restraints. Such matters have been separately reviewed and evaluated by the Commission relative to their significance and merit, and are noted herein only insofar as they represent commitments extending into or beyond fiscal 1971.

The Division of Mergers lists eight major projects, by industry, looking to containment of illegal mergers and acquisitions, in order of priority, as follows: Grocery Products; Automotive Parts; Cement; Commercial and Industrial Equipment, Machinery and Supplies; Metals, Minerals and Mining; Lumber and Building Supplies; Apparel; and Paper and Paper Products.

Enforcement on a case-by-case basis is the general practice and the continuing course proposed by the Division, characterizing industrywide enforcement programs pursuant to declared industry enforcement policies, where applicable and appropriate, as the "next best alternative." Such industrywide enforcement policies have been promulgated by the Commission for the cement and food distribution industries.

The economic and competitive significance of each of the foregoing industry projects is discussed in the Division's memorandum. Each is a project of indefinite commitment but definitely projecting beyond fiscal 1971.

In addition to these industry projects, the Division has significant work commitments in connection with the conglomerate merger study and for conduct of the new program for pre-merger notification by large corporations. Seventy-one pending investigations under the "miscellaneous" and "non-priority" classification, may be expected to commit additional manpower in fiscal 1971. Such industries as Insurance, Department Stores or Mobile Homes, could well require priority consideration by or before fiscal 1971, as well as areas not now under investigation.

Present manpower limitations within the Division of Mergers has required a degree curtailment or deferral of action with respect to matters in the Automotive Parts, Apparel, Cement and Lumber and Building Supplies industries.

With respect to estimated manpower and dollar costs as estimated by the Division of Mergers, as well as the other divisions within the Bureau, a formula has been used equating 1 man-year with 1800 hours, and with an estimated "average" man-year dollar cost. The Commission's Comptroller suggested this

formula to the Bureau based on past Commissionwide over-all averages. The average man-year dollar cost figure suggested by Mr. Glendening however, as applied to this Bureau, appears to us to be extremely low. Each of the divisions has used the suggested man-year cost figure of \$13,000, with the exception of the Division of Discriminatory Practices which used an average man-year dollar cost figure of \$20,000. Without any presently known data as to the actual average man-year dollar costs applicable to this Bureau, the estimates of man-year commitments only are noted by the Bureau for purposes of this memorandum.

The Division of Discriminatory Practices identifies four major projects which will carry over to fiscal 1971, instituted at Commission direction. These involve Apparel, Fresh Fruits and Vegetables, Tri-partite Arrangements and the Publishing Industry. A total manpower commitment of 12 man-years in carrying out these projects is estimated for fiscal 1971 by the Division. An additional 2 man-years is projected for work in the Drug Industry in connection with the alleged diversion of institutional and professional drugs to commercial channels, responsive to recommendations by the House Select Committee on Small Business.

Among the other existing and proposed major projects of the Division of Discriminatory Practices, are several which are essentially "power-buyer" oriented. The substantial manpower commitment in connection with the distribution of food products in the Chain Grocery Industry is considered fully warranted. It is the Bureau's view that the intensive anti-merger program with respect to Grocery Products requires an equally intensive anti-discrimination program to maintain effective competition in this industry, with particular emphasis on discriminations in price and promotional payments induced by the major grocery chains. This is true also of the Division's going project in the Dairy Industry.

The Division proposes a new major investigation of the Appliance Industry, involving both manufacturer and private brands of major home appliances, with special emphasis on "power-buyer" induced discriminations such as discriminations advantaging major department store chains. The Bureau recommends a separate limited investigation directed to the top department store chains to explore the extent and nature of discriminatory advantages in price and promotional allowances obtained by them in the purchase of manufacture-brands of consumer products. Another area in which effective competition in consumer goods may be threatened by concentrations of buying power, encouraged and fostered by discriminations in price, is the Hardware Industry. The Division has proposed a new major investigational project here. With the Commission's growing emphasis on consumer protecting programs, a substantial manpower commitment to these proposed areas for fiscal 1971, is believed warranted.

The Division of General Trade Restraints also has substantial manpower commitments in fiscal 1971 as a result of Commission directed major projects. Among such projects listed in the Division's memorandum are: investigations involving "Reciprocity" by major industry factors in the designated industries, requiring a 3 man-year commitment according to the Division's estimate; investigation of the Hearing Aid Industry, involving an estimated 3 man-year commitment; the Newspaper Industry with an estimated 4 man-year commitment; TV advertising, involving no specific commitment; attempted monopolization of multi-media advertising in the Washington area, estimated by the Division to require 2 man-years; and, the LP Gas Industry, with an estimated 3 man-year commitment.

In addition to these, the Division is undertaking an investigation of the Record Industry pursuant to Commission Minute, focusing particularly on the possible foreclosure of new entry due to acquisitions of record distributors by major producers of records, which will, in the Bureau's opinion, require the full-time efforts of at least two attorneys through fiscal 1971. Additionally, a major industrywide investigation has been directed by the Commission relative to the anti-competitive effects of "confinement" programs by concerns engaged in the manufacture, distribution and sale of man-made and natural fibers. The Bureau would estimate that this will require at least a 3 man-year commitment by the Division in fiscal 1971. The total indicated manpower commitment by the Division with respect to Commission directed projects amounts to 20 man-years.

An estimated 2 man-year commitment in the Petroleum Coke Industry is conditioned upon the Commission's determination with respect to a pending recommendation for complaint, involving several major industry factors.

The Division of General Trade Restraints does not supply specific new major project proposals in its attached memorandum, leaving open, in particular, the subject of non-competition in high concentration industries. This was a subject discussed, however, in a recent memorandum from the Division dated March 25, 1969, on the subject of "Planning of New Investigations." Whether in the form of a "test case" proceeding, challenging the monopoly price level existing in a high concentration industry of comparatively manageable proportions such as the consumer-goods breakfast cereal industry (involving, primarily, "product differentiation" as a barrier to new entry), or in connection with the problem of non-competition in high concentration producer goods industries such as steel, the Bureau believes that a substantial project commitment to explore the reach of Section 5 of the Federal Trade Commission Act to possible coverage in this area should be allocated within this Division for fiscal 1971.

The Division of Compliance, in its memorandum, notes that, with respect to the suggestion that compliance investigations might be planned along important product lines, compliance-check investigations with respect to virtually all old Section 5 orders was undertaken some years ago and is now relatively complete. A similar program in the Robinson-Patman area will perforce be limited by the fact that in only a few industries is there extensive order coverage.

The work commitments of the Division of Compliance are largely governed by the kinds and numbers of orders issued by the Commission. Section 7 orders involving divestiture, Commission approval of future acquisitions, special restrictions and, frequently, requests for advice, provide the one statutory area of greatest work commitment. The Division, however, carries a heavy per-man case load in both the Robinson-Patman and Section 5 areas.

The Division of Compliance advises that additional manpower, if made available, would be used to expedite the handling of cases through expanded use of investigational hearings. Increased opportunity to make on-the-site interviews and inspections would also be permitted, cutting down present reliance on respondent information in Section 7 matters. Further compliance investigations on a statutory basis, checking compliance on outstanding vertical price fixing orders for example, or by selected industry, as in the Tobacco, Automotive Parts or Dairy Industries, also will depend upon additional manpower availability.

As noted by the Division of Accounting, that Division is primarily a service organization and its workload depends upon the activity of the other Divisions. Extensive recourse to accounting assistance is contemplated in the conduct of a number of the projects proposed by the Divisions of Discriminatory Practices and General Trade restraints hereinbefore noted.

Respectfully submitted.

BARTLEY T. GARVEY,
Program Officer, Bureau of Restraint of Trade.

Approved.

WILMER L. TINLEY,
Acting Director, Bureau of Restraint of Trade.

MEMORANDUM

APRIL 11, 1969.

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.
Attention: Bartley T. Garvey, Program Officer.
From: William J. Boyd, Jr., Chief, Division of Mergers.
Subject: Program plans for fiscal 1971 budget.

This is our response to your memorandum of March 24, and the Chairman's directive of March 20, subject as above.

Substantially all of the activities of this Division are directed at enforcement of Section 7 of the Clayton Act on a case-by-case basis through investigations and if necessary, litigation of proposed and consummated merger transactions.

The "next best alternative" to this approach, where applicable and appropriate, in some form of cooperative, industrywide enforcement program such as that promulgated by the Commission for the cement and food distribution industries. The advantage of such industrywide programs lies in an expected reduction in the number of litigated cases to be processed by the Division, plus the voluntary abandonment of numerous contemplated acquisitions by industry members as a result of the announced proscriptions laid down by the Commission in its various enforcement policy statements.

With respect to the requirement "what should you be doing that you are not doing" a brief comment regarding suggested new legislation appears appropriate. In other memoranda and reports this Division has suggested that Section 15 of the Clayton Act be amended to authorize the Commission to seek temporary and preliminary injunctions against apparent violations of Section 7, in the same manner now authorized for U.S. Attorneys. Our experience since the Supreme Court's decision in the *Dean Foods* case indicates that the power to challenge proposed mergers before they are consummated is a powerful tool, and would be of inestimable value at the present time when involuntary "raiding" or takeover of one corporation by another is becoming commonplace in the business community. If the Commission were on the same footing with the Department of Justice in this instance, the Division of Mergers would often have available the valuable cooperation and assistance of the officers of a corporation being unwillingly acquired, and enforcement of Section 7 would be greatly enhanced.

The discussion below of major priority projects sets forth in detail what the Division is, will and should be, doing in each instance. However, a shortage of professional personnel is presently curtailing what is deemed to be a minimum program for the Automotive Parts industry, and is also requiring a deferring of action upon other important investigations in the Apparel, Cement, as well as Lumber and Building Supplies Industries. In the event there should be a 20% increase allowed in the FY 1971 budget, such funds would serve to even out these discrepancies and also to make priority projects of some of the non-priority projects referred to in the last paragraph of this memorandum.

The manpower required for carrying forward in FY 1971 the 10 major priority projects discussed herein totals 38 man-years¹ or \$494,000. It covers nine presently pending formal cases, 16 investigations in which complaints are expected in the near future and 75 other pending investigations in the priority category.

It is to be noted that this planned program makes no allowance for any additional major mergers that occur in FY 1971 many of which will require the initiating of investigations by this Division. On the basis of the statistics to be published soon by the Bureau of Economics, in 1968 all previous levels of merger activity were eclipsed and the 1st quarter of 1969 indicates that such activity will be even greater for the whole year. Thus, it is reasonable to expect that much more action, and concomitantly manpower and resources will be required by this Division in FY 1971 than the 25 attorneys of which this Division is now comprised.

PRIORITY PROJECTS

GROCERY PRODUCTS

Priority 1

Interest in this category has continued as a result of the issuance of the landmark decision in the *Procter & Gamble-Clorox* case, and the project now includes a number of industries producing low-cost, high-turnover household consumer products sold through grocery stores by means of common channels of distribution and common promotional and merchandising techniques.

One docketed matter, *Frito-Lay, Inc.* (D. 8606), resulted in a consent order in August 1968. This was followed by another consent order involving *General Mills, Inc.* (C-1501) in March 1969. Four new investigations have been opened during FY 1969, indicating a sustained interest in this consumer oriented project.

¹As used herein a man-year equals 1,800 hours of attorney time, the dollar cost of which is \$13,000.

Of nine pending investigations, four are expected to be recommended for complaint.

Because of the Commission's growing emphasis upon consumer protection programs, and in view of the Commission's Enforcement Policy issued for this industry, the Division's enforcement activity will continue indefinitely. During FY 1971 the Division has budgeted five man-years² (\$65,000) for this work, with moderate increases expected in the two following fiscal years.

AUTOMOTIVE PARTS

Priority 2

The automobile replacement parts industry has particular significance because of its broad impact upon both the consuming public and the 20,000 wholesale distributors across the country. It is characterized also by numerous regional markets, populated by localized jobber chains which have recently been the target of acquisition by larger jobbers seeking to build up a national distribution system. The result has been a sudden trend toward an oligopolistic industry pattern, and it is this trend which should be halted in its incipency, if possible.

This is a complicated industry because of the many product lines and paucity of accurate universe figures from which to compute market shares. The use of compulsory investigative procedures is often necessary, requiring an added amount of professional staffing during the initial stages.

An important complaint was issued July 1, 1968, against Maremont Corp. (D. 8763), and a second litigated matter is in the stage of completed hearings, Bendix Corp., et al. (D. 8739). In addition, 13 investigations were carried over from FY 1968 and one new matter has been opened during FY 1969. It is anticipated that at least three complaints will result from pending investigations. Five attorneys are now devoting two-thirds of their time to the formal cases and investigations now pending. Recommendations for complaint have been unduly deferred in three investigations because of the shortage of manpower. This large backlog of cases, it is conservatively estimated, will require the attention of a minimum of five man-years (\$65,000) of professional time during FYs 1971-1973.

No target date for completion can be predicted until such time as there is some indication the merger trend has abated.

CEMENT

Priority 3

Expansion by merger and acquisition within this industry is familiar history to the Commission. The January 1967 "Enforcement Policy with Respect to Vertical Mergers in the Cement Industry" was an effort to halt the concentration trend upon an industrywide basis. Although the merger trend has slowed somewhat, three cases are still in litigation, and two additional complaints have been approved by the Commission from the ten investigations outstanding at the beginning of FY 1959. During the current FY 1969, four new investigations have been opened and from these one additional recommendation for complaint is being forwarded for Commission action.

It is anticipated that the pending and anticipated formal cases and investigations, plus those likely to occur in the future, will keep our enforcement policy active from now through FY 1973.

Three attorneys now devote substantially all of their time to the pending formal cases and investigations, but they are unable to staff all of these matters adequately. In addition, they will need to devote all of their time to the three new complaints which have been recommended, and will consequently be unable to complete pending investigations from which several additional recommendations for complaint appear likely.

The time of five full-time attorneys (\$65,000) is required for this continuing project during FY 1971, and until such time as there is positive indication the continuing merger trend has ended.

² As used herein, a man-year equals 1,800 hours of attorney time, the average dollar cost of which is \$13,000.

SPECIAL PROJECTS

Priority 4

This project is new, but is deemed necessary in view of the increasing amount of time of the staff of this Division being devoted to activities not directly connected with litigation, but which evolve from one or more litigated matters within an industry. For example, enforcement policies for the cement industry and for the food distribution industry have been given 7-digit investigational file numbers and do require considerable man-hours to staff and keep viable. The conglomerate merger study is another matter which absorbs an appreciable amount of the professional time within the Division. The recently approved program for pre-merger notification by large corporations and the preparation, overseeing and follow-up and investigation connected therewith is expected to require substantial amounts of manpower. There will no doubt be other special matters of a similar nature during FY 1971 and the years to follow.

It is estimated that not less than three man-years (\$39,000) will be devoted to this type of activity during FY 1971 and the years to follow, depending to a large extent upon directives received from the Commission.

COMMERCIAL & INDUSTRIAL EQUIPMENT, MACHINERY & SUPPLIES

Priority 5

This is a very broad project which includes mergers and acquisitions in machine tools, heavy machinery, and the electrical, earth moving, material handling, testing and welding equipment fields and other industries. Most of these categories are serviced by a relatively few manufacturers in each instance, and any substantial acquisition tends to have a significant effect upon the structure of the affected industry. These are industries which often overlap with other related industries, so that a continuously changing pattern of competitive relationships is constantly being reflected. Formal investigation of the more significant of these transactions is deemed mandatory, and in several instances an indication of interest on the part of the Commission has resulted in cancellation of proposed mergers in these areas. They represent a situation where significant mergers might "slip by" unnoticed if there were no conscious program of surveillance set up to handle them.

Ten investigations were on hand at the beginning of FY 1969 and three additional ones have been opened. Two formal cases are pending, and four additional complaints are expected to be recommended out of the thirteen pending investigations. This is an ongoing program which will require an estimated four man-years (\$52,000) of professional time during FYs 1970-1973.

METALS, MINERAL & MINING

Priority 6

The conglomerate acquisition of the largest coal company, Peabody Coal Co., by the largest copper producer, Kennecott Copper Corp. (D. 8765), was this Division's first effort in this industry. The acquisitions in 1965 of the major independent fertilizer companies by major oil companies was an example of the speed with which the composition of an industry can change as a result of acquisitions; a similar change is now taking place in the coal industry. Other minerals and metals are following a similar pattern, and though the immediate reasons may vary, an overall trend is apparent. Very few natural resources remain undiscovered or unexploited, and there is a rush by large companies with surplus cash at hand to enter businesses based upon coal, timber, oil or other types of natural resources. Seven mergers are under active investigation, and each week brings notice of additional activity in this area. Three attorneys have been and are expected to be tied up throughout most of this year with the Kennecott litigation.

It is estimated that four man-years (\$52,000) will be required to keep abreast of this apparent trend during FY 1971.

LUMBER & BUILDING SUPPLIES

Priority 7

All aspects of the building industry have been subjected to conditions conducive to integration from raw timber and lumber down to the finished mill product, with the small, intermediate jobbers and wholesalers leaving the industry. Tight money has aggravated this situation, as the large fully inte-

grated lumber and building supplier experiences no real difficulty in securing money in the marketplace, while the smaller operator cannot live with the high interest rates and diminishing business which is available to him. For these and other related reasons, there is a discernible tightening up within this industry, and marginal operators are disappearing with no prospect of new entrants to replace them if and when the building and construction business revives.

Two main directions are noticeable: (1) the rash of acquisitions of plywood manufacturers by the large, fully-integrated lumber companies, and (2) the consolidation of huge lumber tracts by the large companies, with a concurrent elimination of the small lumber mill operators. There is nothing to indicate this trend toward bigness will be reversed, and the effort at this point in time is to forestall or slow down the trend toward integration and oligopoly. Four investigations were pending at the beginning of FY 1969, and four new ones have been opened since that time.

Because of the lack of manpower, the investigations in this vital category have, of necessity, had to be deferred. With the present concern in many quarters about high lumber prices, we should be devoting more time to these pending investigations.

It is anticipated that at least three man-years (\$39,000) of professional time will be required to staff this project which, it is believed, will have a profound effect upon a merger trend which is expected to increase with a loosening up in the building market.

APPAREL

Priority 8

This is a highly consumer oriented industry with sales in excess of \$26 billion per year and with about 30,000 industry members. However, recent acquisitions and mergers are threatening the traditionally low entry barriers and threaten the entire structure of the industry. Eight outstanding investigations were on hand at the beginning of FY 1969, one of which has since been closed. Insufficient professional personnel has caused this project to remain more or less at dead center, but it is one which should receive attention at the earliest opportunity.

It is estimated that three man-years (\$39,000) will be required to process the outstanding and anticipated investigations in this industry during FYs 1970 and 1971.

PAPER AND PAPER PRODUCTS

Priority 9

The Commission has a long history of concern over merger and acquisition activities within this industry, and several cease and desist orders are outstanding against leading companies. Because of its considerable expertise in these lines of commerce, and because mergers and acquisitions continue to occur from time to time, the Division maintains a surveillance over all important transactions within the industry. Four investigations are pending in one of which a complaint has just been issued.

In the absence of a major acquisition which would require immediate litigation activity, it is estimated that two man-years (\$26,000) will be devoted to this industry during FY 1971 and for the foreseeable future thereafter.

MISCELLANEOUS

Priority 10

This is a project which defies definition, but which includes the significant acquisitions and mergers in various industries where there is indication of a change in the making. It is often by virtue of an investigation of one of these transactions that an indication of a merger trend is developed. One good example of this was an investigation involving mobile homes. Since that investigation began there has been a rash of acquisitions in this industry, usually conglomerate in nature, indicating a sudden switch in the complexion of the industry from that of small manufacturers to one dominated by very large diversified corporations. At the beginning of FY 1969 seven investigations were outstanding, and during the year nine new ones have been initiated. From these, at least two are expected to be recommended for complaint in the near future.

It is estimated that four man-years (\$52,000) will be required in FY 1971 to

properly staff these transactions as they are uncovered in the daily newspaper and periodical survey, and as recorded from letters of complaint received by the Commission.

NON-PRIORITY PROJECTS

In conclusion, it is to be noted that the foregoing program plan for FY 1971 makes no allocation of any manpower for some 55 other merger investigations pending as of March 31, 1969, in the following non-priority industry categories:

Baking -----	2
Confectionery -----	5
Dairy -----	2
Department stores -----	¹ 3
Drugs, pharmaceuticals, cosmetics and sundries -----	² 1
Housewares and household appliances (elec. and non-electric) -----	3
Insurance -----	⁴ 2
Fertilizer -----	³ 6
Food distribution -----	3
Furniture -----	2
Plastics -----	5
Reciprocity -----	3
Section 8 -----	⁵ 5
Textiles -----	3
Truck-trailers and shipping containers -----	4
Vending -----	6
Total -----	55

¹ Includes a new investigation being opened regarding the recently announced proposed merger of J. L. Hudson Co. with Dayton Corporation.

² Includes Sterling Drug Inc., File 661 0641, presently pending before the Commission for approval or disapproval of a recommended consent settlement.

³ These investigations are expected to be recommended for closing.

⁴ A new area of action for this Division but one which has seen considerable merger activity and is likely to require the opening of additional investigations.

⁵ All of these investigations are being recommended for closing.

Respectfully submitted,

WILLIAM J. BOYD, JR.,
Chief, Division of Mergers.

MEMORANDUM

APRIL 15, 1969.

Subject: Budget—Fiscal year 1970.

To: Bartley T. Garvey, Assistant to the Director, Bureau of Restraint of Trade.
From: M. C. Steele, Chief, Division of Accounting, Bureau of Restraint of Trade.

The Division of Accounting prepares analyses and studies of the pricing policies of respondents or proposed respondents in connection with the Commission's law enforcement work in regard to: (1) alleged price discrimination under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; (2) cost data submitted by the respondents in justification of alleged price discriminations under the Robinson-Patman Act; (3) alleged price fixing in cases arising under Section 5 of the FTC Act; and (4) alleged sales below cost in violation of Section 5 of the FTC Act.

The Division of Accounting is primarily a service organization for the other Divisions of the Bureau and consequently, to a large extent, its workload depends upon the activity of the other Divisions. During the first nine months of FY 1969, the Division furnished accounting services on a total of 49 investigation and litigation matters which included 22 involving violation of Section 2 of the Robinson-Patman Act, 23 involving violation of Section 5 of the Federal Trade Commission Act, and 4 involving mergers under Section 7 of the Clayton Act. On a projected annual basis, the case load would total approximately 70 cases and will average nearly eight cases per man after adjusting for noncase activity.

In addition to the casework for the other Divisions of the Bureau of Restraint of Trade, the Division of Accounting furnishes accounting services for the Bureau of Economics, and on occasion, for other Bureaus in the Commission and for the Congress. Also, the Division of Accounting prepares for publication each year, Rates of Return for Identical Companies in Selected Manufacturing Industries.

During FY 1969 casework for the Bureau required approximately 8.5 man-years. The Division furnished accounting services for the Bureau of Economics and other Bureaus in the Commission approximating 1.5 man-years, and the project of Rates of Return for Identical Companies in Selected Manufacturing Industries required two accountants for approximately six months each year, or the equivalent of one man-year.

Projects through fiscal year 1972	Man-years			
	1969	1970	1971	1972
Legal cases.....	8.5	10.0	11.0	12.0
Rates of return.....	1.0	1.0	1.0	1.0
Bureau of economics and others.....	1.5	3.0	3.5	3.5
Total man-years.....	11.0	14.0	15.5	16.5
Total accountants available.....	11.0			

INCREASES REQUESTED FOR FISCAL 1970

An additional \$16,000 is requested to provide one GS-11 accountant and one GS-5 stenographer for this Division.

Respectfully submitted,

M. C. STEELE,
Chief, Division of Accounting,
Bureau of Restraint of Trade.

MEMORANDUM

APRIL 15, 1969.

Subject: Plans for fiscal 1971 budget.

To: Cecil G. Miles, Director, Bureau of Restraint of Trade.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices.

Pursuant to the Chairman's directive of March 20, 1969, there are submitted herewith our ideas and basic plans for the fiscal 1971 budget.

The overall objective is to combat price and other forms of discrimination which may injure or eliminate competition in the long run. Effective enforcement

is aimed at forestalling monopolistic concentration of economic power. To achieve this goal, smaller, viable competitors must be protected from unlawful discriminatory practices. This gives them the opportunity to compete and survive.

We learn of discriminatory practices through complaints from those allegedly injured and through our own investigations. The areas in which we will direct our emphasis in the future is not always predictable. However, we have developed some expertise as to the industries that are constantly troubled by price and other discrimination problems. We have organized project teams for these industries. As part of our every-day planning, we are extremely selective in screening and eliminate approximately 80% of the complaints from entering the 7-digit investigational workload. The applicants we hear from are generally extremely knowledgeable about the discriminatory practices in their respective industries.

The industries that we are presently giving attention to where performance indicates price discriminations and other discriminatory practices exist are: Apparel, Dairy, Chain Grocery (all food products), Automotive Replacement Parts and Accessories, Baking, Drapery Hardware, Drug, Fresh Fruit and Vegetable, Publishing, and Department Stores. In practically all of these industries, we are confronted with power buyers and buying groups who are able to exert pressure on suppliers for preferential prices, advertising allowances and services. In most of these industries, private label is a significant problem. Some of the major legal problems that we face are:

1. The "commerce" requirement of the amended Clayton Act;
2. To What extent is the meeting of competition defense of the seller available in a private label bid situation to the seller and the buyer inducing the lower bid?
3. What proof is necessary to establish inducement by a buyer under the amended Clayton Act or Section 5 of the Federal Trade Commission Act?
- and
4. Cost justification.

Realistic interpretation of these legal issues is necessary before we can successfully challenge the practices confronted by the Division of Discriminatory Practices.

Assuming this Division receives an increase in the budget, we recommend that we become involved in the Major Appliance Industry and the Hardware Industry. Although we are substantially involved in the Chain Grocery Industry, we favor expanding our activity in that area.

Major Appliance Industry: Because of manpower commitments to pending projects and non-project activity, we have been unable to focus any significant attention to this industry. Industry sales at retail are over \$10 billion. The industry comprises approximately 100 manufacturers and 1300 distributors. Complaints reveal that widespread violations may be involved. Manufacturers and jobbers grant special discounts and advertising allowances to large department stores, discount stores and other large buyers. Private label is believed to be a significant factor. The objective would be to place independent appliance dealers in a position to enable them to compete effectively. Further concentration at the retail level hopefully would be forestalled. Further, the consumer should be able to buy at a discount price irrespective of where he makes his purchase. Estimated dollars cost: \$80,000. Estimated manpower cost: 7,200 man hours. Target date of completion: continuing commitment.¹

Hardware Industry: Industry sales approximate \$1 billion. Recent complaints emanating from manufacturers, individual wholesalers and retailers allege that wholesaler and retailer buying organizations are obtaining preferential prices in connection with the purchase of hardware products from manufacturers, resulting in competitive injury at all levels. The buying groups are retailer-owned co-operative buying groups which deal in hardware, paints and allied products. preliminary investigation is being undertaken to determine what corrective action may be warranted. Because of heavy manpower commitments to pending project and non-project activity, activation of this project will be dependent on availability of the required manpower. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: End of FY 1973.

¹ Manpower and associated dollar costs estimated at \$20,000 a year per man. Manpower costs estimated at 1,800 man-hours a year per man.

The following projects have received considerable attention in the past and will continue to require additional manpower commitments in FY 1971. They are listed in order of priority. Food distribution (chain grocers), apparel and dairy are considered major projects.

Chain Grocers—Food Distribution: The food industry is probably the largest volume business in the national economy. Retail sales exceed \$75 billion. Our goal is to forestall any further concentration of economic power among either buyers or sellers. Nine investigations involving chain grocers and suppliers are in progress. They involve (1) alleged inducement of discriminatory promotional allowances in violation of Section 5 of the Federal Trade Commission Act, (2) alleged price discriminations in violation of Sec. 2(a) of the amended Clayton Act, and (3) alleged inducements of price discriminations in violation of Sec. 2(f) of the amended Clayton Act.

Colonial Stores, Inc., D. 8768, involving inducement of promotional allowances, is already in trial and will probably carry over into FY 1971. In addition, United Fruit Company, et al., File No. 671 0187, will be soon forwarded with a recommendation that complaint issue since the consent order procedure has not satisfactorily resolved the issues. This case involves Sections 2(a) and 2(f) of the amended Clayton Act, Section 5 of the Federal Trade Commission Act (attempt to monopolize) and Section 7 of the Clayton Act (mergers). Estimated dollar cost: \$120,000. Estimated manpower cost: 10,800 man hours. Target date of completion: continuing commitment.

Apparel industry: Industry sales exceed \$26 billion. This project arose through Commission directed industry surveys which disclosed that manufacturers of men's, women's and children's wearing apparel granted substantial discriminatory advertising and promotional allowances to large specialty stores and chain department stores. Consent cease and desist orders were issued against 302 manufacturers. In addition, several contested orders were issued.

This Division was assigned the task of reviewing the compliance reports and cooperative advertising plans submitted. Two hundred and forty (240) of these cases have already been forwarded to the Commission. The remaining sixty-two (62) are being processed.

Korell Corporation, File No. 641 0090, is one of the companies refusing to sign a consent agreement. Complaint in this matter has been issued by the Commission. Two (2) other companies refusing to sign consent orders are being investigated. Continued industry surveillance of manufacturers, including spot check compliance investigations, will be necessary because of the Commission's assurance to manufacturers who cooperated in the project. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: End of FY 1972.

Dairy Industry: The high level of concentration in the dairy industry has been caused by (1) mergers in the industry over the years, (2) forward and backward integration and the continuing decline in the number of independent dairies. There are severe barriers to new entrants due to the strength of large national and regional chains, and the keen competitive conditions existing in the wholesaling of fluid milk and dairy products.

The Commission continues to receive a large number of complaints from independent dairies who claim they are being threatened with extinction because of pricing practices of large national and regional dairies. They charge that the large national and regional dairies are selling vendor and private label to large grocery chains at prices which are substantially lower than the prices charged independent grocers.

By requesting bids for private label, the large grocery chains are exerting extreme pressure on all dairies, both large and small, for lower discriminatory prices. Always present is the threat that the large grocery chain will build its own milk plant.

The lower prices received by the chains permit them to use milk as a loss leader and in frequent week-end specials. The price structure becomes depressed and milk suppliers are pressured by independent grocers for lower prices. In these circumstances, home delivery sales continue to decline. Although private label is usually sold by the grocery chains for a few cents less than vendor brands, only a very small part of the discriminatory prices received by chains are being passed on to the consumer.

To date cease and desist orders enjoining violations of Section 2(a) of the Clayton Act, as amended, have been issued against National Dairy Products Corp.,

Foremost Dairies, Inc. and Dean Milk Co. In a pending proceeding Beatrice Foods Co. is charged with selling milk and dairy products at lower discriminatory prices in violation of Section 2(a) of the Clayton Act, and Kroger is charged with inducing and receiving discriminatory prices in violation of Section 2(f) of the Act. The pending Commission decision in the Beatrice-Kroger matter will no doubt govern our future efforts in dealing with private label bid problems in the fluid milk and other industries.

At present there are pending twenty (20) investigations involving violations of Section 2(a) and 2(f) of the Clayton Act, as amended. They involve large national dairies not under order, large regional dairies, large grocery chains and large discount chains. Although it is difficult to predict, it now appears that complaints will be recommended in several of these matters.

The objective of this project is to forestall further concentration by insuring that viable independent dairies will be given an opportunity to compete and to eliminate the competitive impact of the price advantages which chain grocery stores have over independent grocers. Estimated dollar cost: \$50,000. Estimated manpower cost: 5,400 man hours. Target date of completion: continuing commitment.

Fresh Fruit and Vegetable Industry: Industry sales approximate \$7.5 billion. Our involvement is the result of numerous industry complaints that the brokerage provisions of the Commission's Trade Practice Rules for the Fresh Fruit and Vegetable Industry were being violated. Shippers alleged that competitors were granting brokerage to large buyers or to field brokers when the latter were acting as agents of the buyers, in violation of Section 2(c) of the Clayton Act, as amended.

Investigational hearings conducted in different sections of the country indicated existence of law violations necessitating corrective action. The Commission recently determined to issue complaints charging five retail food chains and six "ground" or "field" brokers with violations of Section 2(c) of the amended Clayton Act in connection with their purchases of fresh fruit and vegetables. The chains are Jewel Companies, Inc., Borman Foods Stores, Inc., H.C. Bohack, Inc., First National Stores, Inc., and Food Fair Stores, Inc.

The goal of this project is to obtain industry compliance with the Commission's Trade Practice Rules. The investigation established that approximately (40) brokers and ten (10) grocery chains engaged in the questioned practices. By issuing complaints against five (5) of the most significant chains receiving illegal brokerage service and six significant brokers involved, we are attempting to bring about industry-wide compliance. Estimated dollar cost: \$120,000. Estimated manpower cost: 10,800 man hours. Target date of completion: End of FY 1972.

Tri-Partite Arrangements: This project was undertaken pursuant to Commission direction. Two (2) investigations [involving at least 10 of the top chain grocers] are in progress and one (1) has reached the recommendation for complaint stage. The investigations concern promotional programs in grocery stores (sales approximately \$75 billion) by third parties. Pursuant to these programs the participating suppliers, directly or indirectly, grant preferential advertising allowances or services to the participating retail grocery chain. The programs make no provision for granting allowances or furnishing services on a proportionate basis to competing retailers. It is anticipated that these investigations may necessitate complaint proceedings against the third parties and participating suppliers under Sections 2(d) and 2(e) of the amended Clayton Act, and possible proceedings against the participating chains for inducing and receiving discriminatory allowances or services in violation of Section 5 of the Federal Trade Commission Act. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: continuing commitment.

Baking Industry: Industry sales approximate 1.5 billion. The Commission continues to receive a large number of complaints from independent bakers complaining they are threatened with extinction because of discriminatory and below cost selling of bread by large national and regional chain bakeries. The complaints specifically allege that large grocery chains are purchasing advertised brands and private label bread from large bakeries at prices lower than prices charged competing independent retail grocers.

Six (6) major investigations are now in progress. Some of the major baking companies involved in the pending investigations are American Baking Company, Continental Baking Company and Campbell-Taggart Baking Company. The

object of the project is to insure that viable independent bakeries will survive by being given a fair opportunity to compete. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: continuing commitment.

Department Stores: Industry sales approximate \$33 billion. This Division has reappraised the department store files as directed by Commission minute of December 12, 1968. Continued concentration resulting from mergers, acquisitions and internal expansion has tended to repose in a number of department store chains unprecedented buying power and influence through sheer volume. The department store files contain information to indicate that the stores are inducing and receiving preferential treatment in the areas of advertising allowances and price, the latter more in the form of rebates, pre-paid freight and credits, presumably for merchandise returns. The problems of attempting to proceed on the basis of the existing evidence in the files were outlined in this Division's memorandum to the Commission dated February 17, 1969. The memorandum and the recommendations contained therein are now under study by the Bureau both as to substance and planning and further comments will be submitted in the future. It is anticipated that recommendation will be made that the industry be reinvestigated by use of subpoenas and investigational hearings. Estimated dollar cost: \$80,000. Estimated manpower cost: 72,000. Target date of completion: Mid FY 1973.

Drug Industry: The Commission's activities in the Drug Industry, in particular the pricing and distribution of prescription-legend and ethically-promoted pharmaceuticals, comprise investigation into institutional and professional purchase and resale to the potential derogation of private markets, diversion by exempt or non-competitive sources into regular commercial channels with attendant dislocation, arbitrary and inimical offering and pricing on bulk purchases and non-standard package sizes, straight price and purchasing concessions traditionally cognizable under the Robinson-Patman Amendment, and "Dual Distribution"—which as herein used means the question whether the customer selection, selling criteria and distribution patterns of individual manufacturers of highly-differentiated drug products are not unduly in themselves restraining or restrictive under one or more statutes administered by the Commission. Investigation of certain other aspects of the drug industry, in line with the recommendations pertaining to this Agency that were made by Subcommittee No. 5 to the Select Committee on Small Business, contained in House Report No. 1983, 90th Congress, 2d Session, at page 83, will require additional manpower commitments in FY 1971. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: Mid FY 1973.

Publishing Industry: Industry sales approximate \$1.1 billion. The educational and advisory phase of this program was designed to eliminate payment of discriminatory allowances by publishers of hardback and prestige softback books to large retailers. The Division now plans to recommend that orders be served on approximately 50 publishers pursuant to Section 6(b) of the Federal Trade Commission Act, requiring the filing of Special Reports setting forth the terms and conditions under which advertising and promotional allowances are made available to customers. The Division reasonably anticipates that many of the Reports will disclose violations of Section 2(d) of the Clayton Act, as amended. The goal of this project is to bring about industry-wide compliance with the *Commission's Guides for Advertising Allowances and other Merchandising Payments and Services*. Estimated dollar cost: \$40,000. Estimated manpower cost 3,600 man hours. Target date of completion: End of FY 1973.

Automotive Replacement Parts: Industry sales total 1.7 billion. A continuing program of surveillance of discriminatory pricing in this industry is necessary because of the many complaints received from competing manufacturers, warehouse distributors and jobbers with regard to manufacturers granting volume discounts and functional discounts to buyers who do not perform the function for which the discounts are granted. Our continuing activities in this industry are in large part dictated by the Commission's past formal actions in this industry. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: continuing commitment.

Drapery Hardware: Industry sales are approximately \$63 million. This project arose out of a proceeding in which the Commission issued a cease and desist order enjoining a competing manufacturer from discriminating in price in favor of large retail stores and against small competing retail outlets in violation of

Section 2(a) of the amended Clayton Act. The investigations against the remaining four (4) leading firms have been completed: the files are being reviewed with a view of determining whether complaints should be recommended. If a determination is made to recommend closing, no additional manpower will be required in FY 1971. Should one or more complaints issue, professional manpower will be required in FY 1971. Estimated dollar cost: \$40,000. Estimated manpower cost: 3,600 man hours. Target date of completion: End FY 1972.

Miscellaneous: A great number of man hours are devoted to matters in varying stages of development which involve isolated industry transactions. We cite the following as examples: frozen foods distribution, dry cleaning fluid, household aluminum foil, wrapping film, scales, plastics, shoes, coffee, ornamental light fixtures, citrus products, furniture, mens' and boys' leisure hats, shower curtains, cellophane, photographic equipment, fishing equipment, sporting goods, cement, bicycle tires, industrial bleach and fertilizer. It is anticipated that this type of activity will recur in FY 1971. Estimated dollar cost: \$200,000. Estimated manpower cost: 18,000 man hours. Target date of completion: continuing commitment.

Additional Division activity is concerned with obtaining compliance with voluntary assurances, work on proposed guides and comments received concerning the Guides, review of advisory opinions (30 thus far this fiscal year), and obtaining compliance with the *Fred Meyer* decision. Twelve (12) cases in the latter category involving toiletries are now being processed. It is anticipated that this activity will continue in FY 1971. No manpower is budgeted for this activity.

Respectfully submitted,

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

MEMORANDUM

APRIL 15, 1969.

Subject: Plans for fiscal 1971 budget.

To: Director, Bureau of Restraint of Trade, Att: Bartley T. Garvey, Program Officer.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

Attached hereto is a chart containing the project breakdown for fiscal 1971 for the Compliance Division.

Several observations are pertinent:

1. Save in very few instances, Compliance projections do not readily admit of being categorized by industry classifications;

2. In the main, the projects covered are those to which this Division, insofar as presently can be predicted, stands committed through fiscal 1971;

3. With respect to the Chairman's observation contained in page 2 of his memorandum to the effect that "Compliance investigations of significant orders could be planned in important product lines" it will be remembered that this Division, several years ago, selected what in our opinion constituted the 50 most significant orders involving Section 5 of the Commission Act and from time to time sent them to the field for investigation. This project is relatively complete, although several of these matters are still in process. In the Robinson-Patman area, for example, we could select, admitting the availability for personnel, certain "industry" orders for spot check, such as those in the publishing and carpet industries. In the main, however, Robinson-Patman orders do not cover all industry factors in a given product line.

Respectfully submitted,

JOSEPH J. GERCKE,
*Chief, Compliance Division,
 Bureau of Restraint of Trade.*

COMPLIANCE DIVISION, BUREAU OF RESTRAINT OF TRADE

FISCAL 1971, SEC. 5, FEDERAL TRADE COMMISSION ACT AND SECS. 2 (a), (c), (d), (e), (f) OF CLAYTON ACT AS AMENDED

Project No.	Approximate number of orders involved	Description of project	Estimated man-years to complete	Estimated cost	Estimated completion date
1	50	Procuring and analyzing compliance with final orders—various industries including food products, drugs, furniture, etc.	6	\$75,000	July 1971.
2	40	Initiating and reviewing compliance investigations in a variety of important industries.	7	85,000	Do.
3	5	Conduct of investigational hearings on matters of pressing importance re compliance with orders.	2	25,000	Do.
4	2	Initiation and conduct of civil penalty cases before U.S. district courts.	2	25,000	Do.

SECTION 7, OF CLAYTON ACT, AS AMENDED

5.....	15	Achievement of ordered divestitures.....	4	\$40,000	July 1974
6.....	18	Processing of requests to make acquisitions subject to Commission approval as required by final orders.	2	25,000	July 1978
7.....	3	Conduct of investigational hearings re possible violations of sec. 7 orders.	1	12,000	July 1971
8.....	4	Conduct of civil penalty cases before U.S. District courts.	3	50,000	Do.
9.....	20	Administration of special compliance features in orders, e.g., granting of licenses, advertising limitations, supply arrangements, etc.	1	13,000	July 1974

NOTE—Could do more of if manpower available: (a) Cutdown time lag by holding investigational hearings instead of referring selected cases to field offices—especially section 7, price fixing; food and petroleum product orders; (b) check compliance with about 20 orders proscribing vertical price fixing; (c) study economic effect of orders in selected industries as a guide to future planning, e.g., tobacco, automotive parts, dairy industry; (d) make-on site interviews and inspections to cut down reliance on respondent information in section 7 matters.

MEMORANDUM

APRIL 25, 1969.

Subject: Proposals for assessment preliminary to preparation of the fiscal year 1971 budget.

To: Paul Rand Dixon, Chairman.

From: Frank C. Hale, Director, Bureau of Deceptive Practices.

Reference is made to your memorandum, subject: Your ideas and basic plans for the Fiscal 1971 budget, dated March 20, 1969 which requests information in order to make preliminary assessment as to the Bureau plans and needs for Fiscal 1971.

The attached memoranda indicates clearly that the major concern of this Bureau is the need to reorient both our identification and work capability in the direction of consumer affairs. With respect to the additional powers leading towards greater Bureau independence I believe this could well prove very effective and useful to the Commission. It would place the Bureau in a position of being on the front line instead of the Commission and would thereby assume the risks inherent in innovation and aggressive action.

The plan of course presupposes capabilities that do not yet exist due to limitations in manpower.

Respectfully submitted,

FRANK C. HALE,
Director, Bureau of Deceptive Practices.

BASIC PLANNING DOCUMENT FOR 1971 BUDGET

PART I.—BUREAU OF DECEPTIVE PRACTICES

I. Introduction.

The responses to the March 20, 1969 query of the Chairman ("What should you be doing that you are not doing?") must be substantial and several because of the demands of the times. Demands which carry a pervasive insistence that government be responsive. Demands which assert that there have to be solutions to problems. Demands which if unmet, result in new directions, new laws, and new agencies to cope with problems unsolved by yesterday's machinery. This paper attempts to deal with how some of the public needs can be met by the Bureau of Deceptive Practices.

II. Consumerism.

Clearly, the most obvious and challenging role that must be undertaken in the Bureau of Deceptive Practices is an effective program of consumer affairs. FTC consumer activities should be so labeled and equipped with adequate manpower and additional statutory authority as may be needed to achieve the level of performance in the consumer spectrum apparently expected by the Congress and the public.

In any case, the Federal Trade Commission must speak to all consumer issues, be prepared to make recommendations as to solutions and if it appears that the remedy should be achieved elsewhere than in the Commission or at the Federal level, a convincing case must be made in the interest of not only good government and smart public relations, but to maintain a viable role in the scheme of government for this agency. This new performance obligation is going to require expertise in consumer affairs and a concomitant knack of communicating and relating to the consumer.

Consumer problems are broad and complex. They range from intangible concerns such as social and economic cost of inferior products and the definition of consumer environmental rights, to tangible difficulties such as inadequate information, ineffective consumer representation in decision making, imbalance of buyer-seller legal rights and ineffective grievance procedures. Many of these problems are not of the consumer's own making, are not within his powers to solve, and are not problems with the marketplace alone but also with government.

The causes are numerous: A rapid transition in this century, particularly since World War II, from a simplistic to a complex marketplace, impersonalized and further aggravated by insufficient provision for objective information: a plethora of new materials and products, often complex, with infinite differentia-

tion; growing specialization of the individual's own training and experience, hence his increasing inability to evaluate products and services; rapid development of a sophisticated consumer credit industry producing radical changes and business practices; growing centralization of business and the present degree to which corporate liability is immunized from legal accountability; lack of corporate disclosure in some instances, and the substitution of corporate planning, regulation, and marketing practices for true competition based on price; the prevalence at all governmental levels of a patchwork of laws passed in ad hoc fashion to meet specific problems, as well as continuation of antiquated laws which no longer reflect actual marketplace practices.

Consumer problems also have important implications for the nation's social well-being. Acute manifestations of consumer discontent, even anger, are evidenced by the report of the National Advisory Commission on Civil Disorders that consumer frustrations were among the twelve most deeply held grievances which led to the disorders of American cities. The scattered housewives' boycotts and the rapid increase in the number of consumer organizations are also manifestations of consumer unrest. The individual complaints received by the Federal Trade Commission about the marketplace are appalling. Since the Congress has discovered the consumer at the Federal level it is indeed timely that the regulatory agencies and the executive branch of the government also recognize the potency of his force as well and tool-up to meet him beyond the doorstep and not behind the barricades.

The answers of course do not rest in any one area or any one agency of government. But the Government's responsibility is implicit, not only to guarantee a sound economy but, to assure social well-being. To construe government involvement with consumer problems as "anti-business" is to miss entirely the thrust of consumer economics. Elimination of marketplace malfunctions ultimately serves both consumers and producers by insuring the economics of stability and growth. Government responsibility for the financial well-being of its citizens by a promotion of full employment and economic growth has been established policy since the passage of the Employment Act of 1946. There is a reasonable corollary between government protection of consumer rights in the marketplace and its long accepted role as the protector of the ethical businessman against those who compete unfairly. Government involvement in consumer problems is also founded in its duty to assure equality of rights and the protection of those rights for every citizen—be they Civil Rights, Property Rights, or rights in the marketplace. Thus it is argued that the redrafting of the charter of the Bureau of Deceptive Practices to fully identify it with the cause of the consumer would be a step fully compatible with the historic mission of the Federal Trade Commission.

The Bureau of Deceptive Practices should be recognized as the consumer voice in the Federal Trade Commission and act as the ear for the Commission for input reflecting general problems as received from individual consumers. Moreover, the Bureau should be making recommendations to the Commission on consumer policies; studying the plans and programs of other Federal agencies affecting consumer interest. The Bureau should be planning, developing, and proposing legislation necessary to implement the consumer objectives of the Commission and should have the responsibility for proposing to the Assistant General Counsel for Legislation all positions to be taken on consumer legislation proposed by, or referred for comment to the Commission by Congress or the Executive branch. Additionally, the Bureau should be given the role of acting in a consultative capacity when requested by the states, local governments, or private groups for supplying comments or assistance concerning consumer legislation and ordinances.

The Bureau of Deceptive Practices should provide input to the Office of Information concerning: all consumer activities in the Federal Trade Commission and to recommend policies and provide appropriate guidance and assistance to assure fulfillment of the requirement to keep the public adequately informed as to the Federal Trade Commission's consumer activities; review of press releases and other information originating within the Federal Trade Commission for public release with respect to comments and positions taken which sound on consumer affairs to insure consistency with established consumer policies or programs of the Commission; planning, developing and implementing comprehensive public relations programs and to campaigns to inform and educate the general public, the business community, and special interest groups, concern-

ing the objectives of the consumer affairs programs of the Federal Trade Commission.

The Bureau of Deceptive Practices should also have as one of its objectives the responsibility for enhancing good relations between producer and consumer by—focusing attention on the unmet consumer needs in the marketplace; providing the forum for constructive dialogue concerning practical consumer problems with the private sector of the economy; the sponsorship of research problems pertaining to both producer and consumer with institutions of higher learning and industry.

The Bureau of Deceptive Practices in its consumer activities should maintain effective liaison with national and state organizations having consumer programs by—

Assisting and planning educational and legislative conference or workshops;

Assisting and identifying specific problems which can be resolved by effective actions on the part of organizations;

Disseminating information regarding state level and city level consumer affairs in coordination with the Assistant General Counsel for Federal-State Relations; identifying consumer problem areas common to the states which appear to require legislation.

The Bureau of Deceptive Practices should be in the field of consumer education by—

Providing leadership in the fields of Federal Trade Commission interest by developing long-range plans for nationwide programs, in coordination with Federal and State educational authorities with the objective of developing and advancing consumer education for use both in and out of the conventional classroom, to include television and other communications media designed to meet the needs of both child and adult of differing income and environmental levels;

Stimulating the development of experimental programs in conjunction with educators, administrators, and interested community, civic, and professional groups;

Preparing reports, articles and other informative and evaluative materials on consumer education programs; and

Maintaining liaison with appropriate Federal, State and local officials in educational associations.

III. Consumer Legislation.

Consumer legislation monitored or developed and promoted at the appropriate level of government by the Bureau of Deceptive Practices should include:

Review of anti-trust laws and enforcement to insure that they serve the consumer as well as competing business. Of all the measures considered on behalf of the consumer, anti-trust laws should continue to receive attention as the fundamental consumer edifice on which all other measures are based.

Repeal of resale price maintenance laws. These laws result in serious injuries to consumers: they increase the price of goods by eliminating competition among retailers and weaken the free enterprise system.

Special attention to the marketplace problems of the poor. Discontent in American cities is, in no small part, a consumer revolt against a system which has permitted the unscrupulous to take advantage of those least able to pay. The system has permitted laws and institutions designed for the more affluent to work special hardship on the poor and least sophisticated. In the inner city neighborhoods, Legal Aid lawyers, social workers, clergy and residents agree that the consumer must be provided an effective means to make himself heard and to obtain redress for his grievances. Justice, which include economic justice, must be available and close at hand—and it must be applied with equal vigor in the marketplace. Despite progress made in the consumer's behalf, the defrauded still have little chance of obtaining economic justice.

Full disclosure of product information in the marketplace, and convenient consumer access to such information. The landmark Truth-in-Lending statute is the harbinger which may lead, eventually, to full disclosure in all consumer transactions. A case may well be made one day for construing anything less than full disclosure as actionable under Section 5 of the Federal Trade Commission Act. If the consumer is entitled to know the details in

credit transactions, there should be a concomitant duty to disclose information about the product which the credit will obtain for him. In other words, "affirmative disclosure".

Revision of consumer credit laws and regulations to that consumer rights are on a parity with creditor's rights. Consumer law should be codified and some practices which are particularly harsh and unfair should be abolished. These are: Wage garnishment and wage assignment; holder-in-due-course doctrine as it applies to consumer credit; confession of judgment in consumer credit transactions; balloon payments; accelerated payment provisions, deficiency judgments, rights of the seller to both repossess and collect on a deficiency judgment; commercial debt pooling or consolidation; injustices in collection and default procedures; and, unsolicited credit must be carefully examined to determine effect on the economy and on the consumer who becomes a victim of over-extended credit.

Action to hasten adoption of FTC legislation proposed for the states. Symmetry in Federal and state consumer protection programs should be fostered.

—Development of a system which will provide more effective and economical redress for consumer grievances at the doorstep level. It should be possible for the consumer to get satisfaction without being out of pocket and to receive financial reimbursement for losses sustained. Provision should be made within the fabric of a consumer code for small claims courts easily accessible to the people. The use of arbitration in the neighborhoods is a fertile field for concurrent development. The treble damage principle of our anti-trust laws should be extended into the consumer protection area. Consumer class actions should be widely utilized, not only to provide more effective redress for larger numbers of consumers but because procedurally they offer an opportunity for the establishment of precedents in development of consumer law.

Federal, state, and local consumer protection legislation must provide stronger deterrents and penalties which make it unprofitable for business to engage in unfair acts and practices, and which equalize penalty standards for corporate business with present standards for the individual. Unfortunately, there is still one standard for the individual and quite another for corporate business. An executive decision, which may result in numerous injuries or extensive economic loss for consumers, carries with it no personal penalty. Instead, the fine which may be assessed against the corporation not only fails to deter, but may be passed on to the consumer as a cost of doing business so that, in effect, the consumer pays twice. The Federal Trade Commission should be given authority to seek preliminary injunctions and temporary restraining orders for all unfair and deceptive sales practices and to ask the courts to impose substantial civil penalties for first violators when the company willfully commits a deceptive practice.

Insuring effective protection of the consumer's right of privacy. Consideration should be given to consumer privacy protection legislation requiring credit reporting bureaus to give an individual the opportunity to review his own file and to cause errors to be corrected. The regulation of this business may well be an emerging requirement.

Study of the effectiveness of present State regulation of the life insurance industry and the present relative immunity from Federal regulation due to the McCarran-Ferguson Act. In 1945 Congress passed the McCarran-Ferguson Act, exempting the life insurance industry from Federal supervision in any State that had passed regulations of its own. As a result, control of the industry varies markedly from state to state. Mergers of life insurance companies; the diminution of competition; the absence of price competition; the general lack of rate controls and the parallel question of the adequacy of return on policyholders cash reserves (2½% per annum); the absence of consumer information (intelligible comparisons); complaints against life insurance marketing practices; the interstate character of most of the business; the absence of quality supervision in most states; and the inclusion of credit, accident and health insurance in the consumer finance field all demand in-depth investigation at the Federal level.

IV. *Redesignation of the bureau as the Bureau of Consumer Affairs.*

A highly visible action that could be taken at once and which would be widely interpreted as pretending new roles for the Bureau would be to redesignate this Bureau as the Bureau of Consumer Affairs. It is so recommended for early action by this Commission.

V. *New authority for the Bureau of Consumer Affairs.*

Consistent with the new posture and authority for the Bureau of Consumer Affairs, and to ease the burden of administration for the Commission it is proposed that changes in the Rules be accomplished which would delegate authority to the Bureau to conduct limited investigations without opening a 7-digit file and to close files. If the authority is provided the Bureau will develop procedures to enable it to deal more effectively with many applications for complaint which do not appear to have sufficient public interest to justify full-scale investigation. In many instances, a mere referral of an applicant's letter to a business concern, with a request for an explanation or comment, would be helpful in providing redress for the complainant and at the same time inform the business concern that the Commission is concerned. It should follow, that with the new authority conferred upon the Bureau, there should be an increased allocation of super-grades to insure the recruitment and retention of competent personnel.

VI. *Budgetary considerations.*

A large majority of the Bureau's present resources are committed to mandatory projects. These include projects undertaken as a result of legislation, e.g., the Fair Packaging and Labeling Act and the Federal Cigarette Labeling and Advertising Act, or specific congressional or Commission concern, e.g., D.C. Consumer Protection Program, Home Improvements, Cigarette Testing Laboratory, Drug Evaluation Program, as well as actions to enforce specific guidance programs, actions to restrain competitors of respondents under orders to cease and desist, and actions to assure compliance with cease and desist orders. Obviously, it will not be possible to undertake any significant portion of the program discussed herein without a substantial increase in personnel.

It is not possible to state with any degree of accuracy just what additional resources would be required to mount a consumer protection program of the kind described herein. Even if that were possible, it would be unrealistic to expect that the necessary funds could be obtained and a staff assembled in fiscal 1971. A 20% increase in the resources would make it possible to start on such a program, but only a start. It is suggested that a reasonable and realistic goal for fiscal 1971 would be an increase of the Bureau's resources by 100%.

PART II—BUREAU OF DECEPTIVE PRACTICES PLANS BY EXISTING DIVISIONS

I. DIVISION OF FOOD AND DRUG ADVERTISING

A. *Continuing projects*

1. FTC/FDA non-prescription drug evaluation is a joint effort anticipated to carry through the entire FY 1971. Labeled as perhaps the most important project in this Division it will entail the largest expenditure of manpower and funds and will involve contact with several hundred proposed respondents, continuous liaison with FDA and a close working relationship with the Division of Scientific Opinions.

2. National TV monitoring program. By direction of the Commission this program is being intensified and should prove most fruitful in rooting out deceptive advertising.

3. Analgesics. Action on this program will carry over into FY 1971 based on the past history of analgesic advertising and the fact that the proposed TRR has already been challenged in the courts.

4. Freezer meat plan. The emphasis today is on the sale of meat products for stocking home freezers with the questionable practices running from "bait and switch", through false advertising of the grade and quality of the meat and failure to disclose true prices.

5. Weight reducing plans. A proliferating problem since weight reduction methods has become a big industry. Such practices will require attention through FY 1971. Included in this project is an industry-wide investigation involving "diet bread".

6. Vitamin-mineral preparations. New products continue to be introduced and new claims not previously made are covered by outstanding orders are appearing in advertising necessitating activity in this area through FY 1971.

7. Economic poisons. Many companies and products are involved in this industry and the FTC will be involved with substantial work in reviewing the advertising claims to insure conformance with the final rule to be promulgated. Thus the project should run well through FY 1971.

B. New programs

1. Breakfast cereals. An industry-wide investigation is desirable in this field due to questionable claims of high energy qualities.
2. Stimulants and tranquilizers. Misleading advertising in this area is on the increase.
3. Allergy products. Claims are being made for effectiveness and relief which may not be justified.
4. Mouthwashes.
5. Skin creams and lotions. Claims go far beyond the simple cosmetic effect which these products actually possess and, while not generally hazardous to health, the cosmetic industry is a thriving business with many millions of dollars being spent on advertising.

C. Additional alternatives

If manpower and money are available other projects in which there is considerable public interest could include: dentrifices, laxatives, cosmetics, anti-perspirants, female remedies, and polyunsaturated fats and oils.

II. DIVISION OF GENERAL PRACTICES

A. Continuing projects

1. Automobile industry. Includes everything from pricing to warranties.
2. Automobile tires. Deceptive pricing as to speed and safety representations.
3. Games of Chance.
4. D.C. Consumer Protection Program.
5. Home improvements.
6. Earnings. In the cases of chinchillas and franchises.
7. Sewing machines. Deceptive contests, bait and switch, and so forth.
8. Fictitious pricing re greeting cards and fishing tackle.
9. Door to door sales. Encyclopedias, housewares, etc.
10. Correspondence and vocational schools. Misrepresentation of benefits to follow completion of courses.
11. Cigars. Misrepresenting the source and failure to disclose non-tobacco ingredients.
12. Gold-Bronze Medallion homes. Involving the advertising practices of electric utility companies.
13. Stereo distributors. Deceptive promotional practices by distributors and retailers of stereo sets.

III. DIVISION OF COMPLIANCE

A. Continuing projects

The Division does not have a formal program for ascertaining whether a respondent to an existing order is in compliance and relies upon complaints from the general public, competitors, various organizations and the Commission's advertising survey section.

B. In the event of a 20% increase in the budget allocation for FY 1971 the Division recommends a program for selecting existing orders to cease and desist.

IV. DIVISION OF SCIENTIFIC OPINIONS

A. Continuing projects

1. FTC-FDA evaluation of non-prescription drug claims.
2. Analgesic product advertising.
3. Vitamin-mineral product advertising.
4. Weight reduction advertising claims for drugs, plans, form letters and devices.
5. Cigarette industry.
6. Cereal foods and breads.
7. Soft drinks and powered beverage mixes.
8. Miscellaneous food products.
9. Economic poisons and pesticide industry.
10. Cosmetic industry.
11. Formal liaison activities. Involves a day to day operational liaison with FDA, Pesticides Regulation Division of USDA, certain offices of the Public Health Service. Through FY 1971 and beyond increased liaison obligations are anticipated with the above and other agencies as a means of early detection of new problem areas.

B. New projects

1. Cough preparations.
2. Mouthwashes and antiseptics.
3. Common colds and sinus preparations.
4. Antacids and laxatives.
5. Topical antiseptics.
6. Denture preparations.
7. Sedatives and stimulants.
8. Skin remedies.
9. Miscellaneous drug product advertising. Entails a variety of products offered for memory impairment, epilepsy, diarrhea, asthma, sedation, stimulation, relaxation, burns, foot trouble, aphrodisia, weakness, fatigue and numerous other symptoms, conditions and diseases.
10. Miscellaneous device product advertising. Entails a variety of devices such as oxygen inhalers, circulatory improvement devices, sunlamps, bed-warmers, bedboards, sleep inducing and teaching devices, electric tooth-brushes, electric shavers, vaporizers, therapeutic shoe devices and devices with general health claims.
11. Food industry. Needing scrutiny are vegetable oil, vegetable shortenings and margarine products advertising, and special dietary food advertising artificial sweeteners
12. Miscellaneous product and device advertising other than food, drugs, devices and cosmetics. To be found in this group are cooking utensils, detergents, soaps, household and other cleaning agents, bleach dispensers, silver cleaners, paint removers, plastic cements, soil conditioners, fertilizers, silence treatments, window cleaners, solvents and coin operated machines and water sterilizers.

V. DIVISION OF SPECIAL PROJECTS

A. Continuing projects

1. Packaging. During FY 1968 and 1969 efforts were mostly expended in connection with mandatory regulations, establishing liaison with Federal and state agencies and industry and consumer groups, information interpretations of regulations, and requests for exemptions and problem areas in which the Commission had discretion to act on under Section 5 of the Packaging Act. In FY 1971 this project will be involved in enforcement, interpretation, and extensive processing of requests for exemptions and proposed amendments.
2. Automobile warranties. The Hearings have been concluded but the record is now being studied in preparation for recommendations to the Commission.
3. PBS Code and magazine sales. This project involves the voluntary industry-adopted PDA Magazine Code and the attempt to eliminate deception from sales of paid-during-service magazine subscriptions.
4. Cigarettes. At this time the exact role of the Commission in FY 1971 cannot be determined but no matter the choice available there will be considerable work resulting from the project whether or not new legislation is passed.
5. Gasoline. The gasoline project involves two marketing practices.
6. Softwood Lumber. This project may result in a Trade Regulation Rule proceeding.
7. Encyclopedias. The project is still in the direction of trying to affect voluntary industry elimination of deception used in sales of door to door merchandise.
8. Sauna baths. Study is currently being made to determine whether the effects of sauna baths are harmful and if so under what circumstances. This examination could result in requirements for proper labeling of sauna equipment.
9. Color television X-radiation. This project involves the answering of outside inquiries concerning the dangers of television X-radiation and working with the Public Health Service in this problem area. Reports will be made periodically to the Commission specifically concerning the latest developments in biological radiation effect studies, such as the one currently under way by the Division of Biological Effects, Public Health Service.
10. Household appliance standards. A study which will seek to determine the need, if any, for government promulgated standards for household appliance products.

11. National Consumer Protection. The Commission's Hearing on this subject was concluded in December 1968 but the project has generated much work and possible recommendations which are discussed under new projects. Additionally the Hearings will result in a FTC report on the subject of consumer protection.

B. New projects

1. Affirmative disclosure. The Cabinet Committee on Price Stability has suggested that the FTC should "compel affirmative disclosures of strategic product information that is inherently deceptive when omitted from advertising." This project should be undertaken by the FTC leading to Trade Regulation Rule proceedings and likely a few carefully chosen litigated cases.

2. Voluntary industry standards. This is a proposal to analyze each of the voluntary industry standards presently enforced from the viewpoint of possible consumer deception. Due to the large number of such standards, the program proposed will require the utilization of considerable manpower.

3. Consumer education and the clearinghouse function. The purpose of this program is to publish and circulate consumer information concerning wise buying and warnings of the principle sharp practices extant in the marketplace and to get this material into the hands of consumers especially to those most exposed to such practices. The plans also entail the maintenance of a comprehensive bibliography of consumer materials to be maintained in addition to news of consumer actions involving questions and issues at the local, state, and Federal levels, before the courts, and before the state and Federal administrative agencies.

4. Consumer liaison. It is contemplated that one of the functions of this Division will be to maintain contact with consumer groups and organizations interested in or active in consumer affairs.

VI. TRUTH-IN-LENDING SECTION

A. Continuing projects

1. Creditor education.
2. Planning work on consumer education.

B. New projects

1. The basic approach for FY 1971 will be one of continuing involvement with consumer education, and
2. Considerably increased emphasis upon enforcement techniques.

MEMORANDUM

APRIL 25, 1969.

Subject: Ideas and basic plans for the fiscal year 1971 budget for the Bureau of Textiles and Furs.

To: Paul Rand Dixon, Chairman, via John W. Wheelock, Executive Director.
From: Henry D. Stringer, Director, Bureau of Textiles and Furs.

The following plans are based on the assumption that Congress will approve the recommendations of the Bureau of the Budget for additional staff and funds for the Bureau of Textiles and Furs as presently set forth in the Fiscal Year 1970 Budget:

1. By July 1, 1970, the beginning of fiscal year 1971, or during the following 12 months, it is anticipated that the Secretary of Commerce under the amendment to the Flammable Fabrics Act will have designated certain categories of textile products which are hazardous and that the Department of Commerce will have provided tests for such products. It is expected that among the first such categories designated by the Secretary of Commerce will be bedding and upholstered furniture, and probably rugs, draperies, and certain other interior furnishings and decorations.

Such action by the Secretary of Commerce and the Commerce Department will call for inspection of several segments of industry that heretofore the Bureau of Textiles and Furs has not had occasion to call upon, such as mattress manufacturers, box spring manufacturers, and upholstered furniture manufacturers. In addition, the plans of the Bureau of Textiles and Furs for the enforcement of this statute are to contact and work closely with state and local fire marshals and fire chiefs so that, when fires involving fabrics occur in the categories specified by the Secretary of Commerce, the Bureau's investigators will be called in to determine if the Flammable Fabrics Act has been violated. Such a program, we believe, is what Congress and President Johnson expected when this amendment to the Flammable Fabrics Act was passed and signed.

2. Rule 36 under the Wool Products Labeling Act is no longer effective, but the problem that gave rise to this regulation is still with us and probably will become more pressing rather than less. Those importers who might be a little bit short on principles will, no doubt, read the Court's decision as a license to bring in goods from abroad with little or no concern for the fiber content set forth on the labels. Further, with imports increasing in an ever greater volume, there will, without question, be more and more misbranded goods included.

The Bureau of Textiles and Furs plans to assign resident investigators to the New York Customs' office in Manhattan and at the Customs' office at Kennedy Airport with the consent of the Bureau of Customs, to peruse entry papers of imported fabrics and textile products under the Wool Act, the Textile Act, and the Flammable Fabrics Act. Investigators at other ports of entry will check imports at the respective Customs' offices on a daily or weekly basis as appears to be necessary. Questionable entries will be sampled at Customs or at the place of business of the importer and later tested.

In this manner it is hoped to overcome the failure of Rule 36 and to stem the influx of misbranded merchandise from abroad.

3. Despite the continuing emphasis on the proper labeling of artificially-colored mink, misbranding is rampant in the fur industry. There are large profits to be made in misbranding fur products as natural when, in fact, they are dyed or color altered. The Bureau is presently working on this matter and will continue to throughout fiscal year 1970. However, in all probability, the problem will still be prevalent in fiscal year 1971.

The Bureau's enforcement plans in this matter are to examine the records of the mink dressers periodically to ascertain how they are dressing mink skins that lend themselves to dyeing, then check the invoices of the dressers to determine their customers. The customers will then be inspected and the lots of skins noted at the dressers checked to ascertain if the fur garment manufacturers are labeling their fur products correctly. This is a time-consuming process but it has been successful in the past in uncovering much misbranding.

Passing off dyed mink garments as natural is a serious fraud on the consumer, as the selling price of a natural mink garment is one-third to one-half higher than a similar dyed garment. Further, mink garments that are dyed will oxidize in time and will lose their rich dark color, to the damage of the purchaser. By such actions the unscrupulous manufacturer is unjustly enriched and his law-abiding competitor is subjected to unfair competition.

4. Another area of fraud in the fur trade, but one the Bureau has not had the personnel to date to cover, is the passing off as new, used fur garments or garments manufactured from used fur. It is hoped that a drive may be made on this problem in fiscal year 1971.

Many women trade in used fur coats when purchasing new ones. If the coats are in good or fair condition they are sold to dealers who purchase used garments. It is believed by the Bureau that in many cases a new lining is put into the garment and any obvious repairs made, and the secondhand product is then sold as new. Also along this same line, used fur in fair condition taken from old garments is remade into garments, which should, under the Fur Act, be labeled, invoiced, and advertised as "used fur", but the Bureau suspects large numbers of such garments are sold as new.

Many of the men engaged in this type of fraud conduct auctions or run special sales in local stores for a few days at a time and then move on. The nature of the problem makes it difficult to police and takes much more time to investigate than legitimate furriers located at fixed addresses. The investigation of this fraud requires a check of the used fur dealers' records and the tracing down of recent shipments of known used garments to retailers to determine how they are represented and sold to unsuspecting consumers.

5. The Fur Products Labeling Act requires the country of origin of imported furs to be shown on the labels attached to fur products and also on invoices covering such products. Large quantities of ranch mink are imported into the United States each year from Canada, Norway, Sweden, Denmark, Finland, Poland, and Japan. Many of these skins are inferior to the ranch mink bred in this country, as mink ranching is a much older industry here than in the foreign countries and over the years our ranchers have developed finer strains of mink. Also, the feed of the animals in the United States is better than in most foreign countries, resulting in finer fur pelts.

Although the number of imported mink skins is high, it is seldom that mink trim on fabric coats and suits show a foreign country of origin; and it is rare, if ever, that a full fur garment is found with a tag showing a foreign country of origin. A start was made this year on correcting this problem, but it was halted shortly after it started when the investigators were needed on the more pressing matter of the passing off of dyed mink as "natural". In the short time devoted to the program, several cases were developed against fur manufacturers engaged in this fraud.

Passing off foreign ranch mink as domestic is unfair to the consumer and definitely injures the domestic mink rancher who usually has a better product and whose labor and overhead is much higher than his foreign competitor's. It is hoped that by fiscal year 1971 the Bureau will have the personnel and time to concentrate on this type of misrepresentation.

6. Several years ago, when PPB was initiated, the Bureau of Textiles and Furs spent a great deal of time and energy in developing a long-range inspection program. It was determined that with a moderate increase in personnel each year the Bureau could eventually cut down the average periods of time between inspections of manufacturers and wholesalers to once in every five years, and retailers to once in every eight to ten years. Each year since the start of PPB the Bureau has requested the necessary people and money to put this program into operation, but each year this plan has been cut at the Bureau of the Budget or in Congress.

However, with the increase in personnel expected from Congress in fiscal year 1970, for the Wool and Flammable Fabrics programs, it is felt, as a side effect, that the Bureau will get additional coverage on its inspection work in fiscal year 1971.

7. If a 20 percent increase in the budget for the Bureau of Textiles and Furs is approved in fiscal year 1971, greater emphasis will be put on the inspection program mentioned above. This program has been outlined in detail in the budget requests for fiscal years 1968, 1969, and 1970. Inspection work is the basis of the Bureau's enforcement of the four Acts administered by it. Constant checking of importers, manufacturers, wholesalers, and retailers is necessary as the fiber content of fabrics in garments changes from season to season. A manufacturer who is properly labeling his spring wear may misbrand his winter garments six months later. A retail store which is scrupulous in seeing its merchandise is properly labeled and truthfully advertised next year may have a new manager who is trying to outdo his predecessor and who, in his enthusiasm for additional sales, is not careful of the store's labeling and advertising policies. The Bureau has been successful in its formal investigation work only because of the efforts of its field investigators in pursuing their inspection work. Over 90 percent of the Bureau's formal cases are initiated through the Bureau's inspection program.

Respectfully submitted,

HENRY D. STRINGER,
Director, Bureau of Textiles and Furs.

PROGRAM MEMORANDUM—BUREAU OF INDUSTRY GUIDANCE—FISCAL YEAR 1971

During Fiscal Year 1971, the Bureau of Industry Guidance will continue to intensify its efforts to inform and guide the business community as to legal requirements pertaining to specific practices, thereby enhancing the Commission's efforts both in the field of consumer protection and maintaining competition.

In planning its programs for Fiscal Year 1970, the Bureau attempted to achieve a balance between the new major programs in the areas of consumer protection and maintenance of competition. However, no attempt to accomplish a similar balancing in Fiscal Year 1971 is contemplated. Instead, because of the demonstrated need for continued efforts by the Commission to develop new consumer protection programs, it is felt that the Bureau is justified in placing added emphasis on the formulation and implementation of such new programs. To be sure, some new programs to further assist the Commission's efforts in maintaining competition will be developed. In addition, programs scheduled to be inaugurated in this field in FY 1970 will also be carried forward to the following year.

In connection with programs to maintain competition, it should be noted that the Commission, in issuing the revised Guides affecting promotional assistance programs, indicated that it would review the effectiveness of the Guides 18 months after promulgation. Inasmuch as future Industry Guidance activity involving Sections 2 (d) and (e) of the amended Clayton Act may well be dictated by the results of the Commission's review, it is not felt that the planning of far reaching and ambitious new programs in this area is warranted at the present time.

In establishing programs within the Bureau, full consideration has been given to two problems which appear to be closely interrelated, i.e., reasonable allocation of manpower and financial resources versus expeditious handling of existing and future workloads within a minimal amount of time. Because of the fact that the annual programs of the Bureau are to some extent subject to change as a result of instructions received from the Commission from time-to-time, the programs set forth below have been developed with due consideration to the manpower resources available through the program year, bearing in mind the possibility for a need to shift a portion of available manpower from planned programs to others, unplanned for, but brought to the attention of the Bureau by the Commission with instructions to take action.

Accordingly, the following are the major specific project recommendations of this Bureau for Fiscal Year 1970:

NEW PROGRAMS AT CURRENT MANPOWER LEVELS

1. Goal: To regulate and clarify price advertising of automobiles. (Consumer Protection)

The purchase of an automobile constitutes a substantial outlay of funds on the part of the average American consumer. In many respects, the consumer is entirely at the mercy of the manufacturer and the automobile dealer in attempting to make a meaningful price comparison when shopping for either differing makes of automobiles or for the same automobile sold by competing distributors. In addition, the cost of an automobile has become one of the major factors in automobile advertising both at the manufacturing and distributing levels. Many purchasers, it is believed, make their selection of an automobile as much on the basis of price as on performance, style, available accessories, etc.

Strategy: Following extensive studies of a number and variety of pricing practices which have been brought to the attention of the Commission in preliminary form, a formal proceeding will be initiated in areas requiring specific attention. Preliminary information indicates the existence of many areas apparently requiring attention, namely, announcements of new car prices which make comparison to previous year corresponding models without disclosure of changes in standard or optional equipment; pricing advertisements that conceal actual price in creases by reduction in warranty coverage; failure to reveal in new car price advertising charges imposed for accessories depicted or described but not included in delivery; and using the preticketed price of new automobiles which is required under the Automobile Information Disclosure Act as a means of misrepresenting actual prices in a trade area and as a means of deceiving customers on price savings. Thus, new car pricing has become a veritable jungle of meaningless phrases to the purchasing public, and the study and subsequent proceeding will attempt to bring some order out of the present chaos.

Alternative: The natural alternative, of course, is to attack the problem by complaints directed at the four principal automotive manufacturers. However, to include both domestic and foreign cars, a further multiplicity of complaints would become necessary. Therefore, attention to all of the problems in a single Industry Guidance proceeding would seem to not only provide the most timely and expeditious solution to the problem but, in addition, have the added value of a savings in time, funds and manpower.

In addition, practices sought to be remedied may not be such as to be amenable to single complaints in each situation. This obstacle could be overcome by the public hearing aspect of the Industry Guidance procedure.

Basis: Because of the annual multibillion dollar sales in this industry, as well as the individual cost of a new automobile to consumers, it is felt that this project is of major economic significance and, therefore, deserves high priority attention.

Manpower: It is estimated that the project will call for the full-time services of one attorney from inception to completion of the project, with the periodic assistance of one or two additional attorneys during the public hearing stages of the proceeding.

Completion Date: No earlier than the end of Fiscal 1971 and, depending upon the difficulties encountered during the proceeding, completion may not be accomplished until the first half of FY 1972.

2. Goal: To obtain disclosure in advertising and/or by labeling of important product information for various consumer products. (Consumer Protection)

Many products on the market today are sold with either minimal or no information being provided the purchaser as to performance, content, care, durability or safety characteristics. As a consequence, consumers have little or no basis for making comparative evaluations of competing merchandise prior to buying an item of merchandise. Annually, Consumers Union reports on a number of products which, through comparative testing, have been demonstrated to be safer, more dependable, more easily cared for than competing products, many of which are higher priced than the so-called "best buys." Not only would the general availability of such information be useful to consumers, but failure to disclose salient facts of the type set forth above may result in actionable deception under Section 5 of the FTC Act.

Strategy: A feasibility study will be commenced to determine the application of Section 5 to the advertising of certain consumer products for the purpose of deciding whether failure to disclose product information may, in fact, be a cause of misleading and deceiving consumers. A parallel study will be commenced to identify products or product lines which, because of their nature, would require affirmative Commission action to compel necessary disclosures.

Should it be determined that the Commission has authority to act and should the need for such action be demonstrated, as we anticipate it will be, steps will then be taken to develop one or more Industry Guidance proceedings in which the participation of industry members, consumer groups, relevant government agencies, business groups and qualified individuals will actively be sought. Such proceedings will initially seek, by voluntary means, to determine the types of disclosures necessary for given products as well as the means by which such disclosures will be made in order to carry out the Commission's objectives. Concurrently, or immediately following this phase of activity, effort will be devoted to compel disclosure of relevant information by manufacturers of products who, it may reasonably be anticipated, will be reluctant or unwilling to participate in any project of voluntary cooperation. The information to be elicited will cover product characteristics of the type mentioned above, i.e., safety, performance, etc., for the purpose of establishing a basis upon which further Commission action may be predicated.

Basis: Since safety, care and performance characteristics of certain products are of concern and interest to consumers and inasmuch as uncounted new products, particularly in the area of major and minor appliances, come on to the market annually, it is felt that the program outlined above has important economic and social significance. Moreover, as an added by-product to the objectives of this program, it may be anticipated that successful Commission action in this area may have the salutary effect of causing manufacturers to upgrade their engineering and manufacturing techniques and processes for the purpose of producing and marketing better performing and more competitive products.

Manpower: In the initial stages, it is estimated that the project will call for the services of at least one attorney on a full-time basis. Until completion of

the initial studies, it will not be possible to estimate further manpower requirements other than to state that an obvious increase in the allocation of manpower resources will be necessary.

Completion Date: Until initial studies have been completed, no estimate can be made as to the duration of this project.

3. *Goal: To prevent the deceptive advertising of franchise offers.* (Consumer Protection)

In recent years, franchising has exploded in much the same way as conglomerate mergers and become a successful method for the developer or promoter of new or successful service or product lines to expand into new market areas, increase distribution and gain wider acceptance for his merchandise. Today, franchises are available for a vast array of products and services, ranging from the conventional vending machine franchise to lines of clothing and various forms of food, beverage, rental and other services.

However, with the growth and success of franchise operations, the sharp operator has made his anticipated appearance on the scene. Unfortunately, many of the deceptive schemes which have evolved in this field have been aimed at minority and marginal economic groups which, because of the current climate, are particularly susceptible of being misled.

In recent years, the Department of Commerce and the Small Business Administration, in their efforts to increase and upgrade minority ownership and operation of small businesses, particularly in the inner city, have determined that franchising is an exceptionally well suited means to accomplish their objectives. Franchisees derive the benefit of proven know-how developed and tested by franchisors and enjoy the benefits of product identification.

Aware of the attempts of these agencies to persuade minority groups to consider franchise arrangements, the sharp operators have tailored their efforts to the situation. Principal among the many misrepresentations being made are those involving the exaggeration of profits and earnings as well as empty promises of exclusive territories, the type of assistance and training to be furnished by franchisors, etc.

Strategy: An Industry Guidance proceeding will be commenced for the dual purposes of developing rules or guides dealing with the deceptive advertising of franchise offers, and at the same time preparing a consumer bulletin or pamphlet to advise franchisees of the pitfalls which they should anticipate when considering entering into an agreement. It is felt that, given wide distribution of both the final rule or guide and the consumer pamphlet (perhaps utilizing the facilities of the Department of Commerce and the Small Business Administration, as well as those at the Commission's disposal), we will be able to effectively inform and advise both franchisors and franchisees of the requirements of law and thereby preclude a number of the unlawful practices presently being engaged in.

Alternative: Here, as in many other situations, the sole alternative appears to be Commission action on a case-by-case basis rather than on the industrywide basis. Such activity, in this instance, is deemed to be highly inappropriate because of the time litigative work would entail and the probable lack of immediate impact which such work would have on those most affected by the practices in question. From the information available to the Bureau at the present time, it would appear that the Commission's activity in this area would best be directed toward education rather than litigation, reserving formal proceedings to obtain effective compliance with a rule or guide, where necessary.

Basis: This project was selected for consideration because of the strong socioeconomic implications involved, particularly as they affect minority groups.

Manpower: It is anticipated that this project can be completed during FY 1971 through full-time utilization of the services of one attorney.

Completion Date: It presently appears that the project could be formally commenced and completed during FY 1971.

ADDITIONAL PROGRAMS AT INCREASED MANPOWER LEVELS

The following are additional programs, considered to be of major importance and listed in order of priority, which will be undertaken in the event that the Commission and the Bureau is authorized an increase in manpower. In this connection, it should be noted that in the event that programs set forth in the previous category are completed at an earlier date than presently anticipated or that major programs carried over from Fiscal Year 1970 are terminated prior to

the end of FY 1971, attention may then be immediately given to the programs in this category, set forth below.

1. *Goal: To forestall discriminatory advertising and promotional allowances under Section 2(d) of the Amended Clayton Act in the electrical home appliance industry.* (Maintaining Competition)

This program is intended to insure that advertising and promotional allowances by manufacturers of electrical home appliances (radios, television sets, stereos, phonographs, and similar household electrical units) offer and make available on proportionally equal terms such allowances to all customers competing in the distribution of such goods.

Strategy: The electrical home appliance industry is composed of the principal manufacturers of radios, televisions and other home entertainment instruments. The industry thus has a number of large national advertisers engaging in heavy advertising outlays. As presently viewed, we believe this industry is so structured as to indicate a predisposition to tailor their advertising allowance programs to suit their larger customers, thereby discriminating against the smaller ones. The Commission recently issued Guides for Advertising Allowances and Other Merchandising Payments and Services. These Guides will furnish such manufacturers with a working knowledge of the requirements of law.

To insure a more meaningful compliance with the Guides, however, a study will be undertaken to ascertain whether an Industry Guidance proceeding might be inaugurated, similar perhaps to that previously undertaken by the Commission in the Men's and Boys' Tailored Clothing Industry. In this last mentioned proceeding, a Trade Regulation Rule was adopted which created a presumption that the granting or furnishing of advertising or promotional allowances to customers would be presumed *not* to have been made available on proportionally equal terms unless made available in accordance with all the terms and conditions of a *written plan* supplied to all competing customers.

Alternative: The approach set forth above is actually an alternative to an industrywide proceeding, attacking discriminatory advertising and promotional allowances within the entire electrical home appliance industry, or separately for each product or type of product. The first, a frontal attack approach, is deemed to be an inordinate waste of time and manpower. The second approach, dealing on a product-by-product basis, is viewed as being unnecessarily restrictive and, for this reason, wasteful of time and manpower also. Correction of discriminatory practices in this industry by the "presumption of illegality" approach would appear to have every prospect of being successful, with equal benefit to the Commission and to the industry. The prospect of such success is enhanced by the experience gained during the compliance survey in the Men's and Boys' Tailored Clothing Industry wherein responses were solicited from over 500 industry members.

Basis: Because of the broad reach of this industry on the purchasing habits of the public, and because of the apparent large sums of money spent on the advertising of industry products, this project is deemed to have important economic significance, particularly as to industry members.

Manpower: At the present time, it would not appear that more than one experienced attorney would be required to work on this project on a full-time basis.

Completion Date: Completion will depend upon whether the program is commenced during FY 1971. In any event, a period of one year would appear to be necessary for development and completion of the project.

2. *Goal: To protect consumers with respect to excessive efficacy advertising claims of oral antiseptics and dentrifices.* (Consumer Protection)

It is estimated that the consuming public spends several hundred million dollars annually on various oral antiseptics, mouthwashes, and dentrifices. Much of this expenditure is induced by all-out campaigns by manufacturers through television and periodical advertising making exaggerated claims for the efficacy of their products.

Strategy: A study will be undertaken to ascertain what steps can be taken under Industry Guidance procedures to alleviate the excesses that may be found in such advertising. The study will concentrate on claims that particular oral antiseptics or mouthwashes provide all-day protection to users. Likewise, many dentrifices are promoted solely for their capability to produce whiter teeth, rather than for the normal use of dentrifices to cleanse the teeth to help eliminate or reduce decay. Available preliminary information indicates that at best most oral

antiseptics and mouthwashes are quite ineffective in reducing or stopping "bad breath" for any except very short periods of time.

Of far greater importance, however, dentrifices that apparently guarantee whiter teeth may contain harmful abrasives which could, by continued use, have a deleterious effect upon teeth enamel. As a consequence, in order to enhance the cosmetic effect of such products, they may be compounded in such a manner which, although not by design perhaps, has the ultimate effect of endangering the dental health of large numbers of consumers.

Should it be determined from further study that such excessive claims are being made and are deceptive, appropriate proceedings to correct these matters will be initiated.

Alternative: An alternative program to proceed on a case-by-case approach against those manufacturers producing and promoting selected products found to be advertised in a deceptive manner, in the hope that issuance of orders would be sufficient inducement to other manufacturers of related products to tone down their advertisements, was not considered an effective deterrent. The large sums of money expended by consumers on these products, the ease of manufacture by simply using additives to promote other and equally excessive efficacy claims, clearly indicates the need for a broad approach to this problem. At the same time, it is felt that considerable time and public funds could be conserved and consumer protection achieved through the type of program described above.

Basis: Because of the possible health implications as well as the high degree of consumer spending for products covered by this project, it is felt that major consideration is deserved.

Manpower: This project will require the services of one attorney on a full-time basis.

Completion Date: A period of from nine months to one year appears to be necessary to complete this project from its inception, subsequent to the completion of preliminary studies. The studies themselves may involve a period of from two to four months.

3. *Goal:* To determine the need for the labeling of special care products to provide for consumer protection.

This Bureau is presently engaged in a pilot study to determine the possibility of extending the application of Section 5 to require that textile products requiring special care and handling be labeled with appropriate instructions for such care and handling. In this regard, it is felt that products other than those in the textile field may be in need of similar treatment.

Strategy: A broad survey and study will be initiated with a view to locating and identifying products outside the textile field which, because of their nature, may require special care and handling. The study will have as one of its objectives the determination of whether the Commission not only can but *should*, attempt to make further entry into this area beyond the proceeding presently under consideration. Chief among the objectives of the project will be an attempt to reach a conclusion as to the manpower requirements necessary to develop and implement a program of this nature and whether a cost-in-relation-to-benefit approach to the problem will indicate that the Commission should either make a manpower and resources commitment to future programs or take no further action.

Alternative: We could, as an alternative, plan to take no further action in this area. However, there exists a possibility that the proceeding presently being considered may germinate future requests for Commission action in other product areas. Taken one at a time, such requests might entail an unwarranted expenditure of manpower in individual programs, with a net result that more manpower would be expended by this approach than by a general study. By planning to survey the entire question at one time, it is felt that the Commission would be in a position to make a major policy decision on future requests which is grounded on sound legal and factual data derived as a consequence of the study.

Basis: This program has been selected because of the apparent need to determine whether future Commission action is needed and warranted and, if so, assist the Commission to determine the form and extent of any action to be taken.

Manpower: The services of one attorney will be needed for a period of at least six months on a full-time basis or one year on a part-time basis.

Completion Date: Six to twelve months after implementation of the program.

PROGRAMS CARRIED FORWARD

It is anticipated that the following major programs will be carried forward into Fiscal Year 1971 and, in one instance, beyond the program year. The warranty and guarantee program is of such an extensive nature that it will not be concluded until sometime during FY 1972 at the earliest. Need to carry forward the other two programs is dictated by the fact that requested increases in manpower for FY 1970 were not authorized.

1. *Warranty and guarantee project*—To have such warranties and guarantees for household appliances say what they mean and mean what they say. (Consumer Protection)

2. *Dry Bakery Products Industry*—To foreclose price discriminations under Sections 2(a) and (d). (Maintaining Competition)

3. *Magazine and Book Distribution Industry*—To prevent trade restraints through vertical and territorial restrictions, price fixing, etc. (Maintaining Competition)

OTHER PROGRAMS

1. In addition to the major projects set forth above, continued effort will be devoted to our compliance programs which serve to make effective our rule and guide proceedings. As the new major projects set forth above are completed (other than studies), they will be implemented by the establishment of new compliance programs.

2. The Advisory Opinion work of the Bureau, which cannot be programmed due to its total reliance upon voluntary requests for such opinions, will continue to improve its effectiveness through its efforts to prepare, index and publish advisory opinion digests which have greatly enhanced the value of the Advisory Opinion program.

MEMORANDUM

APRIL 29, 1969.

Subject: Programs and special projects of the Bureau of Economics for fiscal 1971 budget.

To: Chairman Dixon, via Executive Director.

From: Director, Bureau of Economics.

The following is a description of the Bureau's basic programs for fiscal 1971 as requested in Chairman Dixon's memorandum of March 20, 1969.

DIVISION OF INDUSTRY ANALYSIS

It is difficult to project programs and plans for this Division because of its continuing responsibility to work on special projects resulting from Commission, Congressional or other agency requests. This year about two-thirds of the staff is engaged in a special conglomerate merger study. Although our previous budget anticipated a limited study in this area, such a large allocation was unanticipated. As in previous budget proposals there is a listing as a major project in the Division "The Performance of Special Projects". In the last budget request for this Division an increase in staff was recommended so that planned research projects should be continued along with the processing of the great variety of special projects. This type of request should be renewed in 1971.

Each year for the past several years the Bureau has had to set priorities and sacrifice various aspects of its planned research project because it has had to devote so much staff to special projects. Fiscal 1971 will be no different unless we get an additional appropriation of personnel amounting to 20%-30%. In the event of a 20 percent increase the Division would expect under new projects for fiscal 1971 to complete project 2 listed below "Advertising and Promotional Practices", project 3 "Consumer Protection Studies", and project 5 "Economic Analysis of Commission Activities".

EXISTING PROJECTS TO BE CONTINUED DURING FISCAL 1971

1. *Conglomerate Mergers.*—The Bureau is now conducting an extensive study of conglomerate merger activity. The first phase of this study, a summary review of the merger movement, should be completed in fiscal 1970. This will be followed by more intensive study of factors found to be important in the first phase of the investigation. We expect to look in more detail at financial incentives for merger activity, efficiencies purportedly achieved by large conglomerate firms, and the effect of conglomerates upon competition. The first phase of the study also will undoubtedly suggest other areas which should be studied in depth. For example: Do conglomerates spend less on research and new investment because of their emphasis on merger activity? Are there any advertising or product promotion advantages for conglomerate firms? Do conglomerates practice widespread reciprocity? Do defense and government procurement policies tend to favor conglomerates (ITT, Litton and LTV rely heavily on such contracts)?

The general purpose of the study is (a) to gain a better understanding of the causes and effects of conglomerate merger movement, and (b) explore a wide range of policy alternatives from taxation through antitrust which may curb the harmful effects of the movement.

2. *Industrial Behavior and Market Structures.*—This study explores the relationship between the structure of major industries and their performance in terms of prices and profits. Statistical studies currently under way in the Bureau indicate that those industries with a high degree of concentration are also characterized by above average profits. During 1971 we will explore further this structure/performance relationship for major industries. The analysis will focus on two groups of industries—those that have remained highly concentrated over a period of years and those that are now in the process of becoming more concentrated.

NEW PROJECTS FOR FISCAL 1971

1. *Major Concentrated Industries.*—A series of in-depth studies will be conducted of important, highly concentrated industries which have shown poor performance in recent years. Six industries have been initially selected for study: steel, automobiles, drugs, electrical machinery, energy industries and chemicals. The studies will review the overall performance of each industry in terms of pricing behavior, level of profits, innovation and new investment. An

analysis will be made of the structural and behavioral characteristics which account for the relatively poor performance of these industries. Policy recommendations will be developed for improving performance wherever possible.

Examination of these highly concentrated industries is important from two standpoints. First, their structure and pricing behavior raise serious questions from an antitrust standpoint. Follow-the-leader pricing and price rigidity in the face of downward market pressures suggest an absence of effective competition. In some of the industries, such as automobiles and drugs, the level of profits has been consistently above what may be considered the competitive norm.

Second, major concentrated industries, through the exercise of discretionary pricing power, contribute to both inflation and unemployment. The steel industry, in particular, has shown the ability to resist downward price pressure and even to raise prices in the face of excess capacity. The presence of large, highly concentrated industries hinders the normal process of adjustment to shifts in demand through price flexibility. For this reason it has been difficult to control inflation without incurring high levels of unemployment. Since inflation is an urgent national problem, a better understanding of competition in these bottleneck industries is extremely important.

The first study will focus on the steel industry. In addition to its size, steel is a key industry in the production process, and influences prices throughout the economy. The issue of discretionary pricing power is dramatically illustrated by the steel industry which, despite fluctuations in demand, has followed a "ratchet" pricing pattern—always up and almost never down. Steel producers have tried to maintain this traditional pricing pattern despite strong import competition.

2. Advertising and Promotional Practices.—This would represent an expansion of the present TV network study into a general examination of consumer goods marketing practices. The FTC last published a study of advertising in 1944. Since that time television and mass circulation magazines have become more important. In addition, there are new promotional techniques such as use of coupons, free deals, in-store promotions, etc. Such changes in advertising may have given large, multiproduct corporations an advantage over single-line companies. For instance, a multiproduct company can more effectively use network television by showing several products on a single program.

While there is a great deal of general information on advertising, very little is known about the detailed expenditures of multiproduct firms. How are advertising expenditures allocated among different products? How are expenditures distributed over a product life cycle? What is the geographic distribution of advertising and promotion expenditures for a company like General Foods who meets local competitors?

A primary objective of this study will be to evaluate the effects of advertising practices on competition. There is substantial evidence that advertising may be an important factor in changing market structures and reducing competition. In recent years the most rapid increases in concentration have been in differentiated consumer goods' industries. Large firms may be making effective use of advertising media such as television to take over markets formerly held by small competitors.

A second issue to be examined is the manner in which advertising is fulfilling its role as a source of product information. Aside from the issues of competition, advertising can perform a valuable service in alerting consumers to new products and providing data on performance, quality, or safety characteristics of products. The Commission, in a memorandum of February 12, 1969, asked the Bureau to comment on the need for affirmative disclosure of strategic product information. If the Commission proceeds with a program of affirmative disclosure, the Bureau of Economics could assist the legal bureaus in formulating standards. Standard disclosure of product characteristics, in addition to making consumer choice easier, could also increase competition in many industries by reducing the degree of product differentiation. Disclosure standards would make it more difficult for large firms to build brand loyalties based on confusing or imaginary performance claims.

3. Consumer Protection Studies.—Certain industries represent "trouble-spots" from the standpoint of consumer protection. An example is the home-improvement industry, which appears to suffer from flagrantly deceptive selling practices, exorbitant loan fees, etc. Another recent area of concern has been home

appliance warranties. It would be useful for the Bureau of Economics to conduct studies on a continuing basis of such trouble spots as their existence becomes evident from complaints received by the Commission. This could be done by periodically reviewing complaint files to identify problem industries.

4. *Special Projects.*—One of the most important functions of the Division of Industry Analysis is to undertake special projects, which may arise from requests by Congress, other government agencies, or the Commission. These projects generally cannot be anticipated and often must be completed on a rush basis. An example of such a project was the investigation of bread and milk prices, conducted at the request of the Secretary of Agriculture in 1968. This extensive investigation had to be completed in only 3 months time. As a result almost the entire staff of the Division participated in the project. It has been our experience that at any given time one-third to one-half of the Division's personnel is likely to be tied up by such projects which cannot be planned in advance.

5. *Economic Analysis of Commission Activities.*—The Bureau of Economics can provide valuable assistance to the Commission in program planning activities. With the advent of the PPBS system, there is more emphasis on finding objective measures for evaluating alternative programs. The choice of which industries deserve highest priority will depend upon their relative importance in the economy and the cost of the deceptive or anticompetitive practices involved.

DIVISION OF ECONOMIC EVIDENCE

During fiscal 1971 the Division of Economic Evidence will continue to concentrate about three-fourths of its manpower allocation on providing economic assistance to the legal bureaus and divisions in connection with investigation and trial of cases, as well as in the development and evaluation of economic data and preparation of studies related to actual or potential case questions. In addition, portions of the staff will be drawn into the Bureau's conglomerate merger project. Currently, approximately 75 percent of the Division's activity is in the area of cases, while 25 percent may be devoted to the conglomerate study. The proportions may shift in favor of the conglomerate investigation as time goes on, particularly as non-public hearings are held in connection with takeovers, and as detailed analysis is made of the special studies of nine large conglomerate firms.

Very heavy burdens are placed upon the staff of this Division because of the more than four-fold increase in the level of merger activity which has occurred during the past three years. It is also anticipated that in fiscal 1971, as the Bureau expands its studies of concentrated industries, the staff of the Division will be called upon to assist in such studies.

If a 20 percent increase in the staff were authorized this would help to catch up on the backlog of research, fact gathering and analysis needed to probe the new developments in the conglomerate merger field, but even such an increase in resources would fall far short of the needs of the Division.

DIVISION OF FINANCIAL STATISTICS

For fiscal 1971 the Division of Financial Statistics would like to centralize all the financial reporting programs in the Federal Trade Commission.

In the FTC-SEC quarterly financial reporting program, approximately 8,000 corporations are surveyed by FTC and 2,500 by SEC. If all 10,500 were surveyed by FTC, rather than part by one agency and part by another, the following economic information not heretofore available could be developed for use by the Commission on a continuing basis:

(1) Quarterly changes in the concentration of economic activity in each major industry.

(2) Annual changes in who controls the largest corporate manufacturers.

(3) Quarterly changes in the ownership of other companies by the largest manufacturing corporations.

The foregoing can be accomplished by a 50 percent increase in the budget of the Division of Financial Statistics. Preliminary discussions indicate that a proposal to centralize the quarterly financial reporting program in the FTC will be considered favorably by the Bureau of the Budget. Such centralization would be extremely valuable to the Commission in improving investigational planning and deploying its resources.

Respectfully submitted,

WILLARD F. MUELLER.

MEMORANDUM

MAY 27, 1969.

Subject: Proposed budget request of the Office of Program Review for fiscal 1971.
 To: Executive Director.
 From: Office of Program Review.

Regarding the Commission minute of May 13, 1969, I am attaching a budget statement for this Office and an alternative budget justification. This dual approach gives the Commission a clear choice as to the future role of its policy planning office.

The first budget option presented (Alternative #1) is premised on the continuation of this Office into fiscal 1971 with its current functions and authorized personnel strength of two professionals and one clerk-stenographer. The second option (Alternative #2) assumes that the Commission recognizes that the apparent distortion in its workload emphasis between the significant and the trivial can be reduced and moved toward the important by developing major investigations based on self-generated economic analyses of critical industries that would be conducted by an expanded program review staff.

To develop the staff machinery and plans for the rational deployment of Commission resources into significant project areas, I recommend that the Commission approve attached Alternative #2 which calls for a substantial increase in the program review legal-economic staff. However, the Commission may want to postpone any enlargement of this Office until it appoints a Program Review Officer and obtains his views on the program review charter. If that is the case, the Commission could approve Alternative #1 (no increase) for fiscal 1971 and then consider Alternative #2 (expansion) for fiscal 1972.

Policy planning at the Commission has been and is still largely *ad hoc* and random, taking place only when a problem arises. The Commission needs to establish a planning climate at this agency. To get this done the Program Review Officer should be given a real voice in the day-to-day decision-making of the Commission. To institutionalize planning, the Program Review Officer needs the power to coordinate the bureaus' commitments and the professional staff to produce policy position papers that focus on the major issues relevant to the effective performance of the Commission.

JOHN J. HURLEY, *Economist.*

STATEMENT ON THE PROPOSED BUDGET REQUEST OF THE OFFICE OF PROGRAM
 REVIEW FOR FISCAL 1971

Alternative budget justification No. 1

OFFICE OF PROGRAM REVIEW

The primary mission of this Office is to improve and foster investigational planning by the Commission to enable the Commission to focus its powers and resources on the significant in trade regulation. The Office aims to make such policy planning rational by devising the formal means by which all policy alternatives on potential resource uses are presented to the Commission. To provide these options is to ask where the Commission is going.

In supplying policy guidance for the Commission, this Office makes recommendations to the Commission on program areas in the economy where the Commission could commit the limited Commission resources. The Office also prepares enforcement policy position papers for the Commission, setting forth the decision options on the policy issues. Additionally, the Office advises the operating units on the process of developing program plans and evaluates their annual program proposals.

The major long range project of this Office is the development of a total system for planning the Commission's major programs and resource allocations on a rational basis. This policy research includes devising and refining standards for the selection of industries, practices, and cases for Commission investigation, surveillance or other legal action.

The authorized personnel strength of this small Office since 1963 has been an attorney (the Program Review Officer, now a vacant position), an economist specialist in managerial economics and industrial organization (now acting in place of the Program Review Officer), and a clerk-stenographer (a vacancy). For

fiscal 1971, funds for this Office are requested as indicated below for these three positions to continue the described strategic policy planning functions. No increase in the staff authorized is requested.

PERSONNEL REQUEST (ALTERNATIVE NO 1) OFFICE OF PROGRAM REVIEW

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	3	\$50,000	3	\$52,000	0	\$2,000

STATEMENT ON THE PROPOSED BUDGET REQUEST OF THE OFFICE OF PROGRAM REVIEW
FOR FISCAL 1971

Alternative budget justification No. 2:

OFFICE OF PROGRAM REVIEW

To aid the Commission to discover future opportunities and emphasize the significant in trade regulation, the Commission in October, 1961, appointed a Program Review Officer reporting directly to the Commission. His assignment is policy planning—to study the various areas of the economy, locate primary monopolistic and deceptive trouble spots, and make recommendations on what the Commission should do.

This broad assignment of economic surveillance, appraisal and recommendation, if literally interpreted, would require the Program Review Officer to have a large staff with legal and economic talents and resources far greater than the total of one attorney and an economist allocated since 1963 to this Office. Back in 1960 a Budget Bureau staff report recommended that the Commission establish a high level program review staff of two attorneys and two economists to advise and assist the Commission on deciding major resource commitments and the priority directions of the Commission.

Limited to two professionals, this Office has therefore viewed its basic task as one of planning, initially and periodically, an organization of the staff of the Commission which can carry out the indicated broad assignment of the Program Review Officer as literally as possible. The Office is seeking to design a rational system for trade regulation policy formulation. Its aim is to make policy planning by the Commission more systematic and orderly, assuring by formal means that all options and all points of view on proposed resource involvements are laid out before the Commission.

The mission of the Program Review Office is to furnish policy guidance for all matters under the jurisdiction of the Commission as defined in Reorganization Act No. 8—"revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes." The policy proposals of the Office are aimed to help the Commission make sound economical decisions on the best uses of Commission resources. The long range policy research project of this Office is to refine standards for the selection of industries, practices, and cases that are worthwhile for Commission investigation.

Since industries are the habitat of monopoly and competition, policy planning by the Commission that allows it to identify and deal with monopolistic and deceptive practices on its own initiative requires industry analysis on a continual basis. Basic to this long-range planning is a substantial high level staff of attorneys and economists to make legal-economic studies and probes focusing on the totality of competition in key industries and formulating Commission programs for these industries to deal with everything from mergers to false advertising.

Accordingly, an additional \$77,000 is requested for six new positions for this Office in fiscal 1971: one GS-14 attorney for program evaluations and four economists (one each at the GS-11, GS-12, GS-13, and GS-14 levels) for industry analyses work, and one GS-5 clerk-stenographer. This legal-economic

staff would appraise the structure and behavior of critical industries such as electrical and farm machinery, electrometallurgical products, nonferrous metals, industrial chemicals, oil, computers, and scientific instruments. This analytic staff would produce analyses of industries with structural and performance features conducive to illegal monopolistic and deceptive behavior and recommend alternative courses of Commission action. With this industry information base the Commission would gain an informed position to direct its enforcement bureaus to develop major legal investigations and apply all appropriate legal sanctions.

Through this systematic planning of resource commitments, the Commission objective would aim at fostering competitive pricing, reduced entry barriers, and fair competition in the key industries examined. The emphasis of Commission programs would be skewed toward the important, and the economic significance of Commission activities, by the selection of new investigations based on planned and sustained economic analyses of industries.

PERSONNEL REQUEST (ALTERNATIVE NO. 2) OFFICE OF PROGRAM REVIEW

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	3	\$50,000	9	\$130,000	6	\$80,000

JUNE 4, 1969.

Appropriations request for fiscal year 1971.

In re : Preliminary ideas and plans of the bureaus and offices.

Memorandum for : Director, Office of Comptroller ; Director, Office of Administration ; Executive Director ; Director of Hearing Examiners ; General Counsel ; Director, Bureau of Restraint of Trade ; Director, Bureau of Deceptive Practices ; Director, Bureau of Textiles and Furs ; Director, Bureau of Field Operations ; Director, Bureau of Industry Guidance ; Director, Bureau of Economics ; Assistant to the Chairman ; Program Review Officer ; Legal Advisers to the Commissioners ; Legal and Public Records ; Director of Public Information ; Management Officer ; Reporting Section.

It was agreed that the staff appearances before the Commission for discussion with respect to the above matter would be rescheduled from June 12 and 13 to a time more convenient to the Commission, but prior to July 15, 1969.

The staff was instructed to submit comments and recommendations in writing prior to the scheduled meeting, and advised that the purpose of such meeting is not to discuss the form of request to the Budget Bureau, but for each Division and Bureau to advise the Commission now what projects are being contemplated for both Fiscal 70 and 71 and what manpower requirements would be necessary to carry out such projects, and other pertinent information required by the Commission in order for it to form judgment.

The staff was further instructed to consider circulation of May 27, 1969, by Miss Jones and a projected circulation by Mr. Nicholson with respect to this subject, but specifically devoted to the Division of Mergers, and to submit their comments and recommendations thereon for the Commission's consideration ; to consider allocations in terms of specific area of activity, not by organization, to consult with other Bureaus and Offices in order to submit suggestions on allocations either in terms of percentage of amount sought or in terms of total number of dollars to be spent ; to not only prepare justifications for requests and allocation of funds for Fiscal 1971 but also to cover allocation of funds among the various Bureaus and Divisions for Fiscal 1970.

By direction of the Commission.

JOSEPH W. SHEA,
Secretary.

MEMORANDUM

JUNE 12, 1969.

Subject: Revised fiscal 1970 budget justification for truth in lending.
 To: Frank C. Hale, Director, Bureau of Deceptive Practices.
 From: Sheldon Feldman, Attorney in Charge, Truth in Lending Section.

I. THE SCOPE OF THE ENFORCEMENT PROBLEM

A. Activities During Fiscal 1969

Realizing the vast number (over 1 million) of consumer creditors subject to our jurisdiction under this new law, in January of this year we decided to mail a copy of the implementing regulations, the statute and any available supplemental material directly to as many of the creditors over whom we have responsibility as we could reach. In addition to the text of the Regulation and statute the 60 page pamphlet contains a series of explanatory questions and answers and illustrative forms that comply with the Regulation. At this time we have mailed about 750,000 copies through a private distribution source, using four different specially compiled mailing lists, and have distributed more than 50,000 ourselves from the main FTC building and from our 11 regional field offices. We expect to distribute as many as 50,000 more pamphlets within the coming months. Incidentally, we have a ready check upon the adequacy of our mailing addresses because the postal authorities return all undelivered pamphlets to us. Of approximately 800,000 booklets mailed to date we have received under 1000 returns, by any standards an exceptionally high rate of successful distribution.

In addition to responding to an average of 50 letters each day that spell out the creditor's individual compliance problems, the staff has embarked upon a massive educational program. In each of the territories covered by our 11 regional field offices at least two attorneys have been working full time since March conducting seminars and industry conferences on Truth in Lending. Virtually every day since that time has been devoted to conducting or participating in educational sessions ranging in size of attendance from 25 to 2000 creditors.

In spite of the mailing, the correspondence and the local conferences we believe that the effect has been to only scratch the surface and we are concerned. There is a vast difference between mailing a regulation as detailed as this one and effectuating full understanding and compliance with it.

B. Activities During Fiscal 1970

We have learned a great deal about our creditors and about their problems from the distribution of the Regulation Z pamphlet mentioned above. Briefly, we know from the mail received daily from creditors that compliance problems appear to increase in direct ratio with the descending size of the company. About 80% of our mail comes from the small businessmen who, as a rule, find the whole subject matter of Regulation Z confusing and disconcerting. The basic problem is that the Truth in Lending Act makes every existing mortgage statement, conditional sale contract, promissory note, periodic billing statement, and revolving credit agreement obsolete. The effect of the law is to change the disclosure made to consumers by creditors in all 50 States, including those few states that have so-called Truth in Lending Acts.

Every passing day puts us in a better position to assess the situation and at present we are certain that the chief enforcement problem will be to reach the small retailers and small finance companies. The most common and the most difficult compliance problems fall within four areas:

1. Revising the language of contract forms and billing statements to meet the precise terminology and standards of Regulation Z, and obtaining sufficient supply from printers in time;
2. Computing the dollar amount of "finance charges" and the amount of the "Annual Percentage Rate" in common but complex situations such as those involving discount for prompt payment; delinquency charges; partial rebate of finance charges; add-on transactions and consolidations; series of sales; lay-away charges; and the irregular advances and irregular payments of agricultural credit;
3. The right of rescission—when does it apply, how is it actually granted by the creditor, and how can he accommodate it without drastically revising his basic business operations; and
4. Obtaining easy to use computation tables for determining the annual percentage rate that are tailored to suit the creditor's specific needs; and training sales personnel to use the tables.

No one is in a position to predict the percentage of creditors who will not be in

compliance on July 1, 1969, but we believe that well over 50% will require some degree of individual assistance to cope with the changes brought about by this sweeping new law. The scope of our responsibility is therefore tremendous, and it is during this first year of enforcement that our talents and perseverance will receive their sternest tests.

To summarize then, by July 1, 1969, the sum total of our activities will have amounted to the accomplishment of letting most businessmen know that there is a new Federal law that affects them that deals with their extension of consumer credit. It is submitted that beginning in July we must maintain the momentum of creditor education that we have started with actual enforcement or be prepared to be satisfied with only token compliance.

II. ACHIEVING THE GOAL OF FULL COMPLIANCE

Stated as simply as possible, we have requested sufficient fiscal resources to achieve universal compliance with the Truth in Lending Act, because we believe that is what Congress intended when it passed the Act in May 1968. Since no important legislation in recent memory received more unanimous Congressional approval, we cannot believe that such strong advocacy in the face of persistent opposition would be satisfied with token compliance by the business community. In any case, we will not be satisfied.

We are presently contacting the regulatory authorities in every State in an effort to minimize our examination universe. However, even if we are successful in arranging for a degree of coverage concerning the federally required disclosures made by finance companies and state chartered credit unions—and this is not likely—we will have eliminated a total of 35,000 creditors (23,000 finance company offices and 12,000 state chartered credit unions), or less than 5% of our total universe. The staff is working closely with every major trade association to promote voluntary compliance and to explore the possibilities of instituting self-regulatory measures, but this effort can in no way serve as a substitute for mounting our own independent enforcement program.

We have stated that our goal is to achieve across the board compliance by credit grantors. What are the alternative methods of accomplishing this goal? We see these possible choices:

1. Try to determine the total creditor universe, which would be very costly, and develop sampling techniques to determine the extent of compliance. The probable result of this would be to settle for token compliance, since at best our compliance is on the basis of a sample.
2. Require submission of forms by the full universe of creditors for review. This would be extremely difficult, if not impossible to enforce and those who did respond would not reveal the extent of *actual* compliance but would only show whether their printed format was in compliance. Neither our data processing facilities nor conceivable manpower resources would be capable of handling this kind of input, at least in the foreseeable future.
3. Examine actual creditor compliance on the street by spot checks and in response to consumer and creditor compliance. It is obvious that we favor this alternative.

To try to bring about our goal of full compliance we plan to concentrate the staff's efforts on those segments of the consumer credit industry that are most likely to deviate from the prescribed standards. These are the small one of two office loan companies; the smaller volume new and used automobile dealers; the urban television, appliance, furniture, jewelry and clothing stores—particularly those catering to low and middle income city residents; the rural or small town merchants with "company store" type of operations; and the home improvement entrepreneur wherever operating. These are the people who as a rule do not belong to or are not active in trade associations. These are the people whose business is mostly on credit, who usually exact the highest rate of finance charges and who have thus far demonstrated the highest degree of difficulty in achieving compliance.

Although we can fairly readily identify the *types* of businesses on which we should concentrate, unlike the eight other regulatory agencies enforcing Truth in Lending who for the most part know their creditors and regularly examine them, we have at present no acceptable means of identifying individual creditors or determining the extent of their compliance once the Act becomes effective. However, with primary emphasis upon examination of the type of businesses just mentioned a workable program is definitely within reach. Heavy reliance for selection of the examiners' itinerary would be placed upon the attorney in charge of each field office. He should know where our people will do the most good and proper direction of examiner staff will be his primary responsibility.

We therefore feel that the best program will be that which emphasizes planned examination of those creditors who are least likely to make the required disclosures, coupled with the institution at the staff level of new methods and procedures for expeditious processing of consumer and competitor's complaints (our proposed procedural plans are now substantially complete). This approach, if accompanied by an imaginative consumer education program should ensure that maximum benefit is derived from the funds allocated.

Our original budget proposal asked for 150 people, and this number still represents the minimum in personnel to accomplish full enforcement of this new law. However we now can make a more realistic and practical plan of deployment and would revise our original allocation as follows: approximately 115 to the field [11 supervising attorney-examiners (from present experienced field staff); 90 non-lawyer consumer credit examiners; 14 support clerical-stenographical field staff] and 35 to the Bureau or Division in Washington [3 policy and supervisory staff, 19 enforcement and compliance staff attorneys, 4 professionals to account for planning, special studies, computation and verifying accuracy of disclosure, and 9 support clerical-stenographic].

In conclusion, we fully understand that even with 100 credit examiners we would only have the equivalent of two per state. But success will be measured by how well we assign these examiners to our 11 existing regional field offices, train them, develop their techniques to maximize coverage of creditors and minimize time spent per visit, and select their itineraries so as to take into account factors such as the similarity of state statutory requirements and the degree of concentration of probable law violators. Although we recognize that we will never be able to examine all creditors, with maximum utilization of examiner and legal personnel, we believe that substantial nationwide compliance will be achieved.

The following chart illustrates how this proposed revised personnel allocation differs from that found in our current fiscal 1970 budget presentation. The placements of personnel shown are for illustrative purposes and are not intended to represent precise or fixed concepts.

REVISED PROPOSED ALLOCATION OF TRUTH IN LENDING PERSONNEL

BUREAU [OR DIVISION] OF CONSUMER CREDIT (HEADQUARTERS)

Director [or Chief]-----	1
Assistant Directors [Assistant Chiefs]-----	2
Secretaries-----	3
Enforcement and Compliance Attorneys-----	19
Planning and Studies Economists--Attorneys-----	3
Satistical Computation Clerk-----	1
Clerical-Stenographers-----	6
Total-----	35

FIELD EXAMINATION STAFF (ASSIGNED AND SUPERVISED IN 11 REGIONAL FIELD OFFICES)

	Attorney examiner	Credit examiner	Stenographer	Total
Boston office-----	1	3	-----	4
New York office-----	1	16	2	19
Wash. Area office ¹ -----	1	8	1	10
Atlanta office ² -----	1	8	1	10
New Orleans office ³ -----	1	8	1	10
Kansas City office ⁴ -----	1	10	2	13
Cleveland office ⁵ -----	1	10	2	13
Chicago office-----	1	10	2	13
Seattle office-----	1	3	-----	4
San Francisco office-----	1	6	1	8
Los Angeles office-----	1	8	2	11
Total-----	11	90	14	115

¹ Includes Baltimore and Philadelphia.

² Includes Miami.

³ Includes Houston and Dallas.

⁴ Includes Denver and St. Louis.

⁵ Includes Detroit.

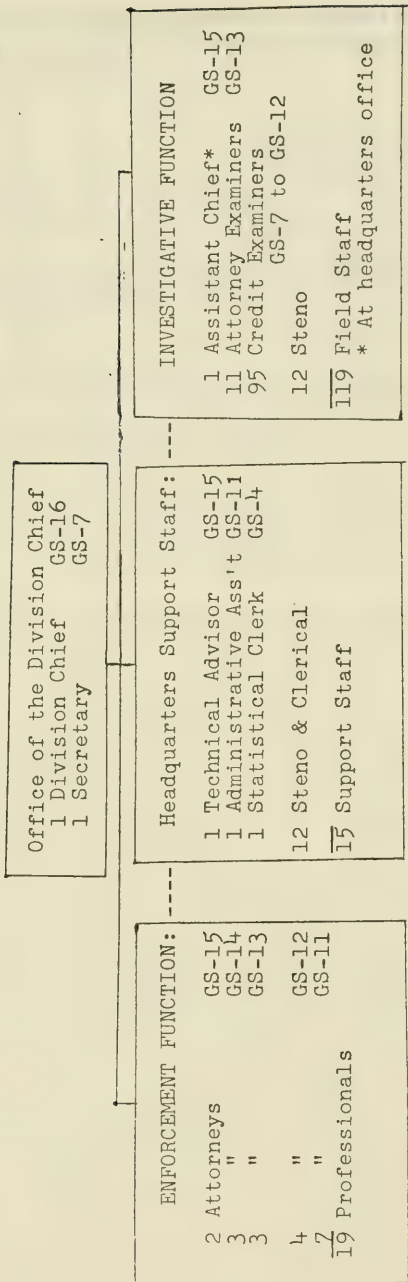
Respectfully submitted,

SHELDON FELDMAN,
Attorney in Charge,
Truth in Lending Section.

Pro Forma Functional Diagram*

Division of Consumer Credit

Bureau of Deceptive Practices



TRUTH IN LENDING STAFF (PROJECTED TO START OF FISCAL 1971)

Title	Grade	Number	Salary each	Total
Director (or chief).....	16	1	\$22,835	\$22,835
Assistant directors (or chiefs).....	15	2	19,780	39,560
Secretaries.....	7	3	6,981	20,943
Enforcement and comp. attorneys.....	15	2	19,780	39,560
Do.....	14	3	16,946	50,838
Do.....	13	3	14,409	43,227
Do.....	12	4	12,174	48,696
Do.....	11	7	10,203	71,421
Management intern.....	11	1	10,203	10,203
Statistical clerk.....	4	1	5,145	5,145
Clerical-steno.....	4	5	5,145	25,725
Attorney-examiners.....	13	11	14,409	187,317
Credit examiners.....	9	95	8,462	761,580
Steno.....	4	12	5,145	61,740
Total.....		118		\$1,388,790
Grand total.....		150		

FEDERAL TRADE COMMISSION BUDGET JUSTIFICATION TO THE BUREAU OF THE BUDGET, FISCAL YEAR 1970

FEDERAL TRADE COMMISSION,
Washington, D.C., Sept. 30, 1968.

Hon. CHARLES J. ZWICK,
Director, Bureau of the Budget, Executive Office of the President, Washington, D.C.

DEAR MR. ZWICK: Transmitted herewith is the budget request and justification of the Federal Trade Commission for the fiscal year 1970.

Respectfully submitted,

PAUL RAND DIXON, *Chairman.*

FEDERAL TRADE COMMISSION SUMMARY OF 1970 BUDGET JUSTIFICATION

The time has come to face the fact that the Federal Trade Commission is in imminent danger of failing its purpose. New enforcement responsibilities plus a grim increase in the volume and complexity of its long established work have stretched the Commission's capacity to a point where it could be overwhelmed.

Such an evil day has been postponed during the past six years by innovations in law enforcement methods, by selecting targets more carefully, and by making an effort unprecedented in scope to encourage voluntary compliance with the trade laws; but there is a limit to the capacity of an understaffed FTC. That limit has been reached.

True, the FTC has been given increases in its appropriations during each of the past six years, but the requests were kept to a stringent minimum, then further reduced by the Bureau of the Budget. Hopefully, the gaps between what was really needed and what was appropriated could be bridged by faster enforcement processes and by providing business with more guidance on the laws' requirements. The results have been gratifying. Reputable business now has a clear understanding of what the rules are. At the same time, business predators and rascals are delighted that the watchdog has been fed barking rations rather than biting rations.

We at the FTC believe consumers and reputable business are entitled to more than guidance from the Commission. They also are entitled to wider and sterner action against those who ignore the guidance.

To bring the FTC up to a point where it has the capacity to command respect for the trade laws will require an appropriation of \$23,845,000 for fiscal 1970. This is an increase of \$7,345,000 over that for fiscal 1969, with \$3,722,000 earmarked for new programs assigned FTC by Congress and \$3,623,000 for overdue and urgently needed staff bolstering for its established duties.

Considering first the new programs that must be undertaken, the largest request is for \$2,600,000 for enforcement of Title I of the recently enacted Consumer Credit Protection Act. This section, known as the Truth in Lending Act, places such heavy responsibility on FTC as to require creation of an entire new bureau. By fiscal 1970, it is estimated that lenders subject to FTC surveillance (and they need not be "in commerce") will hold nearly \$50 billion of the \$110 billion in consumer credit outstanding. In 1967 they accounted for 42 percent of the installment credit held by *all* lenders and 49 percent of the noninstallment credit. FTC's regulatory responsibilities will cover 3700 finance companies and their many thousand retail branches that hold \$23 billion in consumer credit, and hundreds of thousands of retail outlets (and service credit companies) that account for another \$20 billion of consumer credit.

To carry out an enforcement program covering at least a quarter million companies, scientific sampling procedures will, of course, be used. Continuous surveillance will be given the credit cost practices of the major finance companies and the large retail outlets, while the rest will be spot-checked.

To achieve true credit cost disclosure by lenders and to provide a meaningful basis for informed credit shopping by consumers is a tremendous responsibility, but the FTC can handle it through a combination of guidance, education and litigation. The new Bureau to handle this work will require 200 employees.

Another new program made necessary by recent legislation calls for the FTC to police the use of dangerously flammable fabrics comprising in whole or in part any product to be used in homes, offices and places of assembly or accommodation. The new legislation also expands the types of wearing apparel covered by the original Flammable Fabrics Act.

The broadening of the law (in December, 1967) has confronted FTC with an investigative problem far beyond the capacity of the 43-man field staff of its Bureau of Textiles and Furs (whose present responsibility is to police the multi-billion dollar wool, textile, and fur industries from the fiber distributors to retail outlets, including imports from abroad). Not only does the new legislation increase the volume of inspection work, but because the safety of lives and property is involved, delay in inspection can not be tolerated.

Not only will we have to expand the investigative staff but greater and more urgent demands will be made upon our laboratory staff for testing fabrics for flammability.

The minimum we need to handle these new responsibilities under the Flammable Fabrics Act is \$644,000. This will provide for 64 new employees and the services their work will require.

A third new program is required to implement a liaison agreement with the Food and Drug Administration whereby FTC is being called upon to assist FDA in carrying out a Congressional mandate that new drugs on the market be checked for efficacy as well as safety. The legislation (the Kefauver-Harris Drug Amendments) affects not only new drugs as they come on the market but also all drugs for which only safety approval had been given by FDA between 1938 and 1962.

FTC has been informed by FDA that it will be forwarding for investigation in fiscal 1970 more than 1800 reports that will require from FTC both legal and medical reviews of the advertising of the products involved. Certainly substantial litigation can result from these reviews. To handle the sheer magnitude of this work, it will have to be administered separately from our other health, food and drug matters. It will require a minimum staff of 25 which, with supporting costs, will cost \$297,000.

The fourth of the new required programs results from the promulgation last February 12 of Industry Rule 36 under the Wool Products Labeling Act. This rule, promulgated to protect consumers from misbranded woolsens of foreign origin and American manufacturers from unfair competition, requires that each entry of wool products into the U.S. be cleared by FTC through its Bureau of Textiles and Furs before the products can be dispersed in commerce. Here the purpose is to assure against their being misbranded before instead of after the damage has been done.

A group of importers has challenged Rule 36, and a district court has enjoined FTC from enforcing it; however, this injunction was appealed and is now pending in Appellate Court. Whether FTC wins the case or whether the parts of the rule challenged by the importers have to be changed, it is almost certain that in one form or another Rule 36 will be in force by the beginning of Fiscal 1970.

To enforce it entails a tremendous job, for there are some 80,000 entries of wool products into the U.S. annually through many ports of entry. In addition, we anticipate there will be some 30,000 requests for pre-entry clearance. To handle this volume of work calls for an additional \$181,000 to provide a 20-man addition to the staff and supporting services.

Arguments for the foregoing programs can readily be accepted because they represent expenditures needed to carry out major *new* responsibilities Congress has assigned the Commission directly or indirectly. What is less apparent is that FTC's long established responsibilities have taken on new dimensions that pose problems every bit as urgent as the new work. Statements such as this have become too familiar and hence are accorded the indulgent optimism that things are not as bad as they seem and that dire analyses are no more than an occupational disease of the FTC. However, the facts can jar any such complacency.

For example: the past six years have been the Gross National Product rise from about \$520 billion to more than \$850 billion and personal consumption expenditures jump from \$325 billion to \$492 billion. Advertising expenditures have increased even faster, more than 50 percent above the 1957-59 index. While this tremendous growth has been generating at least a comparable increase in FTC's workload, its Bureau of Deceptive Practices has been allotted during the same period only 25 new positions, including clerks and typists, for its regular work—involving the bulk of consumer problems. This is but a 24 percent increase.

The ever tightening stretch has been alleviated to a degree by more efficient screening of cases and planning for their fastest acceptable disposition, even if

the acceptability requires more than a little optimism. The alternative of binding every respondent with formal orders would so bog down the Commission as to defeat its purpose. Instead, fiscal 1970 will find FTC's enforcement bureaus placing even more emphasis on screening and planning in order that problems can be correctly assessed as they develop or change, can be evaluated in terms of relative public interest, and can be tackled effectively with the least expenditure of manpower and time. The days when FTC's law enforcement efforts were dictated by the miscellany that came in "over the transom" are gone.

However, even careful planning and case selection plus fullest use of voluntary procedures have limitations. Without enough manpower, the targets that can be hit with effectiveness become too few, and exhortations to abide by the law voluntarily are undercut by willful violators. *In short, proper planning is essential for the best use of our manpower, but we've got to have enough manpower to make the plans work.*

This is why we are asking for an additional \$3,623,000 to bolster our longer established responsibilities.

With pressures mounting for more adequate protection for consumers, we are hurting most for manpower in the Bureau of Deceptive Practices. Mandatory programs undertaken as the result of legislation, Congressional and Commission directives, cooperative agreements with other agencies, and compliance with FTC's cease and desist orders will require the services of 87 percent of this Bureau's professional staff in fiscal 1970, unless additional manpower becomes available. These mandatory programs include such important consumer protection work as the implementation of the Fair Packaging and Labeling Act; the Cigarette Labeling and Advertising Act; mail order insurance; deception in the advertising and sale of foods, drugs, cosmetics, and devices; and enforcement action against violators of FTC Industry Guides in the deceptive practice field.

Planning has been centralized for our deceptive practice work so that investigations can be initiated on a broader and more informed base of selectivity. This applies both to the required programs and those that we select. For the latter, our selection falls into three categories: (1) Matters relating to the basic necessities of life; (2) Matters involving income or prospects thereof for people of modest or no means; and (3) Matters of national significance, such as games of chance and automobile warranties.

For the 96 new employees we need to combat deceptive practices, both under our required and our selective programs, plus supporting services, we need \$1,187,000. This includes the 25 for the previously mentioned new work with FDA in policing claims for the efficacy of drugs.

Another weak spot in an area of direct concern to consumers is our enforcement of the Wool, Fur, and Flammable Fabrics Acts. Apart from the already discussed new responsibilities in this field, our regular work has grown beyond the capacity of our present staff. For example, it has been possible to inspect no more than about 1/20th of textile mills and manufacturers, about 1/48th of the importers and wholesalers, and about 1/80th of the retail outlets. This is woefully inadequate coverage. The staff also is courting real trouble in being unable to check adequately compliance with some 1,500 outstanding cease and desist orders. An order violated with impunity invites violations of other orders and emboldens the whole industry to ignore regulations.

This is why for our Division of Enforcement we need for fiscal 1970 an additional \$119,000 and for our Division of Regulation, \$280,000.

In the Commission's industry guidance efforts during fiscal 1970, emphasis will be placed on problems of widespread concern to consumers. Particular attention will be paid deceptive practices aimed at those for whom a few extra dollars are very important.

Among the new Guides that will be developed are those that will deal with guarantees and warranties for major home appliances, with earn-money-at-home offers, with inaccuracy in use of the word "wholesale," with misrepresentations in the capacity and cost of lawn and garden power equipment, and with the "savings" offered in food-freezer plans. In addition, intensified effort will be required to gain compliance with the existing Guides on Deceptive Pricing and Guarantees. Guidance work also must be continued in support of FTC's anti-monopoly responsibilities, with particular attention scheduled for trade restraints in the tobacco auction markets, the toy industry, and the athletic goods industry.

To keep abreast of the new and the accumulated workload in industry guidance will require an additional \$152,000. This would include the cost of three new attorneys needed for an anticipated increase in the volume of work connected with Trade Regulation Rules and Advisory Opinions.

In no field of FTC's responsibilities has the nation's increased business volume produced graver problems than in enforcement of the antitrust laws. Both magnitude and complexity of the task grow as competition mounts and businessmen devise ever more sophisticated ways of gaining advantage over competitors.

To halt illegal practices that undermine effective competition requires careful marshaling of our resources. To this end, a new planning program being developed this year will put into effect procedures for successive re-evaluations of current commitments, the selective-substitution, on a continuing basis, of more urgent and economically significant matters for those of lesser import, and establishment of a flexible system of priorities, applicable to all major restraint of trade assignments. In other words, confronted by such a huge assignment, we've got to be able to shoot at the most significant targets as they come into sight.

Illegal mergers will continue to be attacked. We expect to have about 250 merger investigations underway in fiscal 1970. Particular attention will be given major conglomerate mergers. Particular industry lines warranting attention will include auto parts, food distribution, grocery products, plastics, minerals and mining, industrial equipment, drugs, fertilizer, paper, and apparel. We also will continue examining vertical mergers in the cement industry.

As for FTC's work in the field of general trade restraints, concentration in fiscal 1970 will be on the automotive parts, newspaper, and food industries where discriminatory practices are indicated. Also attention will continue to be given illegal pricing practices in the gasoline and LP-gas industries.

In combating discriminatory practices, principally violations of the Robinson-Patman Act, we plan to give special attention to "power-buyer" inducement of discriminatory prices, allowances, or special services. This form of illegal pressure is exerted by very large retail operations, chains, catalog houses and various buying groups. We also will be giving a hard look at price discrimination in the dairy and baking industries, discriminatory allowances in the grocery industry and illegal brokerage in the fresh fruit and vegetable industry.

Enforcement of the antitrust laws is not complete without effective compliance with orders we issue. Indeed, FTC's performance must be measured not simply in orders but by the extent to which compliance with the orders is realistically achieved. This involves the most difficult and challenging work, without which many orders could become effective only after delay and confusion. Without additional attorneys for this work in fiscal 1970, we will be in trouble.

Thus, for FTC's Restraint of Trade Bureau, we ask an increase of \$477,000 for fiscal 1970 to provide eight additional attorneys each for the Divisions of Mergers, General Trade Restraints, and Discriminatory Practices, and seven for the Compliance Division. This also would provide for two additional accountants and five clerks.

For the Commission's work in the field of economics, the principal manpower shortage is in its Division of Industry Analysis which obtains and analyzes information needed by the Commission, by Congress and by other government agencies.

Among the major projects already scheduled for fiscal 1970 is one of major concern to consumers—a study of the Home Improvement Industry, with special attention devoted to such trouble spots as those involving deception and exorbitant loans. Another study looks to an analytical review of manufacturer warranty programs, while still another calls for information to be provided the Department of Transportation for the latter's report to Congress on the automobile insurance industry. And, of course, the FTC's major role in enforcement of the Truth in Lending Act will necessitate extensive participation by the Division of Industry Analysis.

Experience has shown that a minimum of one-third to one-half of the work of the division is generated by special ad hoc projects from the Commission and its bureaus, economic analyses involving proposed legislation, and special studies requested by other government agencies.

To handle its work in fiscal 1970 with acceptable speed the Division will require nine additional economists.

Also in need of strengthening is our Division of Economic Evidence. Four additional economists will be required to provide more assistance to the Bureau of Restraint of Trade in its efforts to halt illegal mergers, plus assistance to the Compliance Division in the enforcement of divestiture orders.

Still another area in need of strengthening is the Division of Financial Statistics which produces jointly with the SEC the Quarterly Financial Reports for Manufacturing Corporations. The Bureau of the Budget and the Senate Sub-

committee on Antitrust and Monopoly have requested FTC to expand these reports to include newspapers. To do so will require three accountants and one clerk.

Thus, for all of the functions of the Bureau of Economics, we request an increase of \$235,000 for fiscal 1970.

Increased law enforcement efforts in the fields of antitrust and deceptive practices already promises a heavy increase in the work of the General Counsel's Office in fiscal 1970.

The fact that FTC's industry guidance work and consent settlement procedures have been so successful in avoiding litigation has enabled the Commission to attack evils on a broader scale. However, the broader attacks inevitably encounter a greater number of businesses determined to disregard FTC's guidance and defend their practices to the last ditch. Thus, the FTC orders which are contested are fought vigorously and with little likelihood of a respondent's surrender. The brunt falls on the General Counsel's Division of Appeals. Moreover, about 85% of the Division's workload involves antimonopoly cases, many of which are extremely complicated. These facts, coupled with our obligation to intensify the work of our enforcement bureaus, makes the strengthening of the Division of Appeals an obvious necessity. An increase of \$65,000 is requested in fiscal 1970 for four more attorneys and two clerk-stenographers.

Also needed for the General Counsel's Office are two attorneys and a secretary to bolster FTC's program for Federal-State Cooperation. Since 1965, this work has been handled by one attorney and his secretary, but progress has been so gratifying and the states' cooperation producing such useful results that expanding the staff is well worth the \$35,000 it would cost.

Another activity designed to spread the usefulness of the Commission's work is a special consumer information program. On the valid theory that a consumer can do much to protect himself if he is made aware of unfair credit practices, bait advertising, and other dishonest sales practices, we propose to undertake a comprehensive program for supplying news and broadcast media with information to alert consumers to the trickery that confronts them. For this work, we ask \$115,000.

Based on the step-up in law enforcement activity of our Bureaus in fiscal 1970, it will, of course, be necessary to expand our force of field investigators. We estimate that the additional workload will require 50 more field attorneys and 15 clerical personnel. Salaries plus supporting costs will total \$698,000.

Strengthening FTC's staff to meet the demands of fiscal 1970 is a build-up that is long overdue; for too thinly staffed, the FTC could become an instrument of consumer deception. People would think they were being protected when they were not. The same false hope would be held out to reputable business. Indeed, the stern and comforting language of the trade laws offers a smokescreen for predators smugly aware that without adequate enforcement these laws restrain only the honest or the timid. However, should successful flouting of the law invite retaliation in kind, a deluge would be on its way. Helpless in its path would be the vigor of our free competitive system at a time when vigor was never more vital to the nation's survival.

STATEMENT OF COMMISSIONER ELMAN

"Commissioner Elman does not concur. He believes that the additional functions assigned to the Commission justify an increase in its budget for the fiscal year 1970, but not as large as that requested."

STATEMENT OF COMMISSIONER NICHOLSON

"It is not possible to carefully analyze and evaluate all portions and sections without, in substance, preparing a substitute budget. However, it seems evident that the proposals allocate disproportionately great amounts to new programs without adequate analysis and justification, but do not provide for the workload increases contemplated by present programs nor for adjustments in present salary levels which must occur in light of the newly initiated starting salary levels authorized by the Civil Service Commission.

"It is clear that some increases in the budget of the Commission are justified by its new responsibilities, but this budget appears to go substantially beyond what is necessary and is inadequately justified."

FINANCIAL SUMMARIES

ANALYSIS OF BUDGET AUTHORITY AND OUTLAYS

(In thousands of dollars)

FEDERAL TRADE COMMISSION						Increase or de- crease (-)	Explanation									
Account and functional code				1970 estimate												
				1969 estimate												
				1968 enacted												
FEDERAL FUNDS																
Federal Trade Commission																
Salaries and expenses																
508 NOA						15,281	16,000	23,845	7,345	1969	NOA	LA	Exp	ML		
							D/ 500			Enacted	16,000	-	15,892	-		
Exp.						15,221	16,360	23,532	7,168	D/	500	-	468	-		
ADJUSTMENTS																
Applicable receipts from the public						-6	-6	-6	-			1970	NOA	LA	Exp	ML
500 NOA																
Exp)																
Total, Federal Trade Commission						15,281	16,500	23,845	7,345	Trans-	23,845	-	23,500	-		
NOA										mitted						
Exp						15,215	16,354	23,526	7,168	D/	-	-	32	-		

FEDERAL TRADE COMMISSION (30-84)

[In thousands of dollars]

Receipt title	1968 actual	1969 estimate	1970 estimate	Comments
Fines, penalties, and forfeitures, customs, commerce, and anti-trust laws.	63			In fiscal year 1968 judgments in the amount of \$18,100 were levied in Federal courts resulting from criminal and civil penalty suites filed by the Federal Trade Commission. On July 1, 1968, 16 criminal and civil penalty suits had been certified and were pending either in the Department of Justice or in Federal courts. Inasmuch as this Commission has neither control over the amounts assessed nor subsequent collections no accurate estimate can be made of amounts that will be received in 1969 or 1970.
Receipts Federal Trade Commission: 2250-0 sale of publications and reproductions (P500)	6	6	6	
Total special fund receipts...	69	6	6	

FEDERAL TRADE COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Federal Trade Commission, including uniforms or allowances therefor, as authorized by law (5 U.S.C. 5901-5902), and services as authorized by 5 U.S.C. 3109, *and not to exceed \$500 for official reception and representation expenses* [\$16,000,000] \$23,845,000: *Provided*, That no part of the foregoing appropriation shall be expended upon any investigation hereafter provided by concurrent resolution of the Congress until funds are appropriated subsequently to the enactment of such resolution to finance the cost of such investigation.

Independent Offices Appropriation (82 Stat. 937; Public Law 90-550; 1969)	\$16, 000, 000
Pay Raise Supplemental	500, 000
Total	16, 500, 000

PROGRAM AND FINANCING

(In thousands of dollars)

	1968 actual	1969 estimate	1970 estimate ^e
Program by activities:			
1. Antimonopoly:			
(a) Investigation and litigation	5, 942	6, 317	7, 264
(b) Economic and financial reports	1, 057	1, 133	1, 358
(c) Trade practices, industry guides, and small business	312	345	409
2. Deceptive practices:			
(a) Investigation and litigation	4, 652	5, 049	6, 770
(b) Trade practice conferences, industry guides, and small business	626	691	818
(c) Textile and fur enforcement	1, 508	1, 708	3, 107
3. Truth in lending			2, 600
4. Executive direction and management	353	382	440
5. Administration	871	875	1, 079
Total program costs ¹	15, 321	16, 500	23, 845
Unfunded adjustments to total program costs:			
Loss on disposition of fixed assets	-38		
Change in selected resources ²	-3		
Total obligations	15, 280	16, 500	23, 845

¹ Includes capital outlay as follows: 1968, \$157,000; 1969, \$70,000; 1970, \$310,000.² Selected resources as of June 30 are as follows:

	1967	1968	1969	1970
Stores	9	10	10	10
Unpaid undelivered orders	147	143	143	143
Total selected resources	156	153	153	153

FINANCING AND OUTLAYS

(In thousands of dollars)

	1968 actual	1969 estimate	1970 estimate
Total obligations (from program schedule).....	15,280	16,500	23,845
Financing: Unobligated balance lapsing.....	1		
Budget authority (appropriation).....	15,281	16,500	23,845
Relation of obligations to outlays: Obligations incurred, net.....	15,280	16,500	23,845
Obligated balance, start of year.....	914	859	999
Obligated balance, end of year (—).....	—927	—999	—1,312
Adjustments in expired accounts.....	—46		
Outlays.....	15,221	16,360	23,532

TRUST RECEIPTS AND EXPENDITURES

(In thousands of dollars)

	1968 actual	1969 estimate	1970 estimate
Deposit funds, net:			
Relation of obligations to expenditures:			
Obligated balance, start of year.....	80	95	90
Obligated balance, end of year (—).....	—95	—90	—100
Expenditures.....	—15	5	—10

FEDERAL TRADE COMMISSION NARRATIVE STATEMENT FOR PRINTING
PROGRAM AND PERFORMANCE

The Commission has the duty of preserving free competitive enterprise through prevention of monopolistic and unfair trade.

1. *Antimonopoly.*—All types of monopolistic restrictions, including price-fixing conspiracies, boycotting, price discriminations, and illegal mergers and acquisitions are corrected; economic data and criteria are brought to bear on monopoly and related problems; and supervision is provided over the registration and operations of associations of American exporters engaged solely in export trade. In 1970 investigation and trial of merger and other antimonopoly cases will be expedited.

2. *Deceptive practices.*—False and misleading advertising and other unfair or deceptive practices are prevented by corrective action, including the affirmative aid of voluntary trade-practice conferences and advertising guides; business and the public are protected from misbranding and non-disclosure of fiber content of manufactured wool products and household textile articles; consumers and merchants are protected from unfair practices with respect to furs and fur products; and the public is protected from dangers inherent in flammable fabrics. In 1970 consumer protection programs will be expedited; additional regulations and enforcement of the Fair Packaging and Labeling Act will be required; the program to insure proper labeling of woolen textile imports will be expanded.

3. *Truth in Lending.*—The full impact of the educational and enforcement requirements of the Truth in Lending Act will be faced by the Commission in 1970 which will require creation of a new Bureau because of the broad scope of this new legislation.

4. *Executive direction and management.*—These also include the adjudicatory functions of the Commission.

SELECTED WORKLOAD DATA

	1968 actual	1969 estimated	1970 estimated
Applications for complaint received	8,693	10,180	10,785
Investigations initiated or reopened	751	1,126	1,500
Investigations completed or closed	884	1,485	1,851
Investigations pending end of year	1,990	1,664	1,308
Informal corrective actions	4,282	4,400	6,000
Complaints issued	123	236	335
Complaints approved for consent order	180	362	373
Orders to cease and desist issued	138	140	265
Voluntary compliance actions	507	520	994
Compliance actions completed	1,831	1,930	2,165
Cases pending litigation, yearend	46	54	57
Trade regulation rules and guides, issued or revised	7	7	8
Advisory opinions issued	138	150	150

OBJECT CLASSIFICATION

(In thousands of dollars)

	1968 actual	1969 estimate	1970 estimate
Personnel compensation:			
Permanent positions	12,986	14,064	19,694
Positions other than permanent	44	46	46
Other personnel compensation	19	50	50
Special personal service payments	7	11	15
Total personnel compensation	13,056	14,171	19,805
Personnel benefits	962	1,064	1,474
Travel and transportation of persons	363	350	639
Transportation of things	7	11	19
Rent, communications, and utilities	291	362	910
Printing and reproduction	94	90	111
Other services	82	93	132
Services of other agencies	76	83	155
Supplies and materials	192	206	290
Equipment	157	70	310
Total obligations	15,280	16,500	23,845

PERSONNEL SUMMARY

	1968 actual	1969 estimate	1970 estimate
Total number of permanent positions	1,244	1,244	1,845
Full-time equivalent of other positions	5	5	5
Average number of all employees	1,197	1,170	1,675
Average GS grade	9.4	9.4	9.4
Average GS salary	\$11,000	\$11,669	\$11,157
Average salary of ungraded positions	\$7,038	\$7,237	\$7,217

ANALYSIS OF CHANGES IN PROGRAM REQUIREMENTS—4-YEAR COMPARISON

[In thousands of dollars]

	1967 actual	1968 actual	1969 estimate	1970 estimate
Budget authority (Federal funds).....	14,378	14,281	16,500	23,845
Outlays (Federal funds).....	14,108	15,221	16,360	23,532
ANALYSIS OF CHANGES IN BUDGET AUTHORITY				
1969 as enacted.....				16,000
Estimated savings:				
Reduction in NOA in accordance with Public Law 90-364.....				-292
Increased costs due to pay raise.....				+792
Supplemental proposed for pay raise costs.....				500
1969 current estimate.....				16,500
Increases over 1969:				
Program increase:				
Enforcement of new legislation:				
Truth in lending (Title I of the Consumer Credit Protection Act).....				+2,600
Flammable Fabrics Act extension of coverage.....				+644
Subtotal.....				+3,244
New food and drug program—FTC liaison agreement with FDA.....				+297
Enforcement of Rule 36—Consumer protection against mislabeled wool imports.....				+181
New program of consumer information.....				+115
Increases in current programs to reduce backlogs and to accomplish more effective law enforcement:				
Antimonopoly.....				+947
Deceptive practices.....				+1,424
Textiles and furs.....				+574
Industry Guidance.....				+191
Economic reports.....				+225
Executive and Administrative support.....				+147
Subtotal.....				+3,508
Total, 1970 request.....				23,845
Distribution of budget authority by appropriation:				
Federal Trade Commission: Salaries and expenses.....				23,845

CONSOLIDATED SCHEDULE—ANALYSIS OF CIVILIAN PERSONNEL COMPENSATION

	1968		1969		1970 proposed
	In preceding budget	Actual	In preceding budget	Proposed for 1970 budget	
A. Total civilian personnel compensation.....	\$13,134,000	\$13,049,425	\$13,860,000	\$14,160,000	\$19,790,000
B. Adjustments for changes in pay scales not reflected in 1968 obligations in 1969 budget:					
1. Wage board increases:					
a. Increases effective during the year.....				-2,600	
b. Increases effective in prior years.....				-4,430	-5,200
c. Anticipated additional increases to be effective in 1969.....					
2. Pay Act increase:					
a. Increase effective during year.....				-737,000	
b. Increases effective in prior years.....					-737,000
C. Adjusted personnel compensation.....	13,134,000	13,049,425	13,860,000	13,415,970	19,047,800
D. Average number of all civilian employees.....	1,185	1,197	1,204	1,170	1,675
E. Average compensation.....	\$11,084	\$10,902	\$11,512	\$11,466	\$11,372
F. Percent change in average compensation 1970 over 1969.....					-.8

COMPARATIVE SUMMARY—SALARIES AND EXPENSES—FISCAL YEAR 1969-70

	Estimated funds available, fiscal year 1969				Total request for the fiscal year 1970				Increase requested, fiscal year 1970			
	Posi- tions	Personal services	Travel and other	Total	Posi- tions	Personal services	Travel and other	Total	Posi- tions	Personal services	Travel and other	Total
Commissioners' Offices.....	41	\$622,500	\$8,000	\$630,500	41	\$622,500	\$8,000	\$630,500				
Office of Program Review.....	3	50,000		50,000	6	82,000		82,000	3	\$32,000		\$32,000
Office of Executive Director.....	7	117,500	2,000	119,500	17	207,500	2,000	290,500	10	90,000		90,000
Office of Executive Director.....	2	47,500			2	47,500						
Office of Information.....	5	70,000			5	70,000						
Office of Consumer Information.....					10	90,000			10	90,000		
Office of Administration.....	105	840,000	6,000	846,000	123	948,000	6,000	954,000	18	108,000		108,000
Office of Director.....	5	59,500			5	59,500						
Management staff.....	6	84,500			9	105,500						
Division of Personnel.....	21	165,000			25	193,000			3	21,000		
Division of Data Processing.....	14	99,000			18	121,000			4	28,000		
Division of Administrative Services.....	59	432,000			66	469,000			7	37,000		
Office of the Comptroller.....	22	190,000	500	190,500	28	225,000	500	225,500	6	35,000		35,000
Office of Comptroller.....	4	66,000			4	66,000						
Division of Finance.....	18	124,000			24	159,000			6	35,000		
Office of the Secretary.....	50	360,000	500	360,500	60	409,000	500	409,500	10	49,000		49,000
Office of Secretary.....	12	108,000			14	118,000			2	10,000		
Division of Legal and Public Records.....	38	252,000			46	291,000			8	39,000		
Office of General Counsel.....	60	883,000	6,000	889,000	69	983,000	6,000	989,000	9	100,000		100,000
Office of General Counsel.....	13	219,500			16	254,500						
Division of Appeals.....	33	457,000			39	522,000			3	35,000		
Division of Consent Orders.....	7	117,000			7	117,000			6	65,000		
Division of Legislation.....	4	58,000			4	58,000						
Division of Export Trade.....	3	31,500			3	31,500						
Hearing examiners.....	29	428,000	8,000	436,000	29	428,000	8,000	436,000				
Bureau of Restraint of Trade.....	208	2,597,000	83,000	2,680,000	246	2,967,000	107,000	3,074,000	38	370,000	\$24,000	394,000
Office of Director.....	46	366,000			51	391,000			5	25,000		

COMPARATIVE SUMMARY—SALARIES AND EXPENSES—FISCAL YEAR 1969-70—Continued

	Estimated funds available, fiscal year 1969				Total request for the fiscal year 1970				Increase requested, fiscal year 1970			
	Posi- tions	Personal services	Travel and other	Total	Posi- tions	Personal services	Travel and other	Total	Posi- tions	Personal services	Travel and other	Total
Division of Mergers.....	35	\$470,500	—	—	43	\$556,500	—	—	8	\$86,000	—	—
Division of General Trade Restraints.....	35	542,000	—	—	43	623,000	—	—	8	81,000	—	—
Division of Discriminatory Practices.....	46	654,500	—	—	54	735,500	—	—	8	81,000	—	—
Division of Compliance.....	33	357,000	—	—	40	435,000	—	—	7	78,000	—	—
Division of Accounting.....	13	207,000	—	—	15	226,000	—	—	2	19,000	—	—
Bureau of Deceptive Practices.....	152	1,877,000	\$107,000	\$1,984,000	248	2,827,000	\$129,000	\$2,956,000	96	950,000	\$22,000	\$972,000
Office of Director.....	34	280,000	—	—	63	456,000	—	—	29	176,000	—	—
Division of Special Projects.....	24	287,000	—	—	41	462,000	—	—	17	175,000	—	—
Division Food and Drug Advertising.....	31	375,000	—	—	54	610,000	—	—	23	235,000	—	—
Division of General Practices.....	31	430,000	—	—	49	663,000	—	—	18	233,000	—	—
Division of Compliance.....	15	235,000	—	—	19	238,000	—	—	4	33,000	—	—
Division of Scientific Opinions.....	17	270,000	—	—	22	368,000	—	—	5	98,000	—	—
Bureau of Textiles and Furs.....	104	1,225,000	55,000	1,280,000	225	2,215,000	169,000	2,384,000	121	990,000	114,000	1,104,000
Office of Director.....	20	149,500	—	—	32	211,500	—	—	12	62,000	—	—
Division of Enforcement.....	18	282,000	—	—	35	464,000	—	—	17	182,000	—	—
Division of Regulation.....	66	795,500	—	—	158	1,539,500	—	—	92	746,000	—	—
Bureau of Field Operations.....	273	2,925,000	167,000	3,092,000	338	3,450,000	204,000	3,654,000	65	525,000	37,000	562,000
Office of Director.....	6	87,000	—	—	6	87,000	—	—	—	—	—	—
Field offices.....	267	2,838,000	—	—	332	3,363,000	—	—	65	525,000	—	—
Bureau of Industry Guidance.....	59	795,000	2,000	797,000	67	866,000	2,000	868,000	8	71,000	—	71,000
Office of Director.....	17	156,000	—	—	19	166,000	—	—	2	10,000	—	—
Division of Industry Guides.....	23	346,500	—	—	26	374,500	—	—	3	28,000	—	—
Division of Advisory Opinions.....	7	145,500	—	—	8	159,500	—	—	1	14,000	—	—
Division Trade Regulation Rules.....	12	147,000	—	—	14	166,000	—	—	2	19,000	—	—
Bureau of Economics.....	131	1,250,000	24,000	1,274,000	148	1,450,000	24,000	1,474,000	17	200,000	—	200,000
Office of Director.....	38	300,000	—	—	38	300,000	—	—	—	—	—	—
Division of Economic Evidence.....	27	319,000	—	—	31	370,000	—	—	4	51,000	—	—
Division of Industry Analysis.....	29	309,500	—	—	38	429,500	—	—	9	120,000	—	—
Division of Financial Statistics.....	37	321,500	—	—	41	350,500	—	—	4	29,000	—	—
Bureau of Truth in Lending.....	—	—	—	—	200	2,110,000	135,000	2,245,000	200	2,110,000	135,000	2,245,000
General Operating Expenses.....	—	—	—	—	—	—	—	—	—	—	—	—
Total.....	1,244	14,160,000	2,340,000	16,500,000	1,845	19,790,000	4,055,000	23,845,000	601	5,630,000	1,715,000	7,345,000

ACTUAL OBLIGATIONS—FISCAL YEAR 1968

	Employment June 30, 1968	Personal services	Travel and other	Total obligations
Commissioner's Offices.....	42	\$539,755	\$48,360	\$588,115
Office of Program Review.....	3	40,827	2,065	42,892
Office of Executive Director.....	8	99,807	8,563	108,370
Office of Executive Director.....	3	36,842		
Office of Information.....	5	62,965		
Office of Administration.....	107	793,996	68,373	862,369
Office of Director.....	4	49,887		
Management Staff.....	6	61,697		
Division of Personnel.....	22	164,695		
Division of Data Processing.....	12	92,447		
Division of Administrative Services.....	63	425,270		
Office of the Comptroller.....	20	165,479	12,664	178,143
Office of Comptroller.....	4	62,064		
Division of Finance.....	16	103,415		
Office of the Secretary.....	54	335,444	23,840	359,284
Office of the Secretary.....	10	83,825		
Legal and Public Records.....	44	251,619		
Office of the General Counsel.....	62	768,995	99,371	868,366
Office of General Counsel.....	15	182,480		
Division of Appeals.....	34	398,330		
Division of Consent Orders.....	7	106,589		
Division of Legislation.....	4	51,894		
Division of Export Trade.....	2	29,702		
Hearing Examiners.....	25	419,495	38,022	457,517
Bureau of Restraint of Trade.....	203	2,404,058	260,457	2,664,515
Office of Director.....	48	316,819		
Division of Mergers.....	34	435,463		
Division of General Trade Restraints.....	33	490,032		
Division of Discriminatory Practices.....	43	614,842		
Division of Compliance.....	33	352,446		
Division of Accounting.....	12	194,496		
Bureau of Deceptive Practices.....	156	1,688,962	176,215	1,865,177
Office of Director.....	45	261,744		
Division of Special Projects.....	24	236,040		
Division of Food and Drug Advertising.....	24	308,942		
Division of General Practices.....	30	432,288		
Division of Compliance.....	13	212,468		
Division of Scientific Opinions.....	20	237,480		
Bureau of Textiles and Furs.....	109	1,075,286	133,875	1,209,161
Office of Director.....	20	144,251		
Division of Enforcement.....	19	248,726		
Division of Regulation.....	70	682,309		
Bureau of Field Operations.....	264	2,853,519	390,843	3,244,362
Office of Director.....	6	94,994		
Field Offices.....	258	2,758,525		
Bureau of Industry Guidance.....	54	727,656	54,806	782,462
Office of Director.....	21	151,022		
Division of Industry Guides.....	19	319,933		
Division of Advisory Opinions.....	6	132,580		
Division of Trade Regulation Rules.....	8	124,121		

ACTUAL OBLIGATIONS—FISCAL YEAR 1968—Continued

	Employment June 30, 1968	Personal services	Travel and other	Total obligations
Bureau of Economics.....	130	\$1, 142, 901	\$145, 422	\$1, 288, 323
Office of Director.....	45	295, 986		
Division of Economic Evidence.....	27	293, 151		
Division of Industry Analysis.....	24	245, 848		
Division of Financial Statistics.....	34	307, 916		
General operating expenses.....			761, 102	761, 102
Total.....	1, 237	13, 056, 180	2, 223, 978	15, 280, 158

NUMBERS OF CIVILIAN PERSONNEL

	Number of employees at end of year					
	1968		1969		1970	
	Full-time permanent positions	Total	Full-time permanent positions	Total	Full-time permanent positions	Total
Salaries and expenses.....	1, 194	1, 237	1, 150	1, 190	1, 840	1, 880
Number of youth opportunity cam- paign employees included in above total.....		33		40		40

REPORT OF MOTOR VEHICLE DATA—OTHER SEDANS (DOMESTIC)

	Past year 1968	Current year 1969	Budget year 1970
A. Net Fleet, July 1:			
1. Actually on hand, July 1.....			
2. Add vehicles on order but outstanding, July 1.....			
3. Deduct vehicles included in A1 awaiting disposal.....			
4. Net Fleet, July 1 (A1+A2-A3).....			
B. Acquisitions:			
1. All new orders placed, including those not yet delivered.....			
2. Acquired by forfeiture.....			
3. Acquired by transfer.....			
4. Total acquisitions (B1+B2+B3).....			
C. Disposals accomplished and scheduled:			
1. Carryover disposals accomplished (nonadd).....			
2. Newly scheduled disposals accomplished.....			
3. Newly scheduled disposals, unaccomplished June 30.....			
4. Total newly scheduled disposals (C2+C3=4a+4b1 through 4b4).....			
(a) For replacement (nonadd).....			
(b) Not for replacement (nonadd):			
(1) Transfers to other agencies.....			
(2) Donation to non-Federal recipients.....			
(3) Sold.....			
(4) Other (explain).....			
D. Newly scheduled disposals being replaced (non-add):			
1. Meeting both age and mileage standards.....			
2. Meeting mileage standard only.....			
3. Meeting age standard only.....			
4. Not meeting either standard (explain).....			
5. Total (D1+D2+D3+D4=C4a).....			
E. Net Fleet, June 30 (A4+B4-C4):			
1. Deduct new vehicles ordered but not received.....			
2. Add newly scheduled disposals not accomplished (C3).....			
3. Add carryover disposals not accomplished (A3-C1).....			
4. Actually on hand, June 30 (E-E1+E2+E3).....			
F. Vehicles used on a term basis:			
1. Assigned from interagency motor pools.....	4	5	5
2. Rented commercially.....			
3. Total (F1+F2).....	4	+5	+5

REPORT OF MOTOR VEHICLE DATA—OTHER SEDANS (DOMESTIC)—Continued

	Pasy year 1968	Current year 1969	Budget year 1970
G. Total vehicles available full time (E+F3).....	4	5	5
H. Obligations and related data:			
1. Obligations for vehicles ordered.....			
2. Cost of vehicles acquired otherwise.....			
3. Proceeds from disposals:			
(a) Applied for replacements.....			
(b) Deposited to miscellaneous receipts.....			
(c) Total (H3a+H3b).....			
I. Cost of vehicles used on a term basis:			
1. From interagency motor pools.....	4,600	5,000	5,500
2. Rented commercially.....			
3. Total (I1+I2).....	4,600	5,000	5,500

SCIENTIFIC RESEARCH AND DEVELOPMENT ACTIVITIES AS REFLECTED IN THE 1970 BUDGET

[In thousands of dollars]

Account title	Net budget expenditures					
	Conduct of research and development			Research and development facilities		
	1968	1969	1970	1968	1969	1970
Salaries and expenses.....	\$365	\$365	\$365			

The Federal Trade Commission conducts no program of scientific research and development and has so reported to the Bureau of the Budget in past years. Funds for scientific research have been specifically requested in this Agency's budget request.

The definitions of scientific research as set forth in the more detailed instructions issued by the National Science Foundation include "social science." The Bureau of Economics in this Commission is of the opinion that expenditure for applied research in social science is a part or a by-product of the specialized economic studies and has reported expenditures in this field to the National Science Foundation.

SUMMARY OF ELECTRONIC DIGITAL COMPUTER ACQUISITIONS

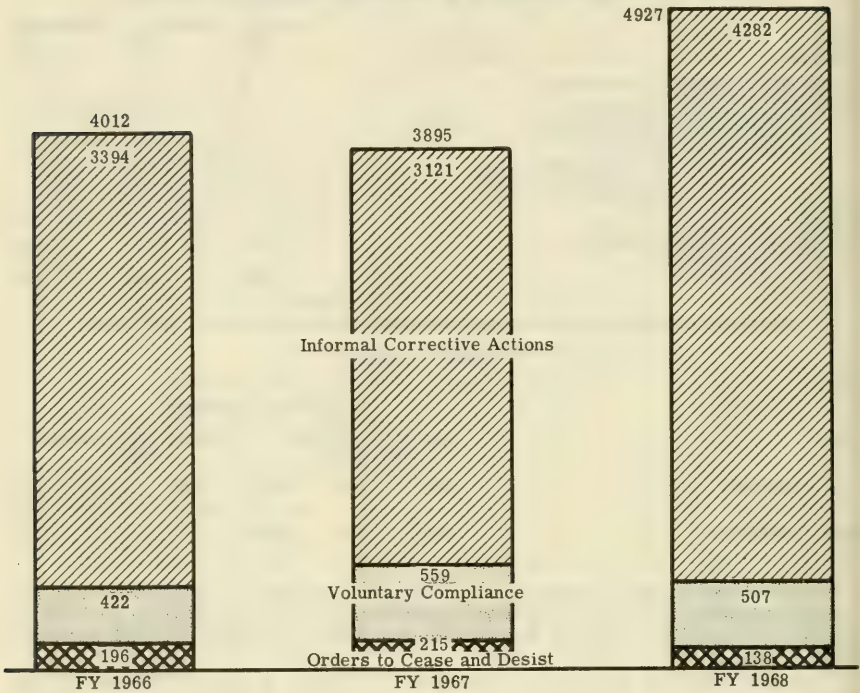
[Dollar amounts in thousands]

	1969		1970			
	Number	Obligations	Number	Obligations		
Acquisitions:						
Additions: None.....						
Replacements: None.....						
Conversions: Computers converted from lease to purchase.....						
	1968		1969		1970	
Inventory	Number	Amount	Number	Amount	Number	Amount
Installed, as of June 30:						
Owned.....	1	\$99	1	\$99	1	\$99
Leased.....						
Total.....	1	99	1	99	1	99

ADDITIONAL AND REPLACEMENT COMPUTERS TO BE ACQUIRED

Activity and location	Computer model	Planned date of installation	Obligations	
			Purchase	Lease
1969: Replacements: None.....				
1970:				
Additions: None.....				
Replacements: None.....				

CORRECTIVE ACTIONS BY THE COMMISSION



COMMISSIONERS AND COMMISSIONERS' OFFICES

	Allotment, fiscal year 1969		Requested, fiscal year 1970		Increase, fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Commissioners.....	5	\$144, 500	5	\$144, 500		
Commissioners' offices.....	36	478, 000	36	478, 000		
Total personal services.....	41	622, 500	41	622, 500		
Travel.....		8, 000		8, 000		
Total.....	41	630, 500	41	630, 500		

COMMISSIONERS AND COMMISSIONERS' OFFICES

The funds requested will provide the salaries and expenses of the Commissioners and the staffs in their offices. In fiscal year 1969, 41 positions are allocated to Offices of Commissioners consisting of attorney advisers, administrative assistants, stenographers and messengers.

No additional positions are requested for fiscal year 1970.

OFFICE OF PROGRAM REVIEW

	Allotment, fiscal year 1969		Requested, fiscal year 1970		Increase, fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	3	\$50, 000	6	\$82, 000	3	\$32, 000

PROGRAM REVIEW OFFICER

The Program Review Office is the institutional means of determining how and where the Commission, within the wide spectrum of its jurisdiction, can most effectively commit its limited resources to maximize its impact on monopolistic and deceptive practices. The mission of the office is to help the Commission weigh priorities and determine annual programs. The office reports directly to the Commission.

The most rapidly developing function of the Program Review Office is the identification, principally in cooperation with the Division of Industry Analysis (Bureau of Economics), of significant "trouble spots" in the economy and the recommendation to the Commission of enforcement programs.

Also evolving, with the aid of other Commission units, is a program for identifying and articulating other standards of criteria for initiating and evaluating Commission actions. Further, the office is making progress in the exercise of its functions of advising the Committee concerning the utilization of the Commission's resources according to major programs and purposes.

An additional \$32,000 is requested for three new positions in fiscal year 1970: one GS-13 analyst, one GS-13 statistician, and one GS-5 clerk-stenographer.

OFFICE OF THE EXECUTIVE DIRECTOR

	Allotment, fiscal year 1969		Requested, fiscal year 1970		Increase, fiscal year 1970	
	Posi- tions	Amount	Posi- tions	Amount	Posi- tions	Amount
Office of Executive Director.....	2	\$47, 500	2	\$47, 500		
Office of Information.....	5	70, 000	5	70, 000		
Consumer information.....			10	90, 000	10	\$90, 000
Total personal services.....	7	117, 500	17	207, 500	10	90, 000
Travel.....		2, 000		2, 000		
Total.....	7	119, 500	17	209, 500	10	90, 000

OFFICE OF THE EXECUTIVE DIRECTOR

The Executive Director, as the Commission's chief operating official, manages the Federal Trade Commission's activities to achieve effective and economical operations. He has responsibility for operational and administrative direction of all the Commission's Bureaus and Field Offices.

The Office of Information reports to the Executive Director and its overall policy, advisory and educational functions have been given additional emphasis.

CONSUMER INFORMATION

A special consumer information program is planned as a dynamic new program to provide, through all possible media, opportunity for the consumer to become knowledgeable regarding misleading advertising, unfair credit practices and other dishonest sales practices that tend to exploit them.

FTC informational programs have for years been directed to the education of the businessman as to what practices might be lawful and unlawful under the laws administered by the Commission. Incidentally, several pamphlets have been developed which set forth practices harmful to consumers; however, this has been a limited effort and not designed as a strong information and education program.

Under this new proposed program for Fiscal Year 1970, emphasis will be directed toward the information of consumers through various media after determination as to the most efficient ways to reach various categories of consumers. One of the very definite programs to be undertaken will be the preparation of spot-television productions directed toward low-income consumers together with spot public service announcements on specific radio stations.

As an overall program, this consumer information unit will be charged with developing information to increase consumers' knowledge of deceptive

and fraudulent activities and advice as to how to protect themselves. The Unit will determine appropriate media for the most comprehensive consumer information activities and develop pamphlets, film strips, radio spot announcements, etc., and negotiate with the various media for the presentation of programs once developed.

It is estimated that as an initial effort in 1970, this program will require \$115,000 to provide the ten following positions and supporting costs:

Information specialists:

GS-14 -----	1
GS-13 -----	1
GS-11 -----	2
GS-9 -----	2

Editorial assistant:

GS-7 -----	1
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Stenos and typists:

GS-5 -----	2
GS-3 -----	1

Personnel compensation -----	\$90,000
Personnel benefits -----	7,000

Communications and rents:

Communications -----	2,000
Space Rental -----	5,000

Total -----	7,000
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Building alterations -----	1,000
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Supplies -----	4,000
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Equipment -----	6,000
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Total -----	115,000
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OFFICE OF ADMINISTRATION

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of Director -----	5	\$59,500	5	\$59,500		
Management Staff -----	6	84,500	9	105,500	3	\$21,000
Division of Personnel -----	21	165,000	25	193,000	4	28,000
Division of Data Processing -----	14	99,000	18	121,000	4	22,000
Division of Administrative Services -----	59	432,000	66	469,000	7	37,000
Total, personal services -----	105	840,000	123	948,000	18	108,000
Travel -----		6,000		6,000		
Total -----	105	846,000	123	954,000	18	108,000

OFFICE OF ADMINISTRATION

The Office of Administration gives policy guidance and general supervision to the management and organization programs, administrative services activities and personnel programs of the Federal Trade Commission. Plans for effective organization and administration of the Commission's management programs. Formulates and puts into effect basic administrative policies. Develops long-range plans relating to needs for personnel, space, supplies, equipment, etc. This office consists of the Management Staff and the Divisions of Personnel, Data Processing, and Administrative Services.

Management interns are assigned to the Office of Administration and are detailed during their training period to administrative positions throughout the Federal Trade Commission.

MANAGEMENT STAFF

The Management Staff in the Office of Administration is responsible for conducting agency-wide organizational and procedural studies; coordinating and issuing procedural and policy statements through a Directives System in the form of an Administrative Manual, Administrative Bulletins, and notices; conducting the Workload, Production and Manpower Reports System which also includes a Highlights narrative for all program functions; operating the Progress Report System covering the status of formal and informal casework; and the performance of special studies as assigned.

A recent survey indicated the necessity for expansion of management analysis activities in order to provide for economic and efficient correspondence, reports, and forms control activities as well as overall analysis and study of organization and procedures within the Commission. Truth in Lending will require the development of new computer systems applications. In order to provide these expanded services, an additional \$21,000 is requested in 1970 to provide two GS-9 management analysts and one GS-4 clerk stenographer.

DIVISION OF PERSONNEL

The Division of Personnel initiates, develops, and administers personnel policies and programs in the spheres of recruitment, appointment and placement, training, position classification, performance ratings, employee relations, welfare, and health and recreation.

Also this Division has been given the responsibility for position management and manpower utilization surveys and maintenance of necessary controls.

An orientation pool for stenographers and typists predominately consisting of employees initially entering on duty with the Commission has been established under the Division of Personnel. This group expedites overflow work from the substantive bureaus and is used for relief assignments to Commissioners' Office, the Office of the Executive Director, and other top offices throughout the Commission.

Increased responsibilities for the development of position structure for the new consumer protection activities including Truth in Lending, Rule 36 and the administration of the new Flammable Fabrics Act will require an additional \$28,000 to provide three GS-9 personnel technicians and one GS-4 clerk-stenographer for 1970.

DIVISION OF DATA PROCESSING

The Division of Data Processing operates a Burroughs computer and peripheral equipment to service operating bureaus' needs for data processing. These include both administrative and substantive program activities. On the administrative side, this division has the continuing job of machine preparation of payroll, the maintenance of equipment inventories, the maintenance of workload statistics for attorneys, and among other administrative programs, the maintenance of personnel information concerning both employees and attorney applicants.

In regard to the substantive programs of the Commission, this Division prepares information relating to financial statistics (a sample of 9,000 businesses are covered by the F.T.C. segment of this study), various economic and legal programs, including rates of return for the Division of Accounting, and master case cards on legal cases currently being worked on in the legal divisions of the Commission.

This Division, in connection with the above programs and others, is responsible for advising operating officials in regard to adequacy of information supplied to accomplish objectives, the development of programs as required for various administrative and operating studies, and the establishment of good, workable priorities for the expeditious handling of data processing activities.

Plans are currently underway for the development of a data bank covering all complaints and other information that will pinpoint industries and products, geographic areas, and practices on which to focus the attention of this Commission because of emerging consumer protection problems.

Plans are also underway for the automation of workload data in regard to

current legal casework and for the development of economical and statistical survey programs to implement the Truth in Lending Act. In order to satisfy the demands to be placed on the Division of Data Processing, it will be necessary to lease magnetic tape at an annual cost of \$25,000 and look into the possibility of adding to the memory capacity of our current small Burroughs computer. More sophisticated equipment which will have the capacity to meet current demands is estimated to cost approximately \$45,000. Also, three GS-3 card-punch operators and a GS-11 programmer will be necessary which will require an additional \$22,000 for fiscal 1970.

DIVISION OF ADMINISTRATIVE SERVICES

The division of Administrative Services is a central administrative unit established for the purpose of publishing the material made public under Section 6(f) of the Federal Trade Commission Act; for the procurement of supplies and equipment; and for supplying other services essential to the functioning of the Federal Trade Commission. The Commission's Library is also located in this Division.

The Publication Branch of the Division of Administrative Services clears for format, economy of reproduction, and distribution, all material printed or duplicated by the Federal Trade Commission within the limitations of the laws and regulations as applicable thereto. This branch also operates a Class A Printing Plant established under the provisions of the regulations by the Joint Committee on Printing of the United States Congress; and provides photographic, photostat and drafting services. These services are performed by the following sections:

The Composition Section edits for format and typography, material to be printed by the Government Printing Office or printed or duplicated in the Federal Trade Commission Printing Plant and provides stenographic services when bureau pools are over-burdened. During fiscal year 1966 over 4,000 pages of copy were produced by this activity for lithographic reproduction in the printing plant.

The Photographic Section provides the Commission with photographic, xerox and photostat services for use in connection with the Commission's legal proceedings and economic reports. Production reports for this section show that over 895,352 photographic, photostat and xerox prints were produced during fiscal year 1967.

Functions of the Printing Plant are the printing of the Commission's orders, press releases, legal and economic reports, speeches, Trade Practice Rules, pamphlets, forms, letters, etc. Production during the fiscal year 1967 was more than 20,978,665 pages.

The Library System of the Federal Trade Commission consists of: (1) the Commission Library; (2) the Medical Library in the Division of Scientific Opinions; (3) a small library in the Office of the Hearing Examiners; and (4) a small library in each of the Commission's 11 field offices.

These libraries provide facilities for research by personnel of the bureaus and offices of the Commission and assist in disseminating information regarding the antitrust laws and trade regulations.

The combined holdings of these collections total more than 125,000 bound volumes. Extensive files of legislative documents and statistical publications of other Government departments and agencies, and of trade associations are also maintained.

More than 375 different periodicals are received, indexed and routed among the staff on a weekly, monthly, quarterly or other frequency basis. Approximately 85,000 reference questions were answered during the year and more than 125,000 books are loaned for use outside the library.

The Procurement and Services Branch is responsible for providing services and controls in the necessary housekeeping functions as follows: procurement and maintenance of supplies, equipment, furniture, etc.; space control and building maintenance; communications including mail, telephone and telegraph and messenger.

The new functions of Truth in Lending, increased flammable fabrics activities, Rule 36 and comprehensive review of the truthfulness of advertising of drugs cited by the Food and Drug Administration, will require two WP-9 printing plant workers, three GS-4 clerk-stenographers, one WB-4 chauffeur and one GS-5 clerk at a cost of \$37,000 for fiscal 1970.

OFFICE OF THE COMPTROLLER

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Comptroller.....	4	\$66,000	4	\$66,000		
Division of Finance.....	18	124,000	24	159,000	6	\$35,000
Total, personal services.....	22	190,000	28	225,000	6	35,000
Travel.....		500		500		
Total.....	22	190,500	28	225,500	6	35,000

OFFICE OF THE COMPTROLLER

This Office is the focal point for all the budgetary and financial management functions of the Commission. Here the Commission's budget is formulated and presented to the Bureau of the Budget and to Congress in final form.

In addition to the budgetary processes, this Office is responsible for the maintenance of all fiscal records of the Commission and controls the various records that reflect the salary, savings bonds, taxes, Social Security, retirement and annual and sick leave of all employees of the Commission, including the field offices. This Office and its Division of Finance performs the audit, prior to payment, of all vouchers covering payment for travel expenses, communications, and supplies and equipment. The Division of Finance also maintains the various ledgers and records that are necessary to accurately reflect the financial position of the Commission at all times, and prepares the basic statistical data under the direction of the Comptroller for the various financial statements and reports rendered to the Commission, the Bureau of the Budget, the Treasury, the General Accounting Office and the Congress.

An additional \$35,000 is requested to provide two GS-6 accounting technicians and four GS-5 fiscal clerks during 1970.

OFFICE OF THE SECRETARY

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Secretary.....	12	\$108,000	14	\$118,000	2	\$10,000
Legal and Public Records.....	38	252,000	46	291,000	8	39,000
Total, personal services.....	50	360,000	60	409,000	10	49,000
Travel.....		500		500		
Total.....	50	360,500	60	409,500	10	49,000

OFFICE OF THE SECRETARY

The Secretary and his immediate office receive and handle mail on all phases of the Commission's work. He signs all orders and certain other official papers. He also is responsible for liaison with the Congress and Government agencies and for decisions on informal cases not submitted to the Commission.

The Assistant Secretary for Minutes takes the minutes of, and records the executive meetings of the Commission, prepares directives for the signature of the Secretary and keeps the docket of pending matters before the Commission.

DIVISION OF LEGAL AND PUBLIC RECORDS

The Division of Legal and Public Records embraces the Formal Docket, Informal Docket, Correspondence, Public Reference and Distribution Sections.

The Formal and Informal Docket Sections are responsible for the establishment, management, safety, completeness and accuracy, uses and retirement of the legal and related records of the Commission.

The Correspondence Section receives incoming mail, opens, date stamps, establishes index and tickler when appropriate, conducts history search and forwards letters to proper office for action.

The Public Reference Section furnishes information and assistance to the public, and to the staff of the Commission in relation to public, legal and court proceedings and in matters of related procedure. The Section is responsible for the custody, location, safety, conditions, etc., of dockets, files, exhibits, etc.

The Distribution Section controls the supply and distribution of all publications issued by the Commission, such as economic reports, annual reports, trade practice rules, etc.

Increase requested—1970

An additional \$49,000 is requested for two GS-4 clerk-stenographers for the Office of the Secretary and eight GS-4 clerical positions for the Division of Legal and Public Records.

OFFICE OF THE GENERAL COUNSEL

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of General Counsel.....	13	\$219,500	16	\$254,500	3	\$35,000
Division of Appeals.....	33	457,000	39	522,000	6	65,000
Division of Consent Orders.....	7	117,000	7	117,000		
Division of Legislation.....	4	58,000	4	58,000		
Division of Export Trade.....	3	31,500	3	31,500		
Total, personal services.....	60	883,000	69	983,000	9	100,000
Travel.....		6,000		6,000		
Total.....	60	889,000	69	989,000	9	100,000

OFFICE OF THE GENERAL COUNSEL

The General Counsel is the chief law officer of the Commission. He is its legal counselor and adviser. He represents the Commission as its lawyer in contacts with other departments, agencies and branches of Government, and in controversies before the courts of the United States. He directs the work and performance of all offices and divisions within his office.

The work of the Division of Appeals; the legislative activity affecting or designed to affect the work and duties of the Commission and increasing by a substantial percentage each year; the interest in export trade, governmentally and privately inspired; the broadened enforcement efforts of the operating bureaus which culminate to a large extent in consent settlements; all are expected to continue and to accelerate during fiscal 1970. The Commission is raising its enforcement goals. It emphasizes its work in restraints of trade and requires an increase in this activity. It is giving new attention to broadened concepts and efforts to enforce antideceptive practice laws. It is adopting new trade rules and regulations which tend to dispose of minor matters expeditiously, but which bring into sharp contention larger cases of financial aid and economic importance to the business community.

An upsurge of antitrust cases is foreseeable from recent Supreme Court decisions giving fresh vitality to classic antitrust concepts, from new approaches to complicated merger causes, and from increased efforts of the operating bureaus. Competitive conditions in the changing, burgeoning economy of our nation forecast a rising number of applications of these concepts in the immediate future. New statutes, such as the truth in labeling and packaging act, have been assigned to the Commission for administration and for the exercise of rule-making powers to implement the will of Congress. This means greatly expanded effort and responsibility for the General Counsel's Office to furnish legal guidance to the Commission and operating bureaus in the interpretation, administration and enforcement of the laws, to assist in the formulation of the rules to be promulgated thereunder, and to defend in the courts the normally resultant legal challenges to the Commission's interpretations, rules, and actions.

The rapidly increasing public demand for consumer protection forecasts a vastly increased enforcement effort by the Bureau of Deceptive Practices, which, in turn, will increase the work of the General Counsel in all areas. The Commission's staff is making necessary and more numerous demands for special reports and investigational subpoenas in aid of its industrywide investigations and proceedings; it creates the need for prompt enforcement of special orders and subpoenas in the Federal district courts. A material increase in the work of the General Counsel's Office will result in fiscal 1970.

A section of the office directed by an Assistant to the General Counsel enforces the provisions of the Lanham Trademark Act in which certain duties are delegated to the Commission.

Problems under the Trademark Act arise in a variety of ways. They may originate from Members of Congress, foreign embassies, the trademark office, bureaus of the Commission, individuals and competitors of trademark users. During fiscal year 1970, approximately 45 complaints will protest marks which are deceptive as to the quality of the product; about 20 to 30 cases will concern marks which falsely suggest a geographic origin or affiliation with a public or governmental organization; about 10 cases will involve adoption or pirating of a famous name.

Indexing and publishing commission decisions

It is most important the publication of Commission decisions be kept current since these decisions provide to the staff the recent case law in these fields. They furnish a reliable source of court precedents for the use of Commission personnel and for the guidance of business itself. These decisions, available for purchase through the Government Printing Office, fulfill a part of the Commission's duty under section 6(f) of the Federal Trade Commission Act which requires the publication of reports and decisions in such form and manner as may be best adapted for public information and use.

An attorney assigned to the immediate office of the General Counsel participates in the preparation of all legal materials for the compilation, and publication of the "Federal Trade Commission Decisions," the "Statutes and Court Decisions Relating to the Commission," and all orders published in the Federal Register. In addition, he prepares indices and topical digests for use in tracing legal principles through the volumes of Federal Trade Commission decisions and court decisions.

The Legal Research and Reporting Section performs the technical, non-legal tasks of compiling and editing the orders, decisions of the Commission, and court decisions affecting the work of the Commission. In addition, editing and preparation for printing of Commission court briefs and memoranda are a regular portion of the duties of this section.

At the present time, Volume 63 and 64 are in the process of printing at the Government Printing Office. Volume 65 is being prepared for publication while the page proofs of Volume 63 are being read and rearrangement of Volume 64 into two parts is being completed. A prospective date for publication of each of the three volumes cannot be given at this time. Volume 7, 1961-1965, Statutes and Court decisions, including a revised alphabetical cumulative case index providing a historical record of each case with references to the full text reported or cited in the volumes to date, was published and distributed in July 1968.

No funds for additional positions are requested for these functions of the General Counsel and his office in fiscal year 1970.

OFFICE OF FEDERAL-STATE COOPERATION

The Commission's program of Federal-State Cooperation, in the General Counsel's Office, encourages the States to enact laws, like the Federal Trade Commission Act, to protect the public from deceptive and unfair business practices. Stopping such practices at State or local level, before they grow into problems of interstate proportions, minimizes the need for Federal action, and gives the public quicker and less expensive protection. It frees the Commission to deal more effectively with problems of regional and national significance.

A surging interest in this activity was evident during the past year as the States directed to the Commission 281 requests for advice or assistance in legislative or law enforcement matters involving prevention of deceptive or unfair trade practices. This was an increase of 117% over the 129 similar requests received in fiscal 1967. This increase is indicative of the general level of added emphasis on consumer protection in the States.

Effective liaison has been established with all of the State Attorneys General and with numerous other State agencies. They are devoting an increased amount of time and attention to the identification and correction of unfair and deceptive trade practices, and in cooperating with the Commission to that end.

Since the Commission recommended model consumer protection and unfair trade practice legislation to the Council of State Governments in 1966, nine States have enacted such laws; they are Arizona, Kansas, Maryland, Massachusetts, Missouri, New Mexico, Rhode Island, Texas, and Vermont. Other States with similar legislation or consumer protection offices include Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Michigan, Minnesota, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin, about 30 in all. Other States, including Arkansas, Indiana, and Nebraska, are considering the establishment of such offices.

State offices of consumer protection and Attorneys General are being furnished on a continuing basis with a variety of informational materials in regard to actions by the Commission and by State governments to prevent deceptive and unfair trade practices. This serves as a training medium and a method of correlating such activities throughout the country, as well as an encouragement to States which have not yet established such programs. Training conferences were conducted during the past year for 46 consumer protection personnel from 24 States. Liaison was also established with the States to carry out interrelated functions under the Fair Packaging and Labeling Act, and under the Guides for Advertising and Labeling of Pet Foods.

State officials reported to the Commission a total of 431 complaints during fiscal 1968, about the same as the previous year when 436 were received. These complaints are generally of high quality, serving as a valuable source of information to keep the Commission apprized of practices in interstate commerce warranting corrective attention.

Intrastate matters referred by the Commission to State officials for action numbered 88 this year, compared with 99 last year and 37 the year before. Many of these referrals entail a considerable amount of staff work in placing the facts properly before the cognizant State official and helping him to understand the theory on which the Commission would challenge the practices as being unfair or deceptive if they were being used in interstate commerce.

The Commission's office of Federal-State Cooperation keeps abreast of consumer protection legislation and enforcement programs in the States; serves as a communications central for State agencies in regard to unfair and deceptive trade practice matters; is liaison between the Commission and consumer organizations including the President's Committee on Consumer Interests and the Office of Economic Opportunity; and meets with individuals and groups interested in the development or improvement of State consumer protection and unfair trade practice legislation and programs.

The program of Federal-State Cooperation has since its inception in October 1965 been staffed by one attorney and one secretary. The volume of work now being generated, especially in the form of requests from the States for technical assistance in legislative and law enforcement matters, requires that additional personnel be assigned to this function. Giving prompt answers to the requests from the States is essential if we are to keep alive and develop their growing interest in consumer protection. Additional manpower is also needed to organize and conduct training sessions for State officials, and to attend conferences and seminars with them for the discussion of ways and means of preventing consumer deception and unfair trade practices. And with the growing volume of State legislative and law enforcement action in this area, we need more help to keep abreast of developments, and to perform our function of serving as a central clearinghouse of information in regard to deceptive and unfair trade practice matters.

Increases requested 1970

An increase of \$35,000 is requested to provide one GS-14 attorney, one GS-13 attorney, and one GS-4 secretary.

DIVISION OF APPEALS

The principal function of the Division of Appeals is to represent the Commission in the federal courts. Any party against which the Commission has issued an order to cease and desist may petition a federal court of appeals for review. The Commission may apply in a federal district court for the enforcement of a

subpena or an order requiring a special report. Disobedience of a court's decree enforcing a Commission order or subpena may be punished as a contempt. Collateral suits challenging the Commission's jurisdiction or procedure may be brought by affected parties under certain circumstances in federal district courts. The Division handles these and similar matters both directly and in participation with the Office of the Solicitor General in Supreme Court matters, and with offices of the United States Attorneys in certain other cases. The Division is also regularly called upon to render formal and informal advice and legal assistance to the Commission and to the staffs of other bureaus and divisions.

General case workload

By far the greatest amount of the Division's workload arises from actions taken by the Commission or parties involved in Commission litigation. The timing and volume of the Division's activity, therefore, is governed by factors over which it has little or no control. During fiscal year 1968 the Division handled 88 cases, completing litigation in 27. A significant increase in workload is forecast for fiscal 1969 and 1970 based upon "spill over" from current cases and upon the increasing number, size and complexity of matters pending before the Commission for decision.

Workload expected in fiscal 1970

The Division's fiscal 1970 workload will originate primarily from four sources: 1. "*Spill over.*" Some of the matters now in appellate litigation, especially those in the "major case" category, conceivably will not be resolved by July 1, 1969, at least insofar as Supreme Court disposition. This could occur, for example, with respect to cases such as *American Cyanamid Co.*, with a record of 31,000 pages; *Community Blood Bank of the Kansas City Area, Inc.*, with a record of 15,000 pages; and *Columbia Broadcasting System, Inc.*, with a record of 12,500 pages.

2. *Cases currently before the Commission for decision.* As of June 30, 1968 there were 14 cases on the Commission's adjudicative calendar awaiting decision, and five more awaiting argument on appeal to the Commission from initial decisions of hearing examiners. The entry of cease-and-desist orders in any of these matters is very likely to precipitate appellate court litigation involving the Division in fiscal 1970. This is a virtual certainty, of course, as regards any orders entered in the pending "major cases."

3. *Cases in litigation before hearing examiners.* As of June 30, 1968 there were approximately 45 complaints outstanding in various stages of litigation before hearing examiners. Any of these could potentially reach the Division's appellate docket during fiscal 1970. Because of the Commission's policy of issuing formal complaints only after all other effective means of securing compliance with the law have failed, it can reasonably be assumed that the great majority of these matters involve "hard core" violations, which will ultimately necessitate court review.

4. *Investigational activity in operating bureaus.* There are numerous matters currently under investigation and analysis by the Commission's operating bureaus which could result in formal charges and conceivably reach this Division's appellate docket in fiscal 1970. In more recent years, approximately 85% of the Division's workload has involved antimonopoly cases as opposed to roughly 15% antideceptive. Information received regarding the activities of the Bureau of Restraint of Trade reveals a number of areas which might potentially generate appellate cases in fiscal 1970.

A. *Mergers.* The Division of Mergers is presently giving close attention to competitive problems presented by corporate acquisitions in industries such as food distribution, cement, textile and auto parts. Especially under scrutiny are conglomerate mergers, the most difficult and challenging enforcement problem in this field.

B. *Discriminatory Pricing.* The Division of Discriminatory Practices is currently involved in enforcement projects in the following industries: apparel, bakery, dairy, auto parts, publishing, furniture, railway equipment, drug products, grocery chain store, drapery hardware, fresh fruit and vegetable, and luggage.

C. *General Trade Restraints.* The Division of General Trade Restraints is engaged in investigation and analysis of suspect practices in a large number of industries which may result in formal charges. These include: auto parts, chemical, newspaper, drugs, linen rental, TV tubes, TV advertising rates, petroleum coke, ski supplies, clothing, furniture, iron pipe, LP gas, food,

domestic heating, cosmetics and toiletries, home tractors, outboard motor, agriculture equipment, vending machine, insecticide, photocopying, and phonograph record. In addition, unfair trade practices which cut across a number of industry lines are receiving active consideration. These include pre-ticketing of retail goods, advertising and promotional gimmicks, franchising problems, and business "reciprocity."

In regard to the above activity, it is significant that each of these Divisions has projected increased workloads in the years immediately ahead and that the Bureau of Restraint of Trade requests an increase of 20% for 1970 to reduce the backlogs in its regular programs. In addition, the Bureau of Deceptive Practices is requesting an increase of approximately 50% and the Bureau of Textiles and Furs about 40%.

The above estimation of this Division's expected fiscal 1970 workload has been made in consideration of inevitable district court litigation which will arise but which cannot be accurately forecast. These attacks upon the Commission's jurisdiction and procedures have been increasing in recent years. This increase is expected to continue in the future, especially as the Commission places greater reliance upon industry-wide methods of proceeding, such as by trade regulation rule.

An assessment of this Division's manpower needs must also take into account the sharp increases tentatively authorized by the Commission in new programs in the deceptive practices field: Truth in Lending, Food and Drug, Flammable Fabrics, Rule 36 under the Wool Act, and Home Improvements. The impact of these planned additional activities in the area of consumer protection will inevitably be felt by the Division of Appeals in fiscal 1970.

Increases requested 1970

An increase of \$65,000 is requested for six new positions, as follows: four GS-13 attorneys and two GS-4 clerk-stenographers.

An additional amount of \$3,000 is requested to cover the cost of printing briefs and appendices to be filed in the Courts, in accordance with Court rules, in the presentation of the expected increased number of cases on appeal.

DIVISION OF CONSENT ORDERS

The principal function of this Division is to supervise and control negotiations looking towards the disposition of matters by the entry of consent orders under the procedure provided in Part 2 of the Commission's published rules.

A large majority of the Commission's formal proceedings are disposed of by the entry of consent orders. Under its procedures, when the Commission has reason to believe that a law administered by it has been violated and that a formal proceeding should be instituted, the suspected violator is notified of the Commission's determination in that respect, and is provided with a form of complaint and a proposed order. The proposed respondent has 10 days after service of that notice within which to indicate whether or not he is interested in disposing of the proceeding by the entry of a consent order. If the proposed respondent fails to indicate such an interest, the Commission's rule prescribe that the complaint shall issue and be served forthwith.

The Division has the responsibility not only of supervising and controlling negotiations for an agreement, but also for determining when such negotiations are being carried on in good faith, the likelihood of a satisfactory agreement being reached, and when negotiations should be terminated. It also has the responsibility of determining whether or not proposed settlements are satisfactory making explanations and recommendations to the Commission with respect to those deemed appropriate in the circumstances, and submitting drafts of appropriate decisions and orders.

Current workload

The Division disposed of 408 matters during fiscal year 1968. Of these 197 were cases in which executed agreements containing orders to cease and desist or to divest were forwarded to the Commission with recommendations for their acceptance and issuance of complaint and decision as authorized by such agreements. In 23 matters, the files were returned to the Commission after negotiations terminated without an agreed-upon order and 8 matters were returned after negative response under Part 2 of the rules. Eighteen matters were reported back to the Commission with recommendations which, in most instances,

related to patterns of settlement proposed by the staff and requesting authorization for further negotiations with respect thereto. Under the Commission's rules, parties to matters in the informal or investigative stage may be afforded an opportunity to submit to the Commission, through the Division of Consent Orders, executed consent agreements, together with proposed complaints drafted by the Commission staff. The above-mentioned cases in which executed agreements were forwarded in fiscal year 1968 to the Commission for its consideration, together with drafts of decisions and orders prepared by the Division, included 147 matters submitted under this procedure. Also included in the above overall figure of 408 matters disposed of were 162 miscellaneous assignments.

The Division's assigned duties additionally include the review of proposed complaints and orders prior to their initial submission by the operating bureaus to the Commission for its consideration of the investigational files and determinations of whether corrective action through formal proceedings should be directed. In that connection, 370 drafts of proposed complaints and orders were reviewed in the Division during fiscal year 1968.

The data and information set out above and the increase requested by other Bureaus for fiscal year 1970 reasonably support conclusions that in fiscal year 1970 our workload looking to maintaining competition and protection of consumers will be substantially above the past and current years' levels, however, no increase in staff is requested for 1970.

DIVISION OF LEGISLATION

The Division of Legislation of the General Counsel's Office is the liaison, with reference to legislative matters, between the Federal Trade Commission and Congress. It advises the Commission upon all such matters.

When a committee of Congress or the Bureau of the Budget requests the Commission's views on any proposed legislation, the Division prepares reports for submission and approval by the Commission.

The Division drafts, and assists in the drafting of, legislative proposals on behalf of the Commission which, after clearance by the Bureau of the Budget, are submitted to the Congress. The Division likewise prepares for submission to the Commission for inclusion in the Commission's annual reports, a list of legislation which the Commission believes is needed to make more effective its operations.

During the last two Congresses the Division has prepared reports on approximately 200 bills per Congress. To date we have received 185 from the 90th Congress.

As of this date, during 90th Congress this Division has received requests from the Bureau of the Budget and made reports on approximately 34 bills and by 1970 we expect this number to increase to about 60.

When legislation passes both Houses of Congress and thus becomes an "enrolled bill", the Bureau of the Budget requests the views of the Commission within a period of 48 hours as to whether the President should sign or veto the legislation.

During the two preceding Congresses and the present Congress, as of this date, the number of enrolled bills have averaged approximately 6 per session. By 1970 this number probably will increase to 10 due to Congress having enacted new legislation affecting the operations of the Commission.

The Division provides assistance to the Chairman, as well as to other Commissioners and to members of the staff, when any of them is requested to testify before congressional committees. If formal statements are required in connection with such appearances, the Division usually prepares a draft of such a statement for the approval by the party requested to appear.

The Division represents the Commission at meetings called by the Bureau of the Budget or Executive Departments of the Government on proposed legislation. It also meets with individual members of Congress and members of the staffs of committees who desire to discuss proposed legislation.

Much legislation has been introduced which would broaden the jurisdiction of the Commission, and some have become laws such as the amendment to the Flammable Fabrics Act and the Truth in Lending Act. Numerous additional legislation is expected in connection with Consumer Programs. As more bills are introduced, the work of this Division increases, however, we are requesting no increase for 1970.

DIVISION OF EXPORT TRADE

The Webb-Pomerene Export Trade Act of 1918 is administered by the Commission through its Division of Export Trade in the Office of the General Counsel. This Division does not perform all specific functions relating to the Act's administration, but coordinates and supervises the Commission's administration through its other operating bureaus. This administration includes, *inter alia*, economic studies on Webb associations undertaken by the Commission's Bureau of Economics; investigations of association activity by the Bureau of Field Operations; formal proceedings before hearing examiners directed towards recommendations for readjustment of association practices by the Bureau of Restraint of Trade, and requests by associations for advisory opinions on contemplated future programs in export trade under the Commission's Bureau of Industry Guidance.

In addition to performing the Commission's coordinating functions over the above activities in the Commission's operating bureaus, the Division of Export Trade is also the Commission's clearinghouse for matters relating to its jurisdiction in foreign commerce. Accordingly, the Division of Export Trade is the Commission's liaison on matters affecting foreign commerce with the Departments of Agriculture, Commerce, Justice, State and Treasury, and coordinates the Commission's activities with the Agency for International Development and the Office of the President's Special Trade Representative. The Assistant General Counsel for Export Trade also represents the Commission on the working parties of the Restrictive Business Practices Committee of the OECD and on various governmental committees studying the problems of international trade, balance of payments, and export expansion. Answers to congressional inquiries regarding the administration of the Webb-Pomerene Act and Commission reports to Congress on legislation affecting the Commission's jurisdiction in foreign commerce are also prepared by this Division.

No additional positions are requested for fiscal year 1970.

HEARING EXAMINERS

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	29	\$429,000	29	\$430,500		\$1,500
Travel.....		10,000		10,000		
Total.....	29	439,000	29	440,500		1,500

HEARING EXAMINERS

No increase is requested for the Office of Hearing Examiners for fiscal year 1970.

BUREAU OF RESTRAINT OF TRADE

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	46	\$366,000	51	\$391,000	5	\$25,000
Division of Mergers.....	35	470,500	43	556,500	8	86,000
Division General Trade Restraints.....	35	542,000	43	623,000	8	81,000
Division Discriminatory Practices.....	46	654,500	54	735,500	8	81,000
Division of Compliance.....	33	357,000	40	435,000	7	78,000
Division of Accounting.....	13	207,000	15	226,000	2	19,000
Total personal services.....	208	2,597,000	246	2,967,000	38	370,000
Travel.....		63,000		79,000		16,000
Other expenses.....		20,000		28,000		8,000
Total.....	208	2,680,000	246	3,074,000	38	394,000

BUREAU OF RESTRAINT OF TRADE

The responsibilities of the Bureau of Restraint of Trade obtain in the anti-monopoly area, for administration and enforcement of Section 5 of the Federal Trade Commission Act and Sections 2, 3, 7 and 8 of the Clayton Act.

Conceptually, prohibition or prevention of unfair methods of competition, discriminations and other practices inimical to free competitive processes, provides an essentially negative depiction of the Bureau's mission. The goal is a maximum maintenance of effective competition within the economy. Mere numbers of unfair methods interdicted, discriminations halted, or trade restraints challenged, do not satisfactorily measure the effectiveness of the Bureau's operation, nor the extent or value of its accomplishment. Similarly not disclosed by such statistics, is the cost to the economy, resting as it does on the premise of free and open competition, should the Federal Trade Commission fail or neglect the particular matters in fact handled through this Bureau, looking to termination of anticompetitive practices and elimination of obstructions to the free flow of trade. It is evident that even relatively isolated trade restraints and acts or conduct of business resulting in the prevention, elimination or destruction of competition, if disregarded, may lead to formation of anticompetitive environments, competitively virulent and, indeed, contagious.

The Commission has traditionally sought to discover and halt in *their incipency*, unfair and anticompetitive practices carrying with them the potential and threat of development to even greater restraints. With its extremely limited resources, however, the agency has the additional and separate responsibility to so allocate its manpower and funds as to best segregate and contain those anticompetitive practices which affect the economy most markedly and intimately.

There is impelling need that the Commission do more. In the instance of high concentration industries, the steel industry, for example, power to control and administer prices and extent of production, appears to exist and operate in a manner antithetical to the processes of economic counterforce, characteristic of the nation's competitive markets. Important segments of the economy reflect serious oligopolistic and, in instances, oligopsonistic behavioral patterns, whether and to what extent our competitive system may be adversely influenced and affected by such concentrations of economic power, and the nature and form of practicable processes of remedy, are matters of serious antitrust concern. The Commission, however, on the basis of resources presently available to it, may not undertake the kind of concentrated, in-depth study necessary to adequate economic and legal analysis of any such special industry problems, as ultimately vital as they may be, if to do so would be at the price of abandonment of existing project commitments specifically within statutory mandate, immediately affecting the public interest.

The Commission, on August 9, 1968, directed its staff to undertake a planning study of the feasibility of an in-depth investigation of industries, including steel, characterized by concentration and absence of price competition, to enable the Commission to better appraise the extent to which its resources permit the inclusion of such an investigation into its overall program. The need for such special investigative project is perforce great. However, in present posture, no increase for FY 1970 for this purpose has been requested, nor can yet be formulated.

With respect to present and future manpower commitments within the Bureau, a new planning program is in the process of being instituted this fiscal year, which will put in effect procedures for successive re-evaluations of current work commitments, the selective-substitution, on a continuing basis, of more urgent and economically significant matters for those of less immediacy or a lower level of public interest, and establishment of a flexible system of priorities, applicable to all major restraint of trade project assignments.

Priorities will be determined through the Office of the Bureau Director. Such priorities, starting with the three designated Commission programs in Food, Apparel and Automotive Parts, will be established with respect to all related, subordinate and potentially alternative major project matters. In assigning priorities, the Office of the Director will have recourse to the expertise of each Division and a close liaison will be maintained with respect to investigative developments in the field. The assistance of the Bureau of Economics will be provided, as well as that of the Bureau of Field Operations, in the securing and development of such additional valuation information as may be necessary to priority determination. Reassessment of assigned priorities will be made from

time to time as investigational results dictate or as changes in the law, Commission policy or economic or other circumstances may require.

Conduct of exploratory investigations, enforcement on a case-by-case basis when warranted, and attentiveness to the pleas for help of individual businessmen, will not be perfunctorily suspended or done away with. These, largely prophylactic, functions contribute significantly to the Commission's effectiveness. There will be maintained within each Division, according to its operation, a balance between work assignments involving matters of designated priority and work assignments which, because of their nature, cannot be specifically so classified.

With respect to restraint of trade investigations pending in the field, initiation of priority assignments by this Bureau will successively require specific re-evaluation of existing investigative assignments, an assaying of manpower requirements and appraisal of relative public interest demands, with accommodating prompt suspension of work assignment on matters determined to be of a lower priority.

Investigational back-logs on priority assignments will, accordingly, be circumvented. Matters twice suspended to permit immediate assignment of field attorneys to matters of higher priority, will be returned to the Bureau for closing or other disposition.

Improved selectivity in work assignments, so effected, will utilize evaluation criteria including: (1) The substantiality of the unlawful acts or practices alleged; (2) The relevance of market structure; (3) The significance of the industry or commodity involved, or alternatively the significance of the economic or social environment in which the alleged violation occurs. In assessment of recommended changes in priority, or in determining bases for suspension of investigational matters pending in the field within the Divisions, the following additional evaluation criteria will apply: (4) The indicated probability that corrective action can be sustained; (5) Ameliorating economic or competitive developments subsequent to initiation; (6) Time and manpower involvement out of proportion to other factors considered.

Matters actually in litigation, generally, will not be affected, nor will work projects to which the agency or the Bureau may be currently otherwise effectively precommitted.

BUREAU WORKLOAD SUMMARY

	Fiscal year 1968	Estimated fiscal year 1969	Estimated fiscal year 1970
Applications for complaint: ¹			
On hand beginning of year.....	346	379	379
Received.....	1,417	1,700	1,785
Disposed of.....	1,384	1,700	1,785
Pending end of year.....	379	379	379
Formal investigations:			
Pending beginning of year.....	² 725	747	713
Initiated or reopened.....	³ 218	276	325
Completed or closed.....	196	310	351
Pending end of year.....	⁴ 747	713	687
Complaints issued:			
Pending beginning of year.....	12	24	19
Approved for negotiation or reopened.....	30	42	53
Dispositions:			
Consent settled.....	10	34	37
Litigated.....	6	13	18
Other.....	2		
Pending end of year.....	24	19	17
Litigated cases:			
Pending beginning of year.....	26	20	27
Complaints issued or reopened.....	10	21	28
Docketed orders disposed of.....	16	14	23
Pending end of year.....	20	27	32
Voluntary compliance.....	33	34	44

¹ Division totals do not necessarily total Bureau summary because of matters handled directly by the Office of the Director. Applications for complaint include basic source, i.e., letters of complaint, field reports, merger announcements, and other sources.

² Includes 17 investigations, Compliance Division.

³ Includes 12 investigations, Compliance Division.

⁴ Includes 28 investigations, Compliance Division.

OFFICE OF THE DIRECTOR

The Office of the Director provides general supervision over the work of the Bureau's five Divisions. In addition to the immediate staff of the Director, a central stenographic pool and records section is maintained, which serves all operating divisions.

With the Commission's broad involvement in the Food industry, each of this Bureau's three enforcement divisions having committed substantial manpower to the problems of that industry, a Special Legal Advisor was appointed in the Office of the Director, in order to correlate proceedings concerning the Food Industry and to provide special advice and assistance on Food industry matters to all concerned Bureaus and Divisions within the agency.

To more carefully husband manpower and funds through programming and project planning at the Bureau level, and to provide closer supervision over divisional work commitments and priority assignments, a Program Officer has been appointed as an Assistant to the Director. Specific project and non-project priorities for all Divisions, as hereinbefore discussed, will be developed during FY 1969, together with implementation of a plan for more immediate and direct mutual and reciprocal work relationships between project priorities, investigations and case development.

Increases requested for fiscal 1970:

An additional \$25,000 is requested to provide five GS-4 clerk-stenographers for the Office of the Director.

DIVISION OF MERGERS

The Division of Mergers maintains responsibility for investigative, adjudicative and policy statement procedures relative to corporate mergers and acquisitions, joint ventures and interlocking directorates under Sections 7 and 8 of the Clayton Act (15 U.S.C. 18 and 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) as applicable.

Workload statistics	Fiscal year 1968	Estimated fiscal year 1969	Estimated fiscal year 1970
Preliminary investigations:			
Mergers examined.....	1,895	2,100	2,200
Joint ventures examined.....	162	195	191
Applications for complaint:			
On hand beginning of year.....	18	22	27
Received.....	75	80	80
Disposed of.....	71	75	80
Pending end of year.....	22	27	27
Formal investigations:			
Pending beginning of year.....	139	153	168
Initiated or reopened.....	68	75	80
Completed or closed.....	54	60	66
Pending end of year.....	153	168	182
Complaints issued:			
Pending beginning of year.....	6	7	2
Approved for negotiation or reopened.....	8	9	15
Dispositions:			
Consent.....	3	10	9
Litigated.....	2	4	6
Other.....	2		
Pending end of year.....	7	2	2
Litigated cases:			
Pending beginning of year.....	11	11	13
Complaints issued or reopened.....	3	5	8
Docketed orders issued.....	3	3	6
Pending end of year.....	11	13	15
Voluntary compliance.....	2		

WORKLOAD, FISCAL YEAR 1968-69

The workload of the Division of Mergers increased during FY 1968 as it has, progressively, over the past several years. The number of pending and initiated formal investigations, for example, increased from 105 in FY 1963 to 207 in FY 1968. With a continuing increase in the total number of mergers consummated, the

advance in the number of larger mergers (\$10 million or more) particularly emphasizes the increasing need for additional enforcement in this area. So-called large mergers numbered 68 in the calendar year 1963 and increased to 155 in 1967, an increase of 128%. During this same period, the trend to large conglomerate mergers (inherently complex, and requiring extensive economic and legal analysis) accelerated from 48 in 1963 to 128 in 1967, an increase of 167%.

It may be significantly noted that during FY 1968, after expeditious initiation of investigation by the Division, ten mergers, nine of them major mergers (combined assets of \$10 million or more) were called off.

The legal staff of the Division of Mergers has not been augmented since 1963. This staff, consisting of an average of 30 attorneys over this five-year period, is responsible for all merger cases, from initiation to order or other disposition including all screening and investigation, together with the other attendant responsibilities of the Division. The amount of work the present staff can contain, in efficient and effective performance, is substantially at saturation. Thus, manpower limitations restrict the extent of the Division's investigations and study of acquisitions, while the need for additional enforcement of Section 7 increases.

The Division of Mergers examines more than 2,000 reported mergers and acquisitions per year. It is anticipated that the number of formal investigations initiated will continue at the rate of 70 to 80 per year dependent upon available manpower. With a carry-over from the previous fiscal year, the anticipated workload will amount to about 248 active investigations for the 1970 fiscal year. The merger staff handled 15 docketed cases in FY 1967, and 14 in FY 1968. It is expected, with the carry-over, that the workload of docketed cases will be about 20 in FY 1970.

The workload of the Division will involve increasing activity, with investigation of major conglomerate mergers on the increase. Following the decision in the *Procter & Gamble* case, it is anticipated that the Division will, through a case-by-case approach, investigate appropriate conglomerate mergers. To the extent possible, the Division will be directing its activities primarily along particular industry lines, viz., auto parts, food distribution, grocery products, manufacturing and apparel. With the decrease in horizontal mergers and increase in the number of conglomerate mergers, the tendency, however, is that product line applications to industry are not conveniently confined, but are being spread out. This necessitates examination of a number of mergers in scattered industries which are considered under a miscellaneous project area and are time consuming.

During the year, acquisitions and joint ventures are being given preliminary study by the Division of Mergers with the assistance of the Commission's Bureau of Economics, utilizing published financial, economic and industrial data, as well as economic studies, reports and other information available to the Commission. A careful but flexible selection procedure is being followed in choosing those acquisitions and mergers which will be investigated in depth. The specific criteria used include: Market Share, Concentration, Geographic Market, Product Market, *Per se* Violations and Enforcement Law Development.

The Division continues to work with the Bureau of Economics in conducting industrywide studies as directed by the Commission. Considerable effort was expended in a current study relating to product extension mergers by grocery product manufacturers which was issued by the Commission on May 15, 1968.

MERGER DIVISION PROGRAM

The overriding concern of the Division for FY 1970 and beyond, will undoubtedly be with conglomerate acquisitions and mergers. These cut across all industry categories, and though they may be placed in one of the industry groupings, they involve special legal and economic problems incident to reciprocity dealings, product and market extensions, potential entry, and numerous other theories which call for sophisticated and time consuming investigation and analysis. It is anticipated that the in-depth study of the conglomerate merger movement directed by the Commission, with a date of completion set for January 1, 1969, will accelerate our involvement in the crusade on conglomerates, recently given publicity by the Department of Justice's merger guidelines. By the beginning of FY 1970 the Commission may publish its own policy in this area, and the Division of Mergers will have an additional and continuing volume of work to do, over and above its responsibility for challenging illegal mergers as they

occur from day to day. For example, this Division is currently conducting 89 investigations of conglomerate acquisitions. By FY 1970 it is anticipated that the manpower requirements for an increased emphasis upon this program will have doubled. In effect, the expansion of the program will depend almost exclusively upon the manpower available for it, over and above the normal requirements for the Division.

Three industries are operating under Commission "Enforcement Policy" pronouncements. They are:

- (1) Product extension mergers in grocery products manufacturing ;
- (2) Food distribution industry ; and
- (3) Vertical mergers in the cement industry.

Although these three industries are unrelated economically, they have problems in common with respect to the workload and manpower requirements of the Division of Mergers. For example, two of them (food and cement), have resulted in a requirement that industry members submit Section 6(b) reports giving advance notification of proposed mergers, and this requirement is one which will continue into and beyond FY 1970. Brief experience has shown that a major portion of the time of at least three attorneys will be required to evaluate these reports and furnish the necessary surveillance, and that further manpower will be required to investigate and litigate any indicated violation of the policy guidelines. It seems safe to conclude that while policy statements are effective in slowing down indicated trends within a particular industry, prompt and effective enforcement is necessary to implement the policy. This introduces a new factor into our manpower budgeting, quite different from previous freedom to pick and choose from the mergers as they occur and concentrate manpower where it is needed to finish the job. Now we will have a type of administrative override in the three industries listed, plus possibly others which may be under enforcement policy interdiction during FY 1970. The development of a cohesive industrywide merger enforcement policy will, in each instance, require a continuing increase in manpower. In addition, implementation and enforcement relating to product extension mergers in grocery products manufacturing which the Division of Mergers' Staff is handling will have the effect of decreasing the time available for other investigation and litigation work.

Additional industries will be placed under enforcement policy restrictions which will, *per se*, increase the manpower requirements for this Division. Already the Commission has directed that an enforcement policy statement be prepared in the Textile Industry which will be in effect in 1970.

Special mention should be made of the Automotive Parts Industry because of the large number of investigational matters now underway which indicate a requirement for additional manpower during FY 1970. Of 18 investigations on hand, five indicate future compliant, but still the merger trend continues. This is an industry with many separate product lines, many regional market areas, and a complicated competitive history due to considerable vertical integration from the automobile manufacturers down to the after market retailer. To keep abreast of this trend, once the litigation of cases begins, will require a sizeable increase in professional manpower.

The Wearing Apparel Industry covers all items of clothing for men, women and children and encompasses approximately 30,000 industry members. From the eight investigations currently under way it is anticipated at least three cases will be in litigation by FY 1970. However, present manpower will not allow for additional matters which will undoubtedly arise in this industry where acquisitions are on the increase. If the Commission is to be effective in controlling an indicated trend in its incipency, then the Division will have to devote additional resources to investigating mergers in this industry.

In the Minerals and Mining Industry, the business community has discovered a new tool for making large acquisitions of producers of natural resources with a minimum of cash outlay. This is the Production Payment Plan, where the acquiring company finances the acquisition by, in effect, mortgaging the natural resources holdings of the acquired company to a group of financiers, and then pays off the mortgage as the natural resources are extracted, processed and sold. The acquisition potential here is very great, and it is expected that in the near future many mining companies, timber rich companies, and similar organizations in need of cash will be acquired in a manner similar to the Kennecott-Peabody or the Continental Oil-Consolidation Coal transactions. Close attention will have

to be given to this type of transaction in the future, over and above the manpower required to handle the current Kennecott-Peabody matter.

The increasing use of plastics due to technological development has resulted, and will continue to result, in numerous acquisitions and mergers in the plastics industry. This is due to the fact that three distinct levels of production are involved: producers of raw chemicals; producers of resins; and, the fabrication of a very broad range of end products.

Of seven formal investigations currently on hand it is anticipated that at least two may result in complaints which will be in litigation during FY 1970. However, the trend is expected to continue and the manpower demand will increase.

The following summary and the project descriptions by industry, set forth the projects which will be worked upon during FY 1969 and which are expected to continue into FY 1970. Most categories will continue into the fiscal years 1971-1972.

Summary by projects—mergers	Estimated man-years			
	Fiscal year 1969	Fiscal year 1970	Fiscal year 1971	Fiscal year 1972
Confectionery.....	1.0	1	0	0
Department stores.....	1.0	1	1	0
Housewares and household appliance-electric-nonelectric.....	1.0	0	0	0
Litton Industries.....	1.0	1	0	0
Vending.....	1.0	1	0	6
Auto parts.....	2.5	4	5	2
Cement.....	3.0	3	3	6
Commercial and industrial equipment, machinery, and supplies.....	2.5	4	5	
Drugs, pharmaceuticals, cosmetics, and sundries.....	2.0	2	2	2
Fertilizers.....	1.0	1	1	1
Food distribution.....	2.0	2	2	2
Grocery products.....	3.0	4	5	6
Minerals and mining.....	2.0	2	2	2
Miscellaneous.....	.5	1	1	1
Paper and paper products.....	1.0	1	1	1
Plastics.....	2.5	4	4	4
Textiles.....	2.0	2	2	2
Apparel.....	2.0	3	4	5
Reciprocity.....	1.0	1	2	2
Total man-years.....	32.0	38	40	42
Total attorneys available.....	30.0			

The five projects listed first above, are nearing completion and will require minimal professional manpower in FY 1970, with no manpower projection for FYs 1971-1972. The outstanding orders against the Dairy Industry's four national dairy chains may give rise to requests for pre-merger clearance by independent dairy owners wishing to sell-out to one of the "Big Four," but, otherwise, two formal investigations only, remain to be disposed of. The Bureau of Restraint of Trade Economics are making an in-depth study of Litton Industries as a prime example of growth by conglomerate merger. Litton has, on occasion, availed itself of the Commission's Advisory Opinion procedure, but acquisitions by it continue and a careful surveillance will be maintained. Within the "Vending" category are two closely related industries, i.e., manufacturers of vending machines, and the owners and operators of vending machine routes. Seven investigations are pending in this industry. An appeal from the initial decision dismissing the complaint in *Seeburg Corp.* is pending before the Commission and it is anticipated that a second complaint will be recommended in this industry requiring litigation in 1970.

The next and largest group of projects, eleven in number, have received considerable attention in recent years and will require substantial continuing effort: they may appropriately be classified as, in mid-stream. Mention of the significant Divisional projects in the Automotive, Apparel, and Minerals and Mining Industries, has hereinabove been made. Additionally, concentrated attention has been, and will continue to be given Cement, Industrial Equipment, Drugs, Fertilizer, Paper, Plastics and Textiles. Thirty-four investigations are pending in the category titled "Commercial and Industrial Equipment, Machinery and Supplies," and two complaints were issued during FY 1968. A rash of mergers occurred in

the Fertilizer Industry in 1963, with three major oil companies acquiring three of the largest mixed fertilizer companies. After comprehensive investigation, the Justice Department referred their investigational records to the Commission. Presently, six investigations are pending, one of which has been forwarded with recommendation for complaint. In the Paper and Paper Products Industry, merger activity has been continuous over the years. The merger potential in the Plastics Industry is extremely high.

The remaining projects are at a relatively early stage of development and identify such matters, cutting across industry lines, as joint ventures and reciprocity, but also includes Apparel, where an industry merger trend is emerging. This trend threatens to raise present low entry barriers and change the entire structure of the industry. It is anticipated that these projects will also require substantial manpower commitments by FY 1970 and beyond.

Increases requested for fiscal 1970:

An additional \$86,000 is requested for the Division of Mergers in 1970 to provide eight employees as follows: one GS-13 attorney, one GS-12 attorney and six GS-11 attorneys.

DIVISION OF GENERAL TRADE RESTRAINTS

The Division of General Trade Restraints has responsibility for investigations and other proceedings relating to restraints of trade and unfair methods of competition under Section 5 of the Federal Trade Commission Act.

Practices under the jurisdiction of the Division of General Trade Restraints are, broadly speaking, those which may be found to be unfair or oppressive, which unduly restrain trade or which tend to create monopoly. Among such practices are, combinations which do or which have the capacity to unreasonably restrict competition, conspiracies in restraint of trade, horizontal and vertical price fixing, boycotts, sales below cost, tying agreements and, in general, practices of a nature that, if left unrestrained, would likely develop to Sherman Act dimensions.

Workload statistics	Fiscal year 1968	Estimated fiscal year 1969	Estimated fiscal year 1970
Application for complaint:			
On hand beginning of year.....	215	250	250
Received.....	760	850	900
Disposed of.....	725	850	900
Pending end of year.....	250	250	250
Informal investigations:			
Pending beginning of year.....	74	78	103
Initiated.....	197	225	225
Completed.....	193	200	225
Pending end of year.....	78	103	103
Formal investigations:			
Pending beginning of year.....	260	267	257
Investigations initiated or reopened.....	74	100	120
Investigations completed or closed.....	67	110	125
Pending end of year.....	267	257	252
Complaints issued:			
Pending beginning of year.....	3	4	4
Approved for negotiation or reopened.....	4	8	10
Disposition:			
Consent.....	1	4	6
Litigated.....	2	4	5
Other.....			
Pending end of year.....	4	4	3
Litigated cases:			
Pending beginning of year.....	7	5	8
Complaints issued or reopened.....	3	8	10
Cases concluded.....	5	5	7
Pending end of year.....	5	8	11
Voluntary compliance.....	13	14	20

The area of responsibility of the Division of General Trade Restraints is broader in practice coverage than that of other divisions in the bureau. The diversity of the matters considered, the industry and commodity intermix and the volume of matters which are the subject of specific complaint from the

business community, combine to place a complex workload dispersion on the Division's limited staff.

In fiscal year 1968, 271 informal investigations were maintained by the Division in addition to its regular burden of formal investigations. The permanent responsibility for formal and informal matters in process (a total of 595) during the past fiscal year, averaged more than 18 assignments for each attorney, not including trial assignments. Considering FY 1968's formal investigational matters only, there were approximately 14 different types of practices actionable under Section 5 of the Federal Trade Commission Act, involving approximately 87 separate industries, commodities and industry components.

GENERAL TRADE RESTRAINTS' PROGRAM

It is anticipated that the principal project concentration in FY 1970 will be in the Automotive Parts Industry, the Newspaper Industry, and the Food Industry.

In some of these industries discriminatory practices appear to exist of a nature actionable under Section 5 of the Federal Trade Commission Act. Where practices are uncovered which constitute Robinson-Patman violations, such matters will be reviewed for appropriate further disposition at the Bureau level, in conjunction with the Division of Discriminatory Practices. In pending Automotive Parts investigations, for example, discriminations cognizable under Section 2 of the Clayton Act might well materialize. Neither the same companies nor the same practices are normally the subject of investigation by both Divisions. Situations requiring special correlation between the Divisions, however, do occur. A current conspiracy investigation of an association of battery manufacturers by this Division, for example, could conceivably, at some stage of the investigation, center upon a major battery manufacturer presently being investigated, in connection with possible Robinson-Patman Act violation, by the Division of Discriminatory Practices. When these situations develop, appropriate consolidation of the investigations, if practicable, can be undertaken.

A practice occasioning increasing concern is that of reciprocity. This practice cutting across a number of industries, is not separately reported below in specifying the Division's manpower requirements, because actual work time is charged against other identified projects. Seven pending investigations involve reciprocity problems, however.

The Gasoline and LP-Gas industries will continue to require substantial attention through FY 1970. In the Gasoline industry complaints of alleged price fixing, price discrimination and predatory pricing continue to be received, principally from dealers and wholesalers. There are now in process investigations of such practices in a number of geographic areas (Texas, New Mexico, South Eastern United States, Ohio, Nebraska, Maryland, Kentucky, North Carolina, Georgia and Kansas). Twelve major producers of LP-Gas are also currently under investigation (Mobil, Sinclair, Shell, Texaco, Gulf-Warren, American Oil (Tuloma), Phillips, Continental, Sun, Sun Ray D-X, Cities Service and Humble) to determine, inter alia, whether conspiratorial price fixing is, or has been occurring within the industry.

The Division is of the view that a thorough industrywide investigation of the furniture industry, looking to possible vertical resale price maintenance, conspiracy to fix prices and boycott, should be undertaken; however, present manpower commitments prevent full industry inquiry at this time. The same is true with respect to an in-depth investigation of magazine distribution, with respect to alleged exclusive allocation of territories. It is anticipated that a present investigation into allegations of payments to exclude competition by certain utility companies, will be broadened during or before FY 1970, if manpower permits.

The Division intends to continue its practice of informal investigation and disposition of certain types of complaint matters. The procedure has proved to be of benefit in a growing number of situations. The successful resolution of complaints from individual businesses, on an informal basis, increased from 30 in 1966 to 50 in 1967 and increased again to 67 in FY 1968. Manpower limitations currently prevent the utilization of this procedure on a broader scale.

Procedures for selective substitution of matters under investigation, on the basis of a re-evaluation of relative priorities, scheduled for institution in FY

1969, may result in significant alteration in the alignment of projects set forth in the table below. Every effort will be made to so adjust work commitments as to effect maximum concentration of effort on projects of broadest and most immediate economic impact, as well as those whose significant future impact is most clearly indicated. However, as with application of Section 5 of the Federal Trade Commission Act itself and definition of the phrase "unfair methods of competition," the Division's area of enforcement responsibility is both broad and pervasive. The following summary of project designations identifies projects to which the Division of General Trade Restraints' major efforts are currently directed, with projections for FYs 1969 through 1972, together with an estimate of the man-years allocated to each project.

Summary of projects	Type of action	Estimated			
		1969	1970	1971	1972
Automotive		3.0	3.0	5.0	4.0
Sheet metal parts	Refusals to deal				
Parts after market	Price fixing				
Parts	Resale price maintenance				
Bus tires	Restrictive leasing				
Newspaper advertising	Rate discrimination	2.0	3.5	3.5	2.0
Food		3.0	5.0	6.0	7.0
Coffee, cereals, etc.	Monopolization				
Asparagus	Conspiracy to fix prices				
Macaroni	Attempt to monopolize				
Honey	Mergers, sales below cost				
Mushrooms	Supply allocation, price fixing				
Frozen desserts	Vertical price fixing				
Beer	Allocation of customers				
Soft drinks	Exclusive dealing				
Yeast	Conspiracy, sales below cost				
Groceries	Exclusive dealing				
Petroleum products		3.5	5.0	5.5	6.5
Gasoline	Price fixing, predatory pricing				
LP Gas	Conspiracy, sales below cost, discrimination				
Furniture		2.0	2.5	3.5	4.5
Household	Resale price maintenance				
Office equipment	Tying arrangements				
Franchising	Price fixing, inducing discriminatory prices	1.5	2.0	2.5	3.0
Linen rental service	Conspiracy to fix prices, customer allocation	2.0	2.0	1.0	0
TV advertising	Rate discrimination	1.0	1.0	1.0	1.0
Miscellaneous		11.0	11.0	10.0	8.0
Correspondence with applicants, informal dispositions, etc.		4.0	4.0	4.0	4.0
Total man-years		33.0	40.0	42.0	40.0
Total attorneys available		32.0			

A substantial manpower commitment in the Automotive Parts Industry assists in carrying forward one phase of the Commission's three-fold programs in Food, Apparel and Automotive Parts. In the Commission's justification for FY 1969, this Division reported that a thorough investigation was being made of major automobile producers for refusing to sell auto sheet metal body parts to independent garagemen. This refusal required independent garagemen to pay higher prices to competing auto franchise dealers, from whom they had to purchase such parts. One complaint has been issued and consent negotiations are underway. Complaints are currently being prepared for recommended issuance against two other auto oligopolists. Attorneys assigned these matters have been increased from two to three, and, should any or all of these complaints go to formal hearings, it will be necessary to assign at least one additional attorney in FY 1969 and FY 1970. Additionally, in this industry, investigations are in progress relative to aftermarket problems, looking into complaints of price fixing, resale price maintenance and possible illegal Robinson-Patman activity by producers of spark plugs, filters and related automotive equipment. Five major tire manufacturers are presently under investigation for engaging in allegedly restrictive leasing arrangements for tires, with bus companies. This investigation will be completed in FY 1969 and formal action would appear probable in FY 1970.

In accordance with Commission instructions, a full scale investigation of alleged discrimination rate structures, advertising rates, and double billings, in the Newspaper Industry was initiated by the Division. Twenty companies are presently under investigation and these investigations are expected to be com-

pleted sometime during FY 1969. A survey of published rate data for certain publications indicates a wide disparity between the general (national) rates and the retail (local) rates as well as quantity or frequency discounts available in both the general and retail rate categories. It appears that, aside from discriminations, there may exist other unfair practices connected with application of the rate structures. The investigations are intended to show whether there is a substantial cost basis for the use of quantity and frequency discounts in the categories or steps above the few lowest brackets; whether the lowest rates are available to more than a few advertisers, such as department stores and super-market chains; and whether the rates may be systematically and arbitrarily discriminatory, or otherwise in restraint of competition, between advertisers. Based upon present information, the Division expects to be involved in formal action against some of these companies in FY 1970. The two attorneys presently assigned will continue on this assignment but it is expected that at least two additional attorneys will be required by 1970.

The Food Industry demands and will continue to receive the substantial attention of the Division. It too, with Automotive Parts, is geared to the Commission's overall three-fold broad base program. Complaints of predatory pricing, conspiracy, resale price maintenance and sales below cost, are among those being looked into in pending investigations within the industry. The commodities involved vary widely as to the geographic areas and channels of distribution involved. These matters are at all levels of disposition. For example, five investigations are presently underway, looking into alleged attempts to monopolize, as well as price and promotional discrimination, by five major producers of coffee, cereal, frozen foods, package desserts and pet food. An intensive investigation of growers and canners of asparagus on the West Coast, in connection with alleged price fixing, has been completed and was recently returned from the field. On the assumption that the Justice Department does not find a basis for a criminal action, it is expected that formal action will be recommended during FY 1969. Complaint has issued against *Golden Grain Macaroni* charging an attempt to monopolize the sale of macaroni and related products by (a) acquiring competitors, (b) lifting and buying competing merchandise, (c) price wars, (d) area price discrimination, and (e) selling below cost. Formal hearings are scheduled to take place during FY 1969 and litigation will probably continue into FY 1970.

Other matters in the food industry under active consideration involve: an alleged attempt to monopolize the sale of honey through acquisition, sales below cost and other unfair methods of competition; alleged allocation of supply sources and price fixing via conspiratorial action by producers of mushrooms; and, alleged vertical price fixing by a major West Coast frozen dessert manufacturer.

The Commission's San Francisco office has completed an investigation of several major beer producers and a leading retail food chain, in connection with an alleged conspiracy to allocate customers in the distribution of beer in California. A recommendation for complaint is expected during FY 1969.

The alleged practice of granting free fountain equipment and other services by a major soft drink producer as an inducement for exclusive dealing, is currently being investigated. In another area, extensive investigation undertaken in the yeast industry considered charges of possible price fixing as well as below-cost selling. Whether formal action will be instituted in the yeast industry has not been determined, due to procedural and other problems, delaying resolution of the matter. Exclusive dealing and the granting of exclusive territories are the subject of two other pending investigations in the sale of general grocery products.

The Division's manpower commitment in the Food Industry is expected to increase from an estimated 5 man-years in FY 1969, to 6 or more in FYs 1970, 1971, and 1972.

Divisional activity in the Gasoline and LP Gas Industries has been hereinbefore noted. In addition, a substantial manpower commitment in the Furniture Industry has been undertaken. In Household Furniture three extensive investigations are in process and, with respect to Office Equipment, five separate investigations of major producers are looking into allegations of "tying" arrangements, price fixing, allocation of territories and conspiracy to boycott. A two to five man-year commitment, looking to corrective action in the sale and distribution of office equipment particularly, is expected to extend beyond FY 1970. Three investiga-

tions of allegedly illegal franchise relationships have been instituted, involving alleged inducement of discriminatory prices, restrictions of franchises, advertising, and exclusive dealing arrangements. Formal proceedings initiated by the Division against twenty-three suppliers of Linen Rental Services, are expected to be completed by means of consent negotiations. As a result of complaints received regularly concerning various segments of the industry, however, several further investigations have been instituted which will require Division manpower well into FY 1970. A further specifically designated project parallels the Division's Newspaper Advertising rate Discrimination inquiry. The Division, in conjunction with the Bureau of Economics, is studying allegedly discriminatory advertising rates charged by TV networks throughout the country. It is expected that this study will be completed sometime during FY 1969, defining the extent to which subsequent corrective Commission action may be warranted.

In the "Miscellaneous" category, a wide range of matters are included, which, although not currently of major project dimensions, include important matters and collectively require a substantial manpower commitment. Complaints from businessmen and from other sources, alleging serious injury as a consequence of unfair or predatory practices, must be given careful attention. Practices, which at the outset are limited geographically, or as to channels of distribution, or limited in terms of the number of members of an industry engaged in them, if unchecked, may subsequently become serious restraints upon free and fair competition. The extent and impact of alleged unfair and trade restrictive practices can, in many instances, only be ascertained and evaluated through investigations in the field. To a significant degree, the attention of the Commission upon individual instances of alleged law violation in various segments of the economy, acts to deter more general violation and assure businessmen of the agency's purpose to maintain as broad a surveillance in promoting the public interest as its resources permit. Included among the more important matters within this category are: the matter of price fixing in the sale of the drug "quinidine," where, although the Department of Justice has determined to bring grand jury proceedings, the Commission has retained civil jurisdiction; proceedings in the Apparel Industry, where an order against an association of salesmen for conspiratorial actions against manufacturers and others is pending appeal to the Commission, and two other field investigations are in progress; the Ski Industry, where one consent order has been forwarded to the Commission, with 13 companies still under investigation; investigations of alleged sales below cost by the four major manufacturers of rebuilt TV Tubes; investigation of the Iron Pipe Industry; and, investigation of attempts to monopolize in the Petroleum Coke Industry.

Other matters in the miscellaneous category, include investigations of: use of advertising promotions as an instrumentality for monopolization in a segment of the home cleanser industry; discriminatory furnishing of preticketing services to retain chain stores; price fixing in the sale of hearing aids; conspiracy to boycott in the sale of musical instruments; and, vertical price fixing in the sale of ball bearings. Various alleged violations of law are also being looked into in connection with the sale of optometries, phonograph records, vending machines, insecticides, home tractors, outboard motors, agricultural equipment, airplane parts, chemical and other commodities. Man-year estimates have been minimized for these assignments, although investigational developments may well warrant substantial further man-hour investments in some of them, if priority situations develop.

Increases requested for fiscal 1970:

An additional \$81,000 is requested for this Division to provide eight new attorney positions as follows: two GS-12, five GS-11 and one GS-9.

DIVISION OF DISCRIMINATORY PRACTICES

The Division of Discriminatory Practices is responsible for the investigation and trial of cases relating to violation of Sections 2 (a), (c), (d), (e) and (f) and Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act on the part of buyers who knowingly induce or receive discriminatory allowances or services from suppliers.

Workload statistics	Fiscal year 1968	Estimated fiscal year 1969	Estimated fiscal year 1970
Applications for complaint:			
On hand beginning of year	86	58	83
Received	314	400	425
Disposed of	342	375	410
Pending end of year	58	83	98
Formal investigations:			
Pending beginning of year	309	299	249
Initiated or reopened	64	100	125
Completed or closed	74	150	165
Pending end of year	299	249	209
Complaints issued:			
Pending beginning of year	3	13	13
Approved for negotiation or reopened	18	25	28
Dispositions:			
Consent	6	20	22
Litigated	2	5	7
Other			
Pending end of year	13	13	12
Litigated cases:			
Pending beginning of year	8	4	6
Complaints issued or reopened	4	8	10
Docketed orders issued	8	6	10
Pending end of year	4	6	6
Voluntary compliance	17	20	24

The major project areas in fiscal 1968 included Apparel, where this Division itself is processing and policing compliance with the more than 300 outstanding orders, and the Dairy Industry, where complaints from independent dairies alleging discriminatory pricing by the large national and regional dairies have continued apace, notwithstanding Commission proceedings against *Foremost*, *Dean Milk* and *National Dairy*. These project areas will continue active through FYs 1969 and 1970, and very probably through FYs 1971-1972.

The Division also devoted considerable attention to the "buyer" approach to discrimination favoring large retail chains and groups, e.g., in fluid milk and merchandise. A number of investigations were initiated involving so-called "power-buyers" on the premise that discriminatory prices or allowances may have been knowingly received or induced in violation of Section 2(f) of the Clayton Act as amended, or Section 5 of the Federal Trade Commission Act.

In addition, in FY 1968, the Division was engaged in substantial activity in the Baking Industry, again with respect to alleged discriminations in price. The product areas of corn syrup, drugs, hardware, and automotive parts also required significant manpower.

Program—1969 and 1970

The Division is further augmenting its activity in the Apparel Industry, by concentrating attention on "power-buyer" inducement of discriminatory prices, allowances or special promotional services, from suppliers. Although Apparel is a focal point, the commodity coverage will be broadened significantly. This approach-shift intends consideration of very large retail operations, chains, catalog houses and various buying groups as within the "power-buyer" classification. The buying-group phase of the program will undoubtedly fall into separate projects as, when in particular industries, power-buyers normally comprise combinations of buyers rather than individual corporate entities. The Hardware Industry would appear to be an example. It is anticipated that this program will continue well beyond FY 1970.

There are presently at least three areas which because of manpower limitations, are not being developed as competitive needs appear to warrant. One, is in the Hardware Industry, referenced above. Although the Division is to some extent active in this industry, the impact of "buying groups" on the competitive vigor of the industry, has not been adequately explored and analyzed. In two other industries, Major Appliances and Textile Fiber, there are indications of serious impediment to free and open competition resulting from discriminatory payments of advertising or promotional allowances to select and favored customers. Each of these matters should be made the subject of thorough investigative analysis. With needed additions to the staff, this Division can begin these projects in 1970.

A further program going beyond individual industry considerations, relates to discriminations involving three-party promotional plans. So-called tripartite promotional arrangements include a middleman promoter who undertakes, or at least purports to assume responsibility for, a programmed performance or promotional services and facilities on the part of customers; participating suppliers pay the promoter in consideration for such services. The extent to which significant discriminations occur as a result of the terms or manner of implementation of such tripartite plans is not presently known. The Division is presently conducting investigations in this area and the prospective needs of this program have not as yet been determined.

There follows a summary of the major projects in which the Division is presently engaged and which are anticipated to require man-hour commitments projected for FY 1970 and FYs 1971-1972. Anticipated adjustments resultant upon initiation of procedure for selective substitution of higher for lower priority matters, however, scheduled for FY 1969, may affect certain of these projections.

Summary of projects	Estimated			
	1969	1970	1971	1972
Apparel industry	4.0	8	8	4
Dairy industry	5.0	6	6	6
Chain grocers	4.0	4	4	3
Automotive replacements parts	1.0	2	2	2
Baking industry	1.5	2	2	2
Drapery hardware	2.0	2	1	0
Drug industry	2.0	2	2	2
Fresh fruit and vegetable	2.5	4	3	2
Publishing industry	2.0	2	2	2
Tripartite arrangements	2.0	2	1	1
	26.0	34	31	24
Completion of litigation, pending cases, new investigations and complaints...	16.0	16	18	20
Total man-years	42.0	50	49	44
Total man-years available	40.0			

One of the three major program areas designated by the Commission is Apparel. This large and basic industry (sales in excess of \$26 billion) includes a great many industry members at all levels. Manufacturers are numerous (sales approximately \$5 billion) and many of them are in the medium or small business category. Although retailers also flourish in great number (intermediate wholesaling is minimal), very substantial percentages of retail sales are by large specialty and chain department stores. As a result of industry survey, the Commission concluded that significant discrimination in payment of promotional allowances to large buyers was occurring. The Commission entered over 300 orders, by consent, against manufacturers within the industry. In addition, several contested orders were issued. The task of reviewing reports as to compliance with these orders, advising industry members and policing order compliance, was assigned to this Division. Continued industry surveillance, including spot-check investigations, are necessary on a continuing basis, because of a Commission assurance for general compliance given to manufacturers who cooperated in the project.

Pending investigations indicate a likelihood of complaints against all or some of the following: The May Co., Gimbel Brothers, Marshall Field Co., Associated Dry Goods Corp., Broadway-Hale Stores, Inc., and R. H. Macy Co., Inc. It is anticipated that at least 8 man-years will be devoted to this project in FY 1970.

Although the Commission's overall program, concentrates on three basic industries, i.e., Food, Apparel and Automotive Parts, sub-project breakdowns in the Food Industry have been employed, largely on the basis of attorney assignments. Accordingly, references follow the order of the above "Summary" schedule.

Acquisitions in the Dairy Industry have occasioned substantial past Commission activity. Price discriminations in the industry are matters of equal concern. Drastic marketing and distributional changes with respect to fluid milk, the drying-up of home delivery sales, for example, complicates competitive alternatives and heightens the injury potential resulting from price reductions to major retail chain customers by the national and large regional dairies. To date, cease and desist orders against three major dairies, enjoining violation of Section 2(a) of the Clayton Act, as amended, have been issued. In a

pending proceeding, Beatrice Foods Co. is charged with selling milk and dairy products to Kroger Co., at low discriminatory prices in violation of Section 2(a) and Kroger is charged with inducing and receiving discriminatory prices in violation of Section 2(f) of the Act. At present, there are pending 30 investigations involving alleged Section 2(a) and in some instances 2(f) violations, in connection with the sale of supplier brands and private label fluid milk and dairy products by national or large regional chain dairies to national and regional grocery chains. A commitment of at least 6 man-years in FY 1970 with respect to this project is indicated.

Large national Chain Grocers appear to enjoy continuing increases in sales in all markets. Allegations as to violation of Section 5 of the Federal Trade Commission Act on the part of five large national grocery chains (Colonial Stores, Inc., Allied Supermarkets, Inc., Jewel Tea Company, The Kroger Company and Alterman Foods, Inc.) through inducing and receiving discriminatory advertising and promotional allowances from suppliers who fail to make similar allowances available to independent grocers on proportionally equal terms presents a particular and separate problem currently under investigation.

In the Automotive Parts Industry, the Division has a continuing manpower commitment. It is anticipated that pending investigations (e.g., Gulf & Western Industries, Inc., Gould National Batteries, Inc., McQuay-Norris Manufacturing Company and Republic Gear Company) will result in formal action against one or more companies by FY 1970.

The problems of the Baking Industry are strikingly similar to those of the Dairy Industry. The threat of potential supply integration by major chain store purchasers appears to operate to induce price concessions in hopes to deter such loss-of-market occurrence. This puts particular pressure upon the smaller independent suppliers, if price discriminations are given by the large national or regional bakeries favoring the major retail grocery chains. Presently under investigation in this area are three major bakery companies (American Baking Company, Continental Baking Company and Campbell-Taggart Associated Bakeries Company) on charges of sales to large grocery chains of both nationally advertised and private label bread at prices lower than prices charged competing independents. Fiscal 1970 manpower requirements are estimated at 2 man-years.

Drapery Hardware, an industry of some \$63 million in sales, is under scrutiny for alleged price discrimination on the part of five competing manufacturers within the industry. Information providing the basis for investigation was secured in the course of the proceeding against Graber Mfg. Co. In the Drug Industry, the Division is principally concerned with alleged efforts by drug manufacturers to eliminate distribution through discounting wholesalers and in selling to direct-buying retail drug chains at discriminatory prices.

Brokerage payments are under intensive investigation in the Fresh Fruit and Vegetable Industry. It appears probable that a number of shippers may be in violation in connection with brokerage payments to large buyers or their agents. Discriminatory payment of promotional allowances, on the other hand, provides the principal problem in the Publishing Industry. There, as previously reported, the Commission has undertaken extensive educational and advisory measures to clean-up the industry. The proposed investigational follow-up, however, was suspended pending a decision by the Supreme Court in *FTC v. Fred Meyer, Inc.*, as to coverage of the law. The Division is now going forward with a follow-up inquiry involving some 80 selected publishers.

The Division's activity with respect to Tripartite Arrangements has been noted above. Also previously noted, is the Division's present inability to serious and widespread Robinson-Patman problems indicated in the sale and distribution of Major Appliances and Hardware, although some investigations have been initiated.

Increases requested for fiscal 1970

In view of the above described workload, an additional \$81,000 is requested to provide eight attorney positions, as follows: two GS-12, five GS-11 and one GS-9.

DIVISION OF COMPLIANCE

The Division of Compliance of the Bureau of Restraint of Trade assumes responsibility for all orders affecting the broad field of trade restraint, after these orders become final. Thus, orders issued by the Commission involving Section 5 of the Federal Trade Commission Act, Sections 2(a), (c), (d), (e) and

(f), and Sections 3, 7 and 8 of the Clayton Act, as amended, become the responsibility of the Compliance Division.

The primary mission of this Division is to assure that real and effective—not merely pro forma compliance is obtained and maintained with Commission orders issued in support of the above statutes, procured at substantial expense to the public and which vitally affect many phases of the national economy. Orders issued must be made to work and produce results. The true workability of orders frequently, and often necessarily, drawn in broad terms, must be achieved through realistically adapting said orders to the practicalities of the market structure into which they assert application. The efficacy of the Commission's ability to administer and regulate in the area of anticompetitive practices, must be measured, in the final analysis, not merely by the orders it issues, but by the extent to which compliance with such orders is effectively and realistically achieved.

In working with orders enjoining price discrimination, for example, the Division must not only employ sufficient means to assure that the specific discriminations which grounded the order have, in fact, been terminated, but it must also review and analyze such new pricing structure as respondent may undertake, in light of competitive pressures existing in his market, together with such justification, on the basis of costing or otherwise, and such legal defenses as may be applicable. Where orders exist against competing members of an industry, which is usually the case, serious enforcement complications in connection with consistency-of-enforcement may occur. Such problems require application of consistent legal definition to practices of respondents under similar order restriction, who frequently have significantly different internal operations and different costs, different price structures, different "meeting competition" experience and different distributional patterns.

In the instance of divestiture orders, the Division not only counsels respondents as to proper procedures to be followed for achieving divestiture, but also undertakes to assure that the availability for sale of assets or stock is effectively and widely advertised; reviews proposed financing arrangements; maintains surveillance against covert retention of control over divested facilities; frequently makes on-the-site-inspection of facilities so as to equate value claims; analyzes and makes recommendations relative to the acceptability of proposed buyers, and evaluates changes in the market likely to result from such disposition of stock or assets. Many divestiture orders contemplate a multiplicity of divestitures. Each one of these, usually with the assistance of the Commission's Bureau of Economics, must be separately considered, equated and evaluated in relation not only to the structure of the proposed buyer, but also as to competitive impact upon affected markets. Such orders also entail consideration of repeated requests by respondents subject to order for clearance to make acquisitions subject to Commission approval. These, again, require the assimilation of refined market information and research and analysis such as to adequately advise the Commission with respect to the present and potential legal and economic complications attendant upon approval of such requests.

During FY 1968, the Compliance Division achieved effective divestiture of 148 facilities under some 14 different orders. The magnitude of some of these divestitures may be illustrated by the required divestiture by Procter and Gamble Company of the dominant liquid bleach company in the country, *Clorox*. The asking price by Procter and Gamble was in excess of \$200 million. Negotiations have been extremely complex and the staff of this Division spent substantial time working out a stock exchange arrangement with Procter and Gamble which, if approved by the Commission and implemented, will result in the establishment of a totally new and independent *Clorox* company.

Other divestitures achieved during FY 1968 further reflect affirmative results in Section 7 enforcement with substantial divestitures in the Dairy Industry, the Corrugated Box Industry, the Concrete Ready-mix Industry, the Plastics Industry, and in retail grocery stores. In addition, competition was restored to a degree in the Theater Concession Industry and the Drug Industry.

In the retail grocery store field, the Commission approved the largest divestiture to date in terms of total money value. It consisted of approximately 100

grocery stores principally located in Illinois, Wisconsin and Iowa, along with certain other facilities. By this divestiture the Commission obtained the entry of a large West Coast grocery chain, known for its reliance on price competition, into the Midwest.

Vertical integration between cement producers in the Ready-mix Concrete Industry was substantially curtailed in Jacksonville, Florida and in Memphis, Tennessee, as a result of divestitures under two separate Commission orders. These divestitures involved six ready-mix concrete plants and other cement using facilities in Jacksonville, and five ready-mix plants in the Memphis area.

Similarly, vertical integration in the Paperboard Industry between paperboard manufacturers and corrugated box fabricators was reduced by the divestiture of corrugated box plants by concerns in Illinois, California, New Jersey, and Michigan. A total of seven corrugated box plants were divested during fiscal 1968.

The Commission's efforts to avert an increasingly oligopolistic structure in the Dairy Industry resulted during FY 1968 in the divestiture of five milk processing plants and one ice cream business, located in Wisconsin, Michigan, Colorado, Maryland and Kansas. These facilities are now controlled by local people, running essentially local businesses.

A Commission effort to reduce concentration in the Bakery Industry brought about the divestiture of two bread plants in New Mexico. The purchaser of these two plants should be capable of distributing his products throughout much of New Mexico, and perhaps into portions of Arizona and Texas.

In the area of plastics, where the Commission has conducted a number of investigations and now has outstanding several orders looking to the entry into the industry of additional companies, a large polypropylene resin plant and film business was divested to a substantial chemical concern, not then in the polypropylene business. A license was granted to a third company pursuant to which it will enter the low density polyethylene industry.

In addition, following certification by the Commission, a significant civil penalty case was filed. This case is one of first impression and seeks penalties and injunctive relief of a defendant who allegedly failed to divest in a manner and within a time prescribed by the order in question. One other previously certified civil penalty matter involving alleged price-fixing is pending consideration by the Department of Justice.

Among the activities which must be handled on a day-to-day basis are: conduct of investigational hearings; rendering compliance advisory opinions; conduct of field investigations; initiations of spot-check and civil penalty investigations for development in the field; and, analyses and recommended disposition of completed investigations. During FY 1968, the Division handled as significant matters, the following:

Workload fiscal year 1968:

Investigations initiated.....	23
Advisory opinions issued.....	40
Compliance reports processed.....	62
Inquiries from public concerning final orders.....	133
Complaints of order violation.....	44
Conferences with public.....	199
Investigational hearings.....	3
Subpoenas, Section 6 orders and resolutions prepared.....	8

Active case load:

Pending beginning of year.....	290
Received.....	34
Disposed of.....	62
Pending end of year.....	262

Civil penalty and enforcement:

	<i>Civil penalty</i>	<i>Enforce- ment</i>
Pending beginning of year.....	10	3
Certified.....	--	--
Suits concluded.....	8	2
Pending end of year.....	2	1

The final orders committed to the responsibility of the Division of Compliance number in excess of 1,500 and the above referenced active case load is subject to increase with activation of previously processed orders, upon complaints of order violation. As noted, 44 such complaints were received in FY 1968.

In order to better assure order compliance, greater utilization of investigational hearings should be undertaken. Present manpower limitations prevent conduct of such hearings to the extent believed warranted and necessary. Thus, effective maintenance of compliance with certain orders may be substantially affected. The Division has increased emphasis upon attempts to resolve non-compliance through conference and negotiation. With its present staff, however, the Division is unable to eliminate a serious backlog of Robinson-Patman compliance matters or to proceed with important civil penalty matters as they develop. For example, in FY 1968 the Division had to choose between preparation of a civil penalty case involving the baked goods industry, as against another in electric cable, being unable, due to manpower limitations, to proceed with both at the same time. Preparation of such cases requires substantial manpower commitment.

Achievement of divestitures under pending Section 7 orders will commit at least four attorneys beyond FY 1970. In addition, many of these orders contain prohibitions against future acquisitions requiring active compliance surveillance through the mid 1970's.

The projects of the Compliance Division essentially involve pre-commitments inherent in the orders issued by the Commission, however, the following summary sets forth the areas to which the Division's major efforts will be directed in FY's 1969-1972.

Description of project	Number of compliance orders involved as a minimum	Estimated man-years to complete	Estimated completion date
Sec. 5, Federal Trade Commission Act:			
Procurement and maintenance of compliance with orders prohibiting conspiratorial price fixing, Various industries.	15	5	December 1969.
Trade restraints in various industries unrelated to price fixing.....	16	4	December 1969.
Orders prohibiting use of sales commission arrangements between major tire manufacturers and major marketing petroleum companies.	4	3	November 1969.
Clayton Act, as amended—Sects 2(a), (f), (c), (d), (e), and Sects 3 and 7 thereof:			
Achievement of divestiture.....	24	4	July 1970.
Requests for clearances to merge.....	48	1	Indefinite.
Orders prohibiting price discrimination by leading factors in biscuit industry.	3	3	July 1969.
Procurement of compliance and possible civil penalty proceedings against various procedures in macaroni industry.	5	2	March 1969.
Orders prohibiting price discrimination by major carpet producers..	10	3	July 1970.
Orders prohibiting receipt and payment of discriminatory prices in automotive replacement parts industry.	12	1	June 1969.
Orders, various subsections of Robinson-Patman Act.....	92	6	July 1970.
Payment and receipt of discriminatory allowances by toy manufacturers and toy catalog publishing companies.	15	2	January 1969.
To assist in phases of pretrial and trial in connection with penalty cases filed in District Courts.	1	2	June 1972.
Civil penalty cases for certification to Attorney General.....	3	2	June 1973.

Increases requested for fiscal 1970:

An increase of \$78,000 is requested to provide seven attorney positions as follows: one GS-13, two GS-12 and four GS-11.

DIVISION OF ACCOUNTING

The Division of Accounting prepares analyses and studies of the pricing policies of respondents or proposed respondents in connection with the Commission's law enforcement work in regard to: (1) alleged price discrimination under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; (2) cost data sub-

mitted by the respondents in justification of alleged price discriminations under the Robinson-Patman Act; (3) alleged price fixing in cases arising under Section 5 of the FTC Act; and (4) alleged sales below cost in violation of Section 5 of the FTC Act.

The Division of Accounting is primarily a service organization for the other Divisions of the Bureau and consequently, to a large extent, its workload depends upon the activity of the other Divisions. During FY 1968, the Division furnished accounting services on a total of 65 investigation and litigation matters which included 29 involving violation of Section 2 of the Robinson-Patman Act, 22 involving violation of Section 5 of the Federal Trade Commission Act, and 14 involving mergers under Section 7 of the Clayton Act. The caseload averaged nearly seven cases per man after adjusting for noncase activity.

In addition to the casework for the other Divisions of the Bureau of Restraint of Trade, the Division of Accounting furnishes accounting services for the Bureau of Economics, and on occasion, for other Bureaus in the Commission and for the Congress. Also, the Division of Accounting prepares for publication each year, Rates of Return for Identical Companies in Selected Manufacturing Industries.

During FY 1968 casework for the Bureau required approximately 9.5 man-years. The Division furnished accounting services for the Bureau of Economics and other Bureaus in the Commission approximating 1.5 man-years, and the project of Rates of Return for Identical Companies in Selected Manufacturing Industries required two accountants for approximately six months each year, or the equivalent of one man-year.

Projects through fiscal year 1972	Man-years				
	1968	1969	1970	1971	1972
Legal cases.....	9.5	10.5	12.0	13.0	14.0
Rates of return.....	1.0	1.0	1.0	1.0	1.0
Bureau of economics and others.....	1.5	2.5	3.0	3.5	3.5
Total man-years.....	12.0	14.0	16.0	17.5	18.5
Total accountants available.....	12.0				

Increases requested for fiscal 1970

An additional \$19,000 is requested to provide one GS-11 accountant and one GS-9 accountant for this Division.

Bureau increases requested for other expenses, 1970

In addition to the new positions requested, an increase is requested for other expenses, as follows: travel, \$16,000; stenographic reporting, \$6,000; and witness fees, \$2,000.

BUREAU OF DECEPTIVE PRACTICES

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Posi- tions	Amount	Posi- tions	Amount	Posi- tions	Amount
Office of the Director.....	34	\$280,000	63	\$456,000	29	\$176,000
Division of Special Projects.....	24	287,000	41	462,000	17	175,000
Division of Food and Drug Advertising.....	31	375,000	54	610,000	23	235,000
Division of General Practices.....	31	430,000	49	663,000	18	233,000
Division of Compliance.....	15	235,000	19	268,000	4	33,000
Division of Scientific Opinions.....	17	270,000	22	368,000	5	98,000
Total personal services.....	152	1,877,000	248	2,827,000	96	950,000
Travel.....		28,000		42,000		14,000
Other expenses.....		79,000		87,000		8,000
Total.....	152	1,984,000	248	2,956,000	96	972,000

BUREAU OF DECEPTIVE PRACTICES

The Bureau of Deceptive Practices has a carefully conceived overall program to fight deception of the consumer. Traditionally, the Bureau's efforts have been concentrated on three types of high priority, selected matters, namely, (1) those relating to the basic necessities of life, (2) those involving the income or prospects thereof for people of little means, and (3) other issues of national significance. However, in recent years, an increased awareness of the need for consumer protection has arisen throughout government. Consequently, certain programs have become required of the Bureau in particular areas of deception.

The Bureau's overall program has also been greatly affected by the tremendous growth in our economy. Calendar 1961, the year in which the Bureau was organized, closed with a Gross National Product of \$520.1 billion. At the end of 1967, the GNP stood at \$789.7 billion (an increase of almost 52%), and is estimated at over \$850 billion for 1968. Fiscal 1970 will probably see the beginning of the \$900 billion year.

But, even more important to this Bureau, Personal Income and Personal Consumption Expenditures are on the rise. In 1961 Personal Income totaled \$416.8 billion. By the end of 1967 it has risen 51% to \$628.8 billion. During the same period Personal Consumption Expenditures rose from \$325.2 billion to an all time high of \$492.2 billion (over 62% of our Gross National Product). At the end of the second quarter of 1968 consumer expenditures were proceeding at a rate that indicated a \$527.1 billion year. This would give an increase of over 57% in only 7 years, and all indications are that the trend will continue.

Still another factor directly affecting the Bureau's workload is the continuing development of the advertising industry. In 1967 advertising expenditures had grown to 50% above the 1957-1959 index, contributing no little to the great growth in consumption expenditures. Not only do we see more ads and commercials than ever before—they are more persuasive. The Bureau has the job of seeing that this increase in persuasiveness to get the consumer's dollar does not slide over into areas of deception; a job that becomes more and more difficult as persuasive techniques, especially in television, become more and more subtle.

As consumers demand more protection and their knowledge about available laws increases, we must anticipate an increase in the number of complaints received either directly from the public or from their Congressional representatives and from consumer organizations. Unfortunately, the staffing of the Bureau has not been increased in pace with either the growth in the economy or the development of the advertising industry. Also, in most instances, the Bureau has not requested additional personnel to handle the new Required Programs. Instead, it has tried to meet its increased responsibilities by increasing staff efficiency and production. However, this has not been a complete answer and has resulted in diversion of personnel from previously Selected Programs, and in a lack of personnel to undertake needed new programs.

As personnel were diverted to Required Programs, a backlog of Selected Program matters began to build up. Unless additional manpower is obtained in 1970, the Bureau will be faced with having to utilize approximately 87% of its total professional staff on Required Programs alone. Yet it must also dispose of the 1076 investigations, and 48 cases in stages of negotiation and litigation pending at the beginning of fiscal 1969, as well as handle new matters which require attention—an impossible undertaking without substantial increases in personnel.

Between fiscal 1962 and fiscal 1969 the Bureau grew by only 47 staff members, 22 of which were authorized due to the express demands of one specific piece of legislation—the Fair Packaging and Labeling Act. Thus, while our economy was experiencing an unparalleled growth, during which the need and demands for consumer protection increased by fantastic proportions, the Bureau's natural growth consisted of only 25 new staff positions (a 24% increase), including clerical and stenographic positions.

Due to the breadth of its responsibilities, the Bureau carries an extremely heavy workload. Although statistics can never tell the entire story, the volume of work confronting the Bureau is apparent from the following Workload Summary.

BUREAU WORKLOAD SUMMARY

	Fiscal year 1968	Estimated	
		Fiscal year 1969	Fiscal year 1970
Applications for complaint:			
Pending beginning of year	820	589	489
Received	7,276	8,480	9,000
Disposed of	7,507	8,580	9,239
Pending end of year	589	489	250
Formal investigations:			
Pending beginning of year	1,210	1,076	776
Initiated or reopened	388	700	1,000
Completed or closed	522	1,000	1,300
Pending end of year	1,076	776	476
Complaints approved:			
Pending beginning of year	19	23	23
Approved or reopened	51	120	200
Dispositions:			
Consent orders	29	84	125
Litigated	16	35	75
Other	2	1	3
Pending end of year	23	23	20
Litigated cases:			
Pending beginning of year	34	25	26
Complaints issued or cases reopened	16	36	78
Cases completed	25	35	80
Pending end of year	25	26	24
Assurances of voluntary compliance accepted	145	210	450
Compliance matters:			
Miscellaneous:			
Pending beginning of year	131	169	219
Received	742	800	800
Dispositions	704	750	825
Penalty actions:			
Pending beginning of year	8	8	6
Certified	3	5	15
Dispositions	3	7	8
Compliance reports:			
Pending beginning of year	125	146	150
Received	70	100	146
Accepted	49	100	150

The Bureau tried to meet the challenge of its mounting workload by simply increasing its efficiency. With no increase in Bureau personnel, it became necessary to reallocate manpower, thus diluting its efforts in other areas. In many instances this has meant that matters have been left pending long after disposition should have been achieved. The result has been backlogs of matters previously selected for attention, and to which attention must be paid as soon as possible. It simply did not and does not now have the manpower to do the job.

One of the efficiency measures taken was to establish the Office of Legal Adviser to the Director for Screening and Planning. Here the review of all of the sources utilized by the Bureau in detecting unfair or deceptive practices are centralized. This quickly resulted in better evaluation of changing problems affecting the consumer and the concentration of effort upon those areas of greatest concern, or that reflect the highest degree of public interest. Consequently, in fiscal 1968 the Bureau was able to dispose of over 7500 applications for complaint.

Furthermore, centralization of planning resulted in investigations being initiated upon a broader and more informed base of selectivity. Trends and patterns could be studied. Thus, the Bureau was able to change from its former fragmented view of practices to one of an overall perspective. Consequently, files concerning practices in an overall industry could be consolidated. Thus, the significant economies of numerical reductions were achieved, while Commission efficiency in combating the more important areas of deception was increased.

Another result of the need for increased efficiency was the Division of Special Projects—established when it became evident that: (1) even the most optimum use of attorneys in litigation would not meet minimum Bureau obligations; and (2) many problems of deception are of such a nature that litigation might not produce the best solution in the public interest.

Although the Bureau has been constantly trying to use an industry-wide approach whenever possible, it frequently has encountered situations in which such an approach would not be appropriate, and many instances in which individual concerns would not adopt the nondeceptive methods agreed to by the rest of the industry. The Bureau is also the Commission's enforcement arm in effecting compliance with the Commission's Industry Guides and Trade Regulation Rules, where litigation is required. Consequently, the workload of the Bureau Divisions of Food and Drug Advertising, and General Practices, charged with administering the Bureau's case by case approach continued to grow. Almost 1000 cases were pending in the two Divisions at the beginning of fiscal 1969. This was in spite of substantial reductions in the number of pending cases having been obtained in 1968 as a result of careful screening and planning, and the efforts of Commission staff members who were specially detailed to help the Bureau fight its overwhelming workload.

Program for 1970

The Bureau will carry out its program to combat deception of the consumer through the Office of the Director and its five operating Divisions: Special Projects, General Practices, Food and Drug Advertising, Scientific Opinions, and Compliance.

Each Division has its own area of responsibility in the Bureau's overall program. Although the Bureau is attempting to utilize industrywide approaches where feasible, it still has the responsibility of handling the individual cases to which the industrywide approach is not an appropriate or satisfactory solution. Consequently, in many instances two or more operating Divisions will work on separate aspects of a project.

Also, under revised compliance procedures, the operating divisions will have the responsibility of reviewing compliance reports filed by all respondents from whom assurances of voluntary compliance are obtained. Such reports will be required within 6 months after an assurance is accepted and will consist of full and detailed accounts of steps taken to carry out the assurances. This procedure will increase the Bureau's overall workload and is reflected within the manpower requirements for the various projects. It should also be noted that the new procedures will have a most desirable result, closing a former loop-hole in voluntary compliance matters.

The Bureau's programs have been summarized into two categories: (1) Required Programs; and (2) Selected Programs, as set forth in the following table reflecting the manpower requirements necessary to carry out these responsibilities timely and effectively.

BUREAU PROGRAMS PROJECTED

	Fiscal year 1969	Estimated man-years Fiscal year 1970	Fiscal year 1971	Fiscal year 1972
Required Programs:				
Packaging.....	18	18	14	12
Cigarettes.....	2	4	5	5
Broadcasting.....	3	3	3	3
D.C. consumer protection.....	6	8	8	8
Consumer problem evaluation.....		2	4	4
Mail order insurance.....	1	2	2	2
Food, drugs and cosmetics.....	15	22	23	23
FDA-FTC drug program.....	(1)	14	14	14
Policing in support of guidance programs.....	2	3	3	3
Compliance.....	11	14	18	19
Total.....	58	90	94	93
Selected Programs:				
Housing.....	2	11	12	15
Income.....	5	9	11	11
National importance.....	6	17	24	25
Nonproject matters.....	24	31	32	30
Total.....	37	68	79	81
Office of director, professional.....	9	12	12	12
Total professional.....	104	170	185	186

¹ 1969 Supplemental Request submitted to provide approximately 13 man-years for 1969 requirements.

BUREAU INCREASES—FISCAL YEAR 1970

The Commission is being subjected to mounting pressures from all sides for increased Consumer Protection. In most instances additional legislation is not needed but the Commission simply cannot meet current urgent demands, and any expansion of present programs—or consideration of any new program regardless of its importance—is impossible because of lack of manpower.

For the Commission to conduct any semblance of an effective program for consumer protection in 1970, additional funds must be provided for 71 new positions including supporting costs in the amount of \$800,000 and in addition, for the new FDA-FTC Drug Evaluation Program 25 positions and \$297,000—a total of 96 positions with supporting costs amounting to \$1,187,000, as shown on the following chart:

SUMMARY OF BUREAU INCREASES—FISCAL YEAR 1970

	Consumer protection program	FDA-FTC drug program	Increases requested, fiscal year 1970
New positions.....	71	25	96
Personnel compensation.....	\$700,000	\$250,000	\$950,000
Personnel benefits.....	52,000	19,000	71,000
Travel.....	12,000	2,000	14,000
Communications and rent:			
Communications.....	10,000	4,000	14,000
Space rental.....	39,000	15,000	54,000
Printing.....	2,000	1,000	3,000
Other services:			
Building alterations.....	5,000		5,000
Steno reporting.....	5,000	1,000	6,000
Witness fees.....	2,000		2,000
Supplies.....	20,000	5,000	25,000
Equipment.....	43,000		43,000
Total.....	890,000	297,000	1,187,000

REQUIRED PROGRAMS

The majority of the Bureau's manpower is being used, and will be used in 1970 in carrying on required or mandatory programs. Included in this category are programs undertaken as the result of legislation, Congressional or Commission directives or concern, cooperative agreements with other governmental agencies, and to obtain compliance with Commission orders. The following are all projects falling into the category of Required Programs.

FDA-FTC Drug Evaluation Program

On January 23, 1968 the Commission executed a Liaison Agreement with the Food and Drug Administration setting forth in detail the FTC cooperation with FDA in its Drug Evaluation Program. This is considered to be a new program in 1970 even though a supplemental request for 1969 is being requested to get the program underway.

This important and comprehensive program was started by the FDA in 1966 and was the result of the 1962 Amendment to the Food, Drug and Cosmetics Act which changed the definition of the term "new drug".

Prior to 1962, the Food and Drug Administration (FDA) approved the marketing of drugs on the basis of *safety* alone, with no clinical data required to support the *efficacy* of such products. In 1962, Congress passed the Kefauver-Harris Drug Amendments, which required that all drugs be proved *effective* as well as *safe* for their intended uses. These amendments affected not only new drugs as they came onto the market, but also all drugs on the market which had been approved between 1938 and 1962. FDA was required to review all such products and require medical evidence of efficacy. In the absence of such evidence, FDA could proceed to withdraw approval of the New Drug Applications (NDA) for these products.

Since FDA did not have the manpower to carry out this efficacy review, a contract was arranged for the work to be done by the National Academy of Sciences-National Research Council (NAS/NRC) for which substantially more than \$1 million has been appropriated to FDA. Since July 1966, members of this group

have been engrossed in a detailed study of the many and various products involved. As an example of the complexity of this undertaking, it should be noted that presentations have been submitted on more than 3600 drug formulations covered by NDA's. It is estimated that for each such preparation, there is an average of five other identical products on the market produced by other firms without an NDA ("me-too's").

This program is explained in much more detail in the HEW-FDA appropriation hearings before the House Appropriations Subcommittee for fiscal year 1969, including a copy of the Liaison Agreement between the Commission and FDA (see pages 5 through 18 and 27 and 28).

As of June 30, 1968, the FDA task-force had received more than 400 NAS/NRC reports, some of which will soon be transmitted to the Commission. FDA estimates that non-prescription over-the-counter (OTC) preparations, whose advertising claims are the responsibility of the FTC, comprise approximately 15% of the total being reviewed. FDA further estimates that, by the end of fiscal 1969, it will have forwarded to the FTC a minimum of 900 reports involving OTC preparations, and will forward, in fiscal 1970, a minimum of 1,800 more. These reports will necessitate extensive Bureau legal and medical reviews of the advertising of the products involved. Because of the nature of this action, substantial litigation is anticipated.

The sheer magnitude of this project demands that it be administered separately from other health, food and drug matters. In order to handle the work engendered by a program of this scope a minimum staff of 25 employees with supporting costs will be required in 1970 as set forth below:

INCREASES REQUESTED FOR FDA-FTC EVALUATION PROGRAM--1970

Personal services:

Medical officer: GS-14-----	2	
Attorney:		
GS-14 -----	2	
GS-13 -----	4	
GS-12 -----	3	
GS-11 -----	3	
Examiner: GS-5-----	4	
Clerk-typists: GS-4-----	7	
		<hr/>
Total Personnel-----	25	\$250,000
Personnel Benefits-----		19,000
Travel -----		2,000
		<hr/>
<i>Communications and Rent:</i>		
Communications -----		4,000
Space Rental-----		15,000
		<hr/>
		19,000
		<hr/>
Printing -----		1,000
Other Services (Stenograph reporting)-----		1,000
Supplies -----		5,000
		<hr/>
Total -----		297,000

Packaging—The Fair Packaging and Labeling Act directs the Commission to promulgate and enforce regulations in specified packaging and labeling areas, and calls for a general enforcement of the provisions of the Federal Trade Commission Act in other areas of deceptive labeling and packaging.

During 1968 and 1969 the Bureau's efforts were chiefly concerned with promulgating mandatory regulations, establishing liaison procedures with other interested Federal Agencies and industry, processing administrative proceedings concerning product inclusion or exclusion under the regulations, and promulgating regulations regarding exemptions and the problem areas in which the Commission has discretion to act under Section 5 of the Packaging Act.

Most of the foregoing work will continue in fiscal 1970, 1971 and 1972. In addition, the Bureau has the continuing responsibility of enforcing the mandatory regulations which become effective July 1, 1969, and preventing deception in packaging and labeling areas not specifically covered by the Act.

Packaging is one of the few areas of the Bureau's work in which additional manpower has been authorized. As such it serves as a shining example of what can be accomplished with adequate manpower.

Cigarettes—The Federal Cigarette Labeling and Advertising Act requires that a health warning statement be put on each cigarette pack, and directs that no statement relating to smoking and health shall be required in the advertising of cigarettes whose packages bear the required health warning. In addition, the Act directs the Commission to submit a report to Congress annually concerning the state of cigarette advertising and labeling, and to include therein recommendations for any appropriate legislation.

The provisions of the Act affecting the regulation of cigarette advertising terminate on July 1, 1969. Thus, the problem of what, if any, health warnings should be required in cigarette advertisements will, once again, be left at the Commission's doorstep. Consequently, the workload of the Bureau in the cigarette field will remain undiminished, and, in fact, will increase in 1970.

The Bureau was only beginning to be active in the cigarette field when the Act was passed. Consequently, cigarettes was not a budgeted project, and, in fact, never has been, except nominally. However, the Bureau suddenly found itself charged with overseeing an industry which spends approximately \$312 million annually for cigarette advertising and which has products affecting the health of an estimated 84 million American smokers.

In order to meet its responsibilities in the cigarette program, the Bureau was forced to pirate manpower from other programs. But even that action was limited to diversion of only enough manpower to operate the laboratory and to prepare the annual reports to Congress. No manpower has been available to bring about affirmative Commission action in carrying out its other responsibilities in the cigarette field.

Maintenance of the Bureau's Cigarette Testing Laboratory is essential to the compilation of the report and to any Commission action regarding health warning statements, or to otherwise combat deception regarding cigarettes. In addition, inquiries into the complex problems of collateral tar and nicotine claims, the gas phase of cigarette smoke, tar components and tobacco pesticides which will be initiated during fiscal 1969 will have to be resolved in 1970.

In 1970 still greater responsibilities will be confronting the Bureau. It must have additional manpower consisting of both attorneys and a medical doctor if it is to be effective in protecting consumers in cigarette matters.

D.C. Consumer Protection Program—This pilot project was established by the Commission following a suggestion by the Chairman of the Senate Commerce Committee. The subjects of its attack are unfair and deceptive practices of business concerns in the metropolitan area of the nation's capital—deception of the poor and underprivileged of the "inner city," many of whom can't afford even the necessities of life.

In its first three years the program resulted in approximately 100 investigations being opened. A total of 27 complaints were issued, resulting in 19 cease and desist orders and one dismissal. At the beginning of fiscal 1969, investigations were under way in 57 cases. In spite of the most optimum use of attorneys on this project, the backlog of cases continues to grow. Additional manpower is essential if the project is to be an effective enforcement program.

Consumer Problem Evaluation—Much more has been achieved through the D.C. Consumer Protection Program than even the sizable number of cases indicates. The experience and information gained in challenging certain retail credit transactions were used in strong support for passage of the then to be enacted "Truth in Lending Act". The Commission also used information obtained through the program in recommending State and Federal legislation, and Federal programs to improve the lot of the underprivileged consumer and to revitalize the business community with which he deals.

A significant outgrowth of the program was the Commission's October 1968 public hearing seeking facts upon which it could base concrete Commission actions and recommendations to Congress and the States for effective nationwide consumer protection. The D.C. Consumer Protection Program brought about the realization that D.C. low-income consumers are victims, on a large scale, of fraud and deception, and, undoubtedly, that this is true in all other major U.S. cities. Further recognition of the magnitude of the problem is found in the report of the National Advisory Commission on Civil Disorders listing the existence of such practices as one of the deeply held grievances which led to the disorders. The question is what can be done about it, and the answer won't be quick or easy to come by.

However, the Commission, by merely holding its hearing, has moved to provide one obvious improvement in consumer protection, better information. The Commission has long believed that an informed public is its own best defense against deception. Unfortunately, it has never had the manpower to devote to an extensive factual development and information program. A team that can devote 100% of its time to collection and development of data in problem areas is needed and the Commission proposes to set up such a team in fiscal 1970. A large part of its work would be used by the Consumer Information group of the Office of the Executive Director for evaluation and implementation of proposals for nationwide consumer protection and information activities. Two man-years will be necessary in 1970 to get the program started. The Bureau feels that only by providing basic information on major consumer problems to the new group working on the development of consumer information programs in the Office of the Executive Director can that group be fully informed as to legal implications and basic factual data for full implementation of its program.

Insurance—Fiscal 1969 will see the conclusion of an investigation, begun at the request of the Chairman of the Senate Commerce Committee, into the practices of 75 companies engaged in the advertising and sale of life, health or accident insurance. These companies are not required to be registered in states in which the recipient of the mail resides, hence are beyond state regulation. The investigation should be followed by the issuance of complaints concerning the most significant practices discovered. Manpower will be required in fiscal 1970 in order to prepare the necessary complaints and try the cases that go to litigation.

Broadcasting—A few years ago both the Senate and the House of Representatives were seriously disturbed by disclosures of shocking inadequacies in procedures for determining audience ratings. Without enacting specific legislation, Congress left no doubt that the Commission should take appropriate steps to remedy the situation.

The Commission issued cease and desist orders against the major survey organizations and a statement of Commission policy, addressed to broadcasters, affording guidance to those desirous of avoiding law violations. A survey has now indicated that there are broadcasters failing to follow the policy statement, and whose misrepresentations require corrective action. In addition, the successful prosecution of test cases further clarifying the illegality of some television advertising practices as deceptive demonstrations is a must for fiscal 1970.

Policing in Support of Guidance—The Commission has, as one of its main functions, the responsibility of furnishing guidance to businesses and thereby preventing the use of deceptive or unfair trade practices. This activity is chiefly carried on in the Bureau of Industry Guidance. However, a guidance program must be strongly enforced if it is to be effective. The Bureau of Deceptive Practices has the responsibility of providing the muscle necessary to enforce the Commission's Guidance Program where litigation is indicated.

Illustrative of the Bureau's work in this area are the 83 files it had open at the beginning of fiscal year 1969 concerning possible violations of the Commission's "Guides Against Deceptive Pricing." Since other "Guides", e.g., "Guides Against Bait Advertising," and "Guides Against Deceptive Advertising of Guarantees," involved practices found in a large percentage of the cases throughout the Bureau's various project areas.

In order for the Bureau to provide the enforcement in fiscal 1970 that is necessary for an effective Commission Guidance Program additional personnel will be required.

Foods, Drugs and Cosmetics—The Commission is specifically charged under Sections 12, 13, 14 and 15 with eliminating and preventing deception in the advertising and sale of food, drugs, cosmetics and therapeutic devices. Although the Bureau has always assigned a high priority to matters involving deceptive practices in the advertising and sale of such products, the January 1968 Liaison agreement with FDA moved Bureau efforts regarding such matters into the category of a Required Program.

Food—In this field the Bureau's efforts are concentrated on deceptive practices involving 55 cases pending at the beginning of fiscal 1969. Those cases fall into three categories: (1) the sale of meat products for stocking home freezers; (2) the sale of vitamins and other food supplements; and (3) weight reducing foods.

In the first category the practices encountered are primarily directed at the people in low or modest income brackets—those who really need to raise their

standards of living while accomplishing economies. Yet the practices result in their paying far more for less.

As a result of the growing franchise movement, health stores and salons are popping up everywhere. Unfortunately, they all too often extol weight reducing foods and devices as substitutes for dieting. Advertisements for vitamins, food supplements, and weight reducing foods all hold out hopes of rejuvenation for the old, the sick, or the obese. Not only are such hopes usually not realized, but reliance upon such products as a substitute for proper medical care may actually impair health.

The workload of food matters continues to grow. Additional attorneys will be necessary if the Bureau is to keep pace with this growth in fiscal 1970. In addition, considerable scientific work is necessary in all food cases, and the present number of scientific personnel assigned to food matters cannot handle the volume.

Drugs and Cosmetics—The number of drugs, their manufacturer, and their outlets reaches fantastic proportions. Although industrywide approaches are used whenever it is feasible for the Bureau to do so, a case by case approach is often necessary. Consequently, the Bureau has cases open concerning deceptive advertising and false efficacy claims for such products as rheumatism remedies, mouth washes, cold remedies, dentrifices and dental products, female remedies, skin preparations, perfumes, and health books.

In addition, Trade Regulation Rules relating to the advertising of analgesics, a \$75 million industry, and to advertising of efficacy and safety claims by the economic poison industry, a \$250 million industry, are under consideration by the Commission. Promulgation of those rules will impose increased enforcement problems on the Bureau in 1970.

An inquiry concerning advertising and efficacy claims by the economic poison industry was undertaken after numerous conferences with the Department of Agriculture, which has jurisdiction over the labeling, but not the advertising of such products. Those conferences revealed that such products' advertised safety and efficacy claims often exceed the claims permitted on the label. Typical of such advertisements are unqualified claims of safe usage, although the Department of Agriculture approved label bears warnings against use of the product except under certain circumstances or under controlled conditions by experts. Homeowners, gardeners and farmers who rely on the advertised safety and efficacy claims are thereby induced to purchase such products. Even worse, they are misled into using them without proper safety precautions.

All aspects of the Bureau's workload of drug and cosmetic matters are increasing in fiscal 1969, fiscal 1970 and on into the future. Accordingly, additional personnel will be required if the Bureau is to keep pace.

Compliance—The FTC Act itself (Secs. 5(e), & 16) indicates Congressional desire for the Commission to assure, through policing of practices, that respondents strictly comply with Commission Orders. The Commission has outstanding over 5,000 deceptive or unfair trade practice orders with which compliance must be obtained and maintained, and the number is ever increasing. In addition, each new complaint and proposed order, and subsequent changes thereto should be reviewed for enforceability. As new orders are issued, compliance reports submitted by respondents must be examined and evaluated. Also, in order to have a truly effective compliance program, the Bureau must be ever ready to prepare and handle those Civil Penalty suits that inevitably become necessary. All Bureau compliance work stems from one fundamental hypothesis—if Commission Orders are to continue to be effective weapons in combating deception, the Commission must be able to force respondents to comply with them.

The foregoing Required Projects must be carried on in fiscal 1970. However, they will require at least 90 man-years of professional work (approximately 87% of the entire professional staff authorized for the Bureau in fiscal 1969). Unless additional staffing is authorized for 1970, the Bureau will have, literally, no one available to work on its Selected Programs.

SELECTED PROGRAMS

As previously described, the Screening and Planning section recently established in the Office of the Director will have its greatest impact in this area of the Bureau's work. Criteria are applied such as number and types of persons (poor, old, disadvantaged) affected by the practice, effect upon competition, danger to health or safety, loss suffered by the consumer and materiality of the practice to that loss, difficulty of litigation, economic magnitude of the industry,

and the amount of Commission manpower and resources that will be required to remedy the situation. In essence, matters selected for Bureau action fall into 3 categories: (1) Matters relating to the basic necessities of life; (2) Matters involving income or prospects thereof for people of modest or no means; (3) Matters of national significance.

It is in these three areas that the numerical bulk of the Commission's workload (589 applications for complaint, 1076 investigations, and 48 cases in various stages of negotiation and litigation pending at the beginning of fiscal 1969) will be found. These areas are the previously Selected Programs that have suffered while manpower has been diverted to Required Programs. And it is here that the Bureau needs manpower so desperately if it is to be of real benefit to the consumer. These matters must be brought to a conclusion. Fiscal 1970 will be the year in which the full brunt of the workload of doing so will be felt.

Necessities of Life—Everyone agrees that adequate housing is a primary necessity of life. However, the 60's saw a great upgrading of the standards by which that adequacy is judged, a natural result of the great increase in disposable personal income during the period. Accompanying that upgrading of housing standards was a rapid growth in the home improvement industry—an industry that has been estimated to have sales of \$15 billion annually, and to represent approximately 20-25% of the entire national spending on residential buildings. Unfortunately, this lucrative market attracted a large number of disreputable operators whose activities are a continuing source of complaint to the Commission. Among the deceptive practices utilized are: fictitious discounts; phony commissions for "model home" displays; bait and switch; bogus contests; misrepresentation of guarantees; misrepresentations as to durability and performance; fictitious commissions for referrals; fraudulent substitutions of materials; and spiking the job (immediate partial performance so as to make job uncancellable), followed long delays while the customer has to pay.

At the beginning of fiscal 1969, 62 investigations were underway of concerns in the home improvement field, with additional investigations planned.

Income—The elderly, the poor, the uneducated, the handicapped, the growing family, the small investor, are all people seeking and, in most instances, needing to increase their incomes. Bureau efforts to protect these consumers from deception fall into three main categories: (1) Franchise operations; (2) Chinchilla Breeding and merchandise and services sales; and (3) Correspondence, Trade Schools and Employment Agencies.

In addition to greatly exaggerated claims as to profit potential common to all three categories, false representations are encountered regarding available management assistance, facilities, equipment, and job opportunities. Also instances of stocks of merchandise being sold at greatly inflated prices are all too common.

At the beginning of fiscal 1969 the Bureau had open 36 files concerning franchise operations, and 41 files concerning deceptive practices in chinchilla sales. Fiscal 1970 should be a year of extensive litigation in which disposition of the majority of those pending matters is accomplished.

The case by case approach still appears to be the best approach to franchise and chinchilla matters. However, matters involving correspondence, and trade schools and employment agencies seem subject to better disposition on an industrywide basis. Consequently an industrywide investigation is planned for 1970. That investigation should result in a decrease in the number of new investigations that must be opened, followed by a reduction in the caseload in the long run. However, disposition must also be accomplished as to the cases now pending. In order to handle both the caseload and the industrywide investigation in fiscal 1970, additional personnel will be necessary.

National Importance—The Bureau has in progress 5 major projects that have been selected as matters of National Importance. Without exception, each of them will require additional manpower, if the Bureau is to meet its fiscal 1970 responsibilities.

Each of the major projects will be discussed separately hereafter, as will a new Commission Project, "Quick Action." In addition, a multitude of other matters of National Importance, each of which will require less than one man-year of work in fiscal 1970 are considered by the Bureau as Miscellaneous in its planning summaries. Included in this category are such matters as: Appliance Warranties; Hazardous Products; Costly Burials; Travel Bargains; Retirement Land Deals; Auto Insurance; Water Conditioner; Freon Gas Products; Flammable Hair Curlers; Collection Agencies; Non-tobacco Fillers for Cigars, and many others. Also included is the manpower required to cope with new projects for which a need suddenly appears in 1970.

Door-to-Door Sales—Deceptive practices in connection with door-to-door sales, especially of magazines and encyclopedias, continue to be of major importance.

Although orders have served to stop such practices in specific instances, the problem keeps reappearing in different places and with different culprits. It has become so pronounced that some states have passed legislation greatly regulating such methods of selling. Similar legislation has been introduced in Congress.

One segment of the industry (paid during subscription magazine sales) became so alarmed about the possible consequences of a continuation of such practices that it attempted self regulation through a novel "code of ethics" containing enforcement provisions. That Code became operational in fiscal 1968, and has Commission approval, by virtue of an advisory opinion, for three years. During that period the activities of, and procedures followed by, the code administrator will be under close surveillance. It is hoped that such a code will provide an answer to the problems in that segment of the industry and can be adopted for other segments. But only through such close surveillance, can the Commission determine the degree of success achieved—a rather sizeable job as shown by the more than 100 complaints that were received by the administrator in the first 6 months of the code's operation.

But the Commission cannot just sit back and see what the results of the code will be. In recognition of this, the Bureau has tried another new approach. It invited all the major magazine and encyclopedia publishers to submit detailed information on their internal procedures and controls to prevent deceptive sales practices. The Bureau hopes to complete its evaluation of these submittals in fiscal 1969 and to make suggestions for improvements thereon. Fiscal 1970 will see a close monitoring by the Bureau to determine if improvements are in fact made and to determine their effectiveness.

Although all of this activity is directed at preventing the practices through a broad approach, the fact remains that a backlog of cases falling beyond the reach of any such approach, e.g., independent sales outlets, has been built up, and will receive some additions during this year. It would not be fair to let the independents proceed in violation of the law and compete with the majors and their affiliates who voluntarily comply with the law. Such cases must be investigated, appropriate complaints filed and orders obtained concurrently with the Bureau's efforts at obtaining voluntary compliance by the majors. Consequently, the Bureau will have to devote professional manpower to both aspects of its door-to-door selling program in fiscal 1970.

Sewing Machines—The sewing machine is practically a necessity for the low and moderate income homemaker. In 1965 alone, an estimated 1,860,000 sewing machines were sold in the U.S. At that time the number of home sewers was estimated to be between 25 and 40 million who spend \$1.25 billion a year on sewing machines, patterns, fabrics, threads, and notions. Most retailers are willing to sell the same type of sewing machine at the same or approximately the same price. For lack of competition as to quality, price or performance, the distributor or retailer who uses the most effective promotional gimmick, in many instances, deception or outright fraud, gets the business. Consequently, although the case-by-case method of regulating the sewing machine industry is a tremendous job, it is believed to be the only realistic method of attacking the promotional evils plaguing the industry. Twenty eight such cases were pending at the beginning of fiscal 1969. However, the Bureau is attempting to reduce the number of necessary complaints by filing "class actions" against the distributors and retailers of a particular make.

Games of Chance—The use of games of chance in merchandising, particularly in the retail food and gasoline distributing industries, is being investigated by the Commission. This Bureau has devoted, and will continue to devote, substantial manpower to this investigation. If the investigation establishes that probable violations of the law are involved, this Bureau will have the primary responsibility for correcting the violations by litigation, or otherwise.

Foreign Origin—The sale of imported merchandise without disclosure of its foreign origin continues to plague American manufacturers and legitimate sellers who must compete. Several such matters should be ready for trial in 1970.

Automobile Warranties—Of all the matters handled by the Bureau, the one having the greatest public interest would have to be its comprehensive investigation of manufacturer and dealer performances under automobile warranties.

The automobile industry annually produces more than 9 million new cars, and has new cars and parts sales totaling almost \$30 billion. Its warranties of automobiles are part of the sales transaction, and are generally considered as being for the protection of the consumer. However, if the warranty is not, or cannot be, lived up to, the consumer doesn't receive the protection he paid for, and, in fact has been deceived—an all too frequent occurrence, as evidenced by the tremendous number of applications for complaint the Bureau receives in automobile warranty matters.

The investigation culminated in a Commission-Industry program commencing in 1969 to alleviate the problems found—problems that plague consumers, dealers and manufacturers. Unfortunately, there is no simple, quick remedy to this multifaceted situation. The program undertaken will require a monitoring of all warranty claims received by each manufacturer, a study of each manufacturer's claim forms and its procedures for processing them, a review of dealer repair facilities and manufacturer requirements pertaining thereto, an investigation of dealer franchise agreements, a review of the content of all manufacturer warranty provisions, a review of all advertising and promotional literature regarding warranties, and plant visitations. Fiscal 1970 will be the peak year for this effort.

Quick Action—In fiscal 1970, the Bureau plans to undertake a new pilot program that has been long needed. It would designate a team of two attorneys who will have the responsibility of initiating "quick action" for consumer protection. This team would primarily devote its time to handling the innumerable consumer complaints, Congressional referrals, interagency referrals, etc., which are not of such significance as to warrant full scale investigations. These are matters having to do with small business practices, relatively minor in nature, in which there is scant evidence of a general pattern or practice warranting extensive corrective action. This unit, hopefully, will quickly eliminate the deceptive practices involved by means of letters, telephone calls, or personal visits.

Non-Project Matters—In addition to the matters of national significance that the Bureau is treating on a project basis, many carefully selected matters are pending to which a project type approach would not be appropriate. Included in this category are such matters as: Appliance Warranties; Hazardous Products; Costly Burials; Travel Bargains; Retirement Land Deals; Auto Insurance; Water Conditioners; Freon Gas Products; Flammable Hair Curlers; Collection Agencies; Non-tobacco Filler for Cigars, and many others, each of which will require one man-year of professional work in fiscal 1970. Also included is the manpower required to cope with new matters that suddenly appear in 1970.

PROGRAM INCREASES REQUESTED, FISCAL YEAR 1970

(Exclusive of FDA-FTC Program)

In order to provide even minimal staffing of the Bureau of Deceptive Practices to properly and expeditiously prosecute the foregoing programs for the protection of the public, an increase of 52 professional and 19 clerical positions (exclusive of the new FDA-FTC Drug Evaluation Project) at a cost of \$890,000 for personal services and supporting costs will be required for fiscal year 1970. These increases are summarized on the following page.

BUREAU OF DECEPTIVE PRACTICES REQUESTED INCREASE FOR FISCAL YEAR 1970 (EXCLUSIVE OF FDA-FTC DRUG EVALUATION PROGRAM)

Increased consumer protection programs	Total requested	Office of director	Special projects	Food and drug advertising	General practices	Compliance	Scientific opinions
Medical officer:							
GS-15.....	1						1
GS-14.....	2						2
Attorney:							
GS-15.....	5		1		4		
GS-14.....	7	3			4		
GS-13.....	2		2				
GS-12.....	1		1				
GS-11.....	8		4		4		
GS-9.....	26		9	7	6	4	
Clerical, GS-4.....	19	19					
Total positions.....	71	22	17	7	18	4	3
Personnel compensation.....	\$700,000	\$141,000	\$175,000	\$58,000	\$233,000	\$33,000	\$60,000
Personnel benefits.....	52,000						
Travel.....	12,000						
Communications and rent:							
Communications.....	10,000						
Space rental.....	39,000						
Printing.....	2,000						
Other services:							
Building alterations.....	5,000						
Stenographic reporting.....	5,000						
Witness fees.....	2,000						
Supplies.....	20,000						
Equipment.....	43,000						
Total.....	890,000						

BUREAU OF TEXTILES AND FURS

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	20	\$149,500	32	\$211,500	12	\$62,000
Division of Enforcement.....	18	282,000	35	464,000	17	182,000
Division of Regulation.....	66	793,500	158	1,539,500	92	746,000
Total personal services.....	104	1,225,000	225	2,215,000	121	990,000
Travel.....		50,000		137,000		87,000
Other expenses.....		5,000		32,000		27,000
Total.....	104	1,280,000	225	2,384,000	121	1,104,000

BUREAU OF TEXTILES AND FURS—TOTAL INCREASE BY PROGRAM

	Flammable fabrics		Rule 36		Regular programs		Total	
	Positions	Amount	Positions	Amount	Positions	Amount	Positions	Amount
Personnel compensation:								
Office of Director.....	2	\$9,000			10	\$53,000	12	\$62,000
Division of Enforcement.....	7	63,000			10	119,000	17	182,000
Division of Regulation.....	55	393,000	20	\$145,000	17	208,000	92	746,000
Total personnel com- pensation.....	64	465,000	20	145,000	37	380,000	121	990,000
Personnel benefits.....		34,000		11,000		28,000		73,000
Travel.....		80,000		2,000		5,000		87,000
Communications and rents:								
Communications.....		10,000		2,000		13,000		25,000
Rents.....		35,000		11,000		70,000		116,000
Printing.....				5,000				5,000
Other services:								
Building alterations.....						5,000		5,000
Stenographic reporting.....						2,000		2,000
Exhibits and testing.....		15,000		5,000		5,000		25,000
Miscellaneous expenses.....						5,000		5,000
Supplies.....						10,000		10,000
Equipment.....		5,000				20,000		25,000
Total.....		644,000		181,000		543,000		1,368,000

BUREAU OF TEXTILES AND FURS

The Bureau of Textiles and Furs has responsibility for administering the Wool Products Labeling Act of 1939, the Textile Fiber Products Identification Act, the Fur Products Labeling Act and the Flammable Fabrics Act. In order to carry out these duties, the Bureau of Textiles and Furs has been divided into the Office of the Director, the Division of Regulation and the Division of Enforcement.

The Division of Regulation makes field inspections of manufacturers, wholesalers and retailers of textile products and fur products, monitors textile and fur advertising, prepares and makes recommendations relative to amendments to the regulations under the four Acts administered, issues registered identification numbers, is custodian of the continuing guaranty files, maintains the Bureau's correspondence files and counsels and advises the textile and fur industries concerning their labeling, invoicing and advertising practices.

The Division of Enforcement handles all formal investigations made under the Wool Products Labeling Act, Textile Fiber Products Identification Act, Fur Products Labeling Act and the Flammable Fabrics Act and is responsible for the settlement or trial of each of such cases. Also the trial attorneys in the Division of Enforcement are responsible for any injunctions brought under these statutes. The Bureau laboratory which is a part of this Division analyzes the contents of questionable fibrous stock, yarn and fabrics, conducts dye tests of fur products and makes flammable fabrics tests of fabrics that might be dangerously flammable. In addition, the Compliance Section of this Division polices Commission orders under the four enumerated Acts.

The work of the Bureau of Textiles and Furs is to a large extent prophylactic in nature, and only when the efforts of the Bureau to obtain compliance with the assigned statutes through education, cooperation and voluntary compliance are unsuccessful is enforcement sought through complaint and cease and desist order, or, if warranted, by injunction or criminal penalties.

Events during the past year have indicated a significant increase in the workload of the Bureau of Textiles and Furs for FY 1970 involving several new programs which are outlined at the beginning of this Budget Justification because of their importance to the public, the Commission and to the Bureau.

FLAMMABLE FABRICS ACT

On December 14, 1967, President Johnson approved an amendment to the Flammable Fabrics Act extending the coverage of this Act from wearing apparel and fabrics intended for use in wearing apparel to any product made in whole or in part of fabric or related material intended or expected to be used in homes, offices and places of assembly or accommodation. The Secretary of Commerce was designated as the official who will determine which fabrics, related materials and products should be regulated to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury or significant property damage. Further, the Department of Commerce was assigned the responsibility of defining testing procedures and specifications for the testing of fabrics, related materials and products.

Comments made in Congress at the time this amendment was being considered and the President's remarks at the White House ceremony when he signed the Act indicate that it is the intention of both the Congress and the President that this law be vigorously enforced to reduce the human suffering and death caused or contributed to by fires involving clothing and fabric products and to reduce the staggering loss of property by fires of this nature each year.

During the debate on this important amendment, it was clear that Congress was rightfully concerned with the deaths, injuries and property damage due to fires involving fabrics and related materials and as evidence of this concern, Congress included in the Act, an authorization of \$2,500,000 for FY 1969 and a like amount for 1970.

The Department of Health, Education and Welfare is presently collecting statistics concerning injury and death caused by fires involving fabrics and the Department of Commerce is working on testing procedures and specifications. It is anticipated that the Secretary of Commerce by the beginning of FY 1970 will have made determinations as to which fabrics, materials and products should be regulated under this statute, and will have provided testing procedures and specifications to cover such fabrics and products. Therefore, the Federal Trade Commission by July 1, 1969, should have its enforcement strategy planned and the necessary personnel trained and prepared to carry out the mandate of this Act.

The Commission through the Bureau of Textiles and Furs plans to work closely with state and district fire marshals and with city fire chiefs and other officials in all instances where fires involve clothing or fabric products. This will necessitate having trained investigators available to cooperate with the state officials whenever there is a possibility that the Flammable Fabrics Act has been violated by the manufacture or sale of dangerous flammable fabrics or products. In investigations of this nature time will be of the essence as a day or two delay may mean the loss of essential evidence of such violations.

The present staff and equipment of the Bureau are wholly inadequate to provide necessary enforcement of this statute which through revision assumes the stature of new legislation. At present, the field staff of the Bureau of Textiles and Furs consists of 43 investigators stationed in 11 field offices and 9 field stations throughout the country whose responsibility is to police the multi-billion dollar wool, textile, and fur industries, from the fiber distributors to the retail outlets including imports from abroad. Therefore, it is imperative that additional investigators be stationed in pivotal locations throughout the country where they will be available to assist fire officials and make inspections of manufacturers and distributors of fabrics, related materials and products subject to the Act. It is anticipated that many calls for assistance or advice will be made upon our investigators under the amended Act on matters that heretofore were beyond the scope of the Flammable Fabrics Act, such as investigations of fires in hotels, motels and other places of public accommodations, together with the inspection of upholstered furniture and mattress manufacturers and distributors.

With the increased investigation and inspection work expected under the Flammable Fabrics Act there will no doubt be a tremendous volume of questionable dangerously flammable fabrics and products submitted to our laboratory for test. Work on these exhibits will be of the highest priority as the lives and safety of our citizens will depend on prompt tests of such goods to determine if they are in fact dangerously flammable, and whenever subject products are found to be dangerously flammable the merchandise must be removed from

the channels of trade without delay. These new duties will of necessity require additional personnel, equipment and space for our testing laboratory.

To accomplish this goal the Bureau requests an additional 64 people. These employees will consist of 50 investigators assigned throughout the country and 6 attorneys, 4 laboratory technicians and 4 clerks, typists and stenographers assigned to Washington headquarters.

The following list shows where the field personnel of the Bureau of Textiles and Furs are presently assigned. Proposed new field stations are indicated by asterisks.

INVESTIGATORS

City	Personnel presently assigned	Proposed additional personnel	City	Personnel presently assigned	Proposed additional personnel
Concord, N.H. ¹		1	Louisville, Ky. ¹		1
Boston, Mass.	2	1	Memphis, Tenn. ¹		1
Hartford, Conn. ¹		1	Oklahoma City, Okla. ¹		1
New York, N.Y.	14	4	Birmingham, Ala. ¹		1
Albany, N.Y. ¹		1	New Orleans, La.	1	
Buffalo, N.Y. ¹		1	Rapid City, S. Dak. ¹		1
Philadelphia, Pa.	1	1	Billings, Mont. ¹		1
Pittsburgh, Pa. ¹		1	Albuquerque, N. Mex. ¹		1
Baltimore, Md. ¹		1	Boise, Idaho. ¹		1
Falls Church, Va.	1	1	Salt Lake City, Utah ¹		1
Charlotte, N.C.	1	1	Las Vegas, Nev. ¹		1
Richmond, Va. ¹		1	Phoenix, Ariz. ¹		1
Columbia, S.C. ¹		1	San Francisco, Calif.	2	1
Atlanta, Ga.	2	1	Los Angeles, Calif.	4	2
Savannah, Ga. ¹		1	Anchorage, Alaska ¹		1
Jacksonville, Fla. ¹		1	Honolulu, Hawaii ¹		1
Miami, Fla.	1	1	San Juan, P.R. ¹		1
Cleveland, Ohio	1	1	Houston, Tex.	1	
Detroit, Mich. ¹		1	Dallas, Tex.	2	
Cincinnati, Ohio		1	Denver, Colo.	1	
Chicago, Ill.	2	2	Seattle, Wash.	1	
Minneapolis, Minn. ¹		2	Portland, Oreg.	1	
Indianapolis, Ind. ¹		1	Oak Ridge, Tenn.	1	
Des Moines, Iowa ¹		1	Washington, D.C. (headquarters)	2	
Milwaukee, Wis. ¹		1			
St. Louis, Mo.	1	1			
Kansas City, Mo.	1	1	Total	43	50

REQUESTED INCREASES, FISCAL YEAR 1970

Flammable Fabrics Act enforcement				
Personnel	Division of regulation	Division of enforcement	Office of director	Total
Attorney:				
GS-14		1		1
GS-13		1		1
GS-12		1		1
GS-11	1			1
GS-9	2			2
Laboratory technician:				
GS-5		1		1
GS-4		3		3
Investigator:				
GS-9	10			10
GS-7	40			40
Clerk, stenographer, and typists:				
GS-4			1	1
GS-3			1	1
GS-2	2			2
Total	55	7	2	64
Personnel compensation	\$393,000	\$63,000	\$9,000	\$465,000
Personnel benefits				34,000
Travel				80,000
Communications and rent:				
Communications				10,000
Space rental				35,000
Total				45,000
Other services (purchase of exhibits and testing)				15,000
Equipment (laboratory) ¹				5,000
Total				644,000

¹ Equipment costs for furniture and laboratory equipment in the amount of \$46,000 are included as nonrecurring costs in the supplemental request for fiscal year 1969.

WOOL PRODUCTS LABELING ACT—RULE 36

The past ten to fifteen years has witnessed a continued increase in the importation of wool and part wool fabrics and products. With this rise in importations the Bureau of Textiles and Furs has found an ever increasing amount of misbranded goods. Such misbranding places American manufacturers at a distinct disadvantage as cheaper substitute fibers are many times used in the manufactured products allowing them to be sold at a lower price. Further the American housewife is cheated as she is not receiving what she thinks she is buying, and often is paying the price of truthfully labeled merchandise for the misbranded goods.

American manufacturers are required by the Wool Act to maintain records disclosing the fiber or fabrics used in their finished products, and the inspectors of the Bureau of Textiles and Furs make periodic visits to such manufacturers to verify the labeling through their records. However with foreign manufactured goods the Federal Trade Commission has no jurisdiction over the merchandise until it enters the United States and of course the manufacturers and their records are beyond our jurisdiction. Therefore the only way of checking the fiber contents of such imported merchandise is by laboratory tests.

Imported goods in the past for the most part have been accepted by the Bureau of Customs as truthfully labeled as the said Bureau has not had the personnel or facilities to question and test the merchandise. As a result the Federal Trade Commission has tested imported goods only when our inspectors have questioned the fiber contents of such merchandise when it has been found in the channels of trade. If the questioned goods are tested and found to be misbranded the only remedy is a Commission complaint against the importer. Usually by the time the merchandise has been tested it has been dispersed throughout the country, and is not recoverable. Therefore depending on the size of the incoming shipment hundreds or even thousands of misbranded goods may be sold to the consuming public without the purchasers ever realizing that they had purchased misbranded and perhaps inferior goods.

After many months of work in the Commission and with industry Rule 36 under the Wool Products Labeling Act became effective on February 12, 1968. This Rule required that each entry of wool products into the United States be cleared by the Commission through the Bureau of Textiles and Furs. This clearance could be done prior to the entry in order to save time for the importer or at the time of the importation. Wool products which were suspected of being misbranded could be challenged by the Commission and the importer requested to have the merchandise tested for fiber content, at the importers expense, in a private testing laboratory approved by the Commission. If the goods were found to be properly labeled they would be immediately released but if found to be misbranded they would be required to be relabeled before being released from the Bureau of Customs entry bond and before they were dispersed in commerce. In this way the Commission felt it could police imported wool products in a much more effective way than had been done in the past.

Within a week after Rule 36 became effective the Commission was enjoined by the United States District Court for the District of Columbia from enforcing the regulation on a petition of a group of importers. The injunction was appealed and presently is pending in the Appellate Court. The petitioners complaint will be heard in the United States District Court for the District of Columbia in the near future. Whether the decision on Rule 36 is favorable to the Commission or whether the parts of the Rule objected to by the importers will have to be changed, it is almost certain that this regulation in one form or another will be in force by the beginning of Fiscal Year 1970.

To enforce Rule 36 will be a sizable operation as it is estimated there are approximately 80,000 entries of wool products into the United States each year through perhaps a score of 280 ports of entry. In addition, Rule 36 provides for pre-entry clearance and it is felt there will be some 30,000 or more such requests each year. To handle an estimated 110,000 entry papers, together with the anticipated telephone calls, testing requests, conferences with importers on relabeling problems and the extensive review which will be necessary in many cases, will require an estimated increase of 20 additional employees for the Bureau. These employees will consist of 9 investigators assigned to the ports where the larger number of wool products are imported, 2 clerks in the New York Office and 3 attorneys, 4 examiners, 1 clerk and 1 clerk-stenographer assigned to Washington headquarters. The investigators will be assigned to the following cities:

Boston, Massachusetts	1
New York, New York	1
Philadelphia, Pennsylvania	1
Baltimore, Maryland	1
Miami, Florida	1
New Orleans, Louisiana	1
Los Angeles, California	1
San Francisco, California	1
Chicago, Illinois	1

Requested Increases, Fiscal Year 1970—Wool Products Labeling Act Rule 36 Enforcement

Personnel:	<i>Division of Regulation</i>
Attorney:	
GS-12	1
GS-11	1
GS-9	1
Examiner:	
GS-8	1
GS-7	1
GS-6	2
Investigator: GS-9	9
Clerk-typist:	
GS-4	1
GS-3	1
GS-2	2
Total	20
Personnel compensation	\$145, 000
Personnel benefits	11, 000
Travel	2, 000
Communications and rent:	
Communications	2, 000
Space rent	9, 000
Total	11, 000
Printing	5, 000
Other services (exhibits and testing)	5, 000
Supplies	2, 000
Equipment	(1)
Total	181, 000

¹ Equipment costs of \$14,000 are included as a nonrecurring cost in the requested supplemental for fiscal year 1969.

REGULAR BUREAU PROJECTS

OFFICE OF THE DIRECTOR

The Office of the Director includes the Stenographic Services section which supplies stenographic help wherever it is needed in the Bureau.

The reorganization of the Bureau's administrative functions under an Administrative Assistant to the Director is imperative. The recent development of new Bureau inspection and work activity reporting procedures, the continuing demand for planning, programing and budgeting, the long standing need to consolidate authority and direction of general administrative matters such as personnel administration, paperwork management, report control and stenographic and clerical supervision under a single head makes this reorganization mandatory.

All of the duties that would ordinarily be handled by an Administrative Assistant to the Director are presently being done by the Director, the Assistant Director and the Chiefs of the Divisions of Regulation and Enforcement. When the time of these four men is taken handling matters which should be the duties of an administrative assistant their supervisory duties suffer. Further under the present conditions, using the time of the four of the highest grade personnel in

the Bureau for these administrative duties is a substantial monetary loss to the Government.

Funds in the amount of \$53,000 are requested for fiscal year 1970 to provide one GS-11, administrative assistant, and nine clerk-typists.

DIVISION OF ENFORCEMENT

The Division of Enforcement is responsible for the investigation and effective disposition of serious violations of the Wool, Textile, Fur and Flammable Fabrics Acts. The Division consists of a staff of trial attorneys who supervise the investigation and are responsible for the prosecution of violations considered to be serious enough to warrant issuance of a complaint. It also has a compliance section which polices the cease and desist orders issued under each of these Acts.

During the past year the Division of Enforcement continued to give fast attention to cases arising under the Flammable Fabrics Act. There were twelve cases under this Act which were concluded with Cease and Desist Orders. One of the cases involved a wig manufacturer who was making wigs of dangerously flammable fibers. A second case decided that wood chips used in making leis were fabric under the Flammable Fabrics Act and that leis were articles of wearing apparel.

The small staff of the Division of Enforcement processed 188 cases either by a recommendation for complaint or by a closing recommendation. Thus, each trial attorney concluded an average of approximately 24 cases during the year.

The Division also includes the Commission's testing laboratory which, during FY 1968, made 486 fiber content analyses of fabrics and fibers, conducted 649 burning tests under the Flammable Fabrics Act (each of which consisted of 3-10 individual tests), and 100 tests of fur fibers to determine if dye, bleach or other artificial coloration had been added to the furs. In addition the laboratory ran 115 controlled tests seeking ways and means of analyzing fabrics and fibers for which there are no published tests.

Program—Fiscal Year 1969-70

As of July 1, 1968, the formal cases on the Docket of this Division were:

Wool.....	51
Fur.....	60
Textile.....	80
Flamable fabrics.....	16
Total.....	207

It is considered desirable, *as an average*, to handle all cases in a period of one year. Although some cases will remain on the Docket for longer periods and many may be disposed of in a shorter period, the target to be achieved in this plan is disposition of cases, on the average, in one year.

Based on past experience—data accumulated since 1962—a trial attorney will be expected to dispose of 24 cases per year on the average.

Based on past experience—data accumulated since 1962—Division of Regulation investigators will, on the average, be expected to initiate four formal cases each per year.

It is estimated that 30% of our formal cases arise from an analysis of investigators' reports rather than by direct inspections by the investigators themselves. This percentage factor is added to the number of cases expected to be opened by investigators.

An increase in caseload is expected in the latter half of 1968 and in 1969 as the result of the new covering under the Flammable Fabrics Act, the enforcement of Rule 36 under the Wool Products Labeling Act and an increase in the number of field investigators.

Compliance Section

The Compliance Section of the Division of Enforcement obtains compliance with Commission cease and desist orders as they are issued under the four Acts administered by the Bureau, directs and analyzes investigations of suspected violations of orders, and refers through the Commission such violations as warrant proceedings for civil or criminal penalties in the Federal District Courts. As of July 1, 1968, the Section had an authorized staff of five attorneys.

FY 1968 commenced with 117 active compliance cases. During the year, new

orders and reopened cases brought the total assignment to 197 cases of which 92 were closed, leaving 105 at the beginning of FY 1969.

A judgment in the amount of \$15,000 was filed during the year in a civil penalty suit. Four other civil penalty suits were pending in various United States District Courts at the close of the year. This phase of the Compliance Section's work is particularly exacting and time-consuming. It requires the preparation of all essential papers to be filed in court and for use in trial and cooperation with the United States Attorneys throughout the proceedings.

It is desirable that as new orders are issued, satisfactory compliance reports be obtained in a maximum of six months. As of June 30, 1968, there were pending 24 such cases more than six months old.

In instances where serious violations of orders are found, full enforcement necessitates proceedings for penalties, not only for the effect on the violating parties but also to operate as a deterrent against others who may be similarly involved. In FY 1968 only one case was prepared for certification to the Attorney General as a civil penalty suit. Some matters which might have resulted in penalty cases were by necessity handled administratively.

In order to insure better and more effective compliance we have planned to re-inspect firms which are under Commission order or which have signed affidavits of compliance to the extent that personnel is available. Inasmuch as most of these orders and affidavits pertain to the labeling of wool, textile and fur products it is necessary to make personal calls on the firms involved to check manufacturing records, invoices covering raw materials, and invoices covering finished products.

At the end of June 1968 the Compliance Section of the Division of Enforcement had approximately 1,500 Commission orders to supervise and police. In addition the Commission recently inaugurated a follow-up plan for checking on affidavits of compliance. It is essential to the enforcement of the statutes to make frequent contacts with the firms and individuals under order or who have signed affidavits of compliance as these firms and individuals for the most part have been the hard core violators.

In order to support the increased work which will originate in the Division of Regulation and to provide a better and more efficient compliance program, \$119,000 is requested for the Division of Enforcement to provide seven additional attorneys and three additional laboratory technicians for fiscal year 1970. These technicians will be required for a substantial increase in the laboratory workload due to the dyed fur program as well as wool and fabric testing that will be required by the addition of the requested investigators in the Division of Regulation.

DIVISION OF REGULATION

The Division of Regulation is responsible for the inspection of textile and fur products in manufacturing establishments and distribution channels in order to protect manufacturers, distributors and consumers against misbranding or false and misleading advertising of these products and to insure consumer safety against the hazard of flammable fabrics. In so doing, not only is the safety and welfare of consumers increased directly but also indirectly in that competition is made fairer by the elimination of certain unfair trade practices.

The labeling, invoicing and advertising requirements of the Wool Act, the Textile Act and the Fur Act together with the policing of the Flammable Fabrics Act are administered primarily through the inspection of mills, manufacturers, importers, wholesalers and retailers of textile and fur products. The present staff of 43 investigators stationed throughout the country give priority to formal investigations of the Division of Enforcement looking toward possible Commission complaints and orders against the hard core violators. The balance of their time is spent on the inspection and education work of the Division of Regulation.

Woven and knitted fabric manufacturing is concentrated for the most part in the eastern section of the country starting in northern New England and extending south to South Carolina, Alabama, Georgia, and eastern Tennessee. The garment manufacturing industry is centered in the New York City area and to a lesser extent spreads into New England, the Central Atlantic States, and some of the southern states. There are also sizable garment manufacturing centers in the Los Angeles, Dallas and the Miami area. The retail trade of the country is scattered throughout all of the major populated centers. The fur garment manufacturing industry is concentrated in New York City and fur retailing for the most part is confined to the East and West Coast and to the northern tier of states.

The Bureau with its present field staff has been able to inspect approximately $\frac{1}{20}$ th of the mills and manufacturers, approximately $\frac{1}{4}$ st of the importers and wholesalers and approximately $\frac{1}{60}$ th of the retail outlets, in its adjusted universe, each year. This is a woefully inadequate coverage and the Bureau's ultimate goal is to reduce the time between the average inspection calls on manufacturers, importers and wholesalers to about once in five years, and to reduce the time between the average inspection calls on retail outlets to about once in eight to ten years. The frequency of inspections in the Bureau's goal is an average, some manufacturers, for example spinning mills, working only on cotton, nylon or some other single fiber need fewer inspections. However fabric mills making blended fabrics in which fiber contents change each season must be inspected at more frequent intervals. Likewise in garment manufacturing the Bureau has found over the years very little misbranding in the men's clothing segment of the garment industry, so less frequent calls need be made on these firms. However on the other hand in the ladies' wear manufacturing of less expensive suits and coats considerably more misbranding has been found. Therefore this segment of the industry must be given closer attention.

Likewise, in retail inspections it has been found that certain types of retail stores need more careful supervision than others. Therefore the type of stores that are more prone to remove or destroy labels, and those more likely to have misbranded merchandise must be called upon more often than those that are usually found with few violations. To illustrate, large department and chain stores handling middle and upper-class merchandise are generally careful of their labeling and advertising practices. However smaller independent stores catering to the lower income group of the community are more indifferent to the labeling and invoicing requirements. It is in this area of low income consumer protection that we propose to expand our efforts.

About a year ago the Division of Regulation arranged with some of the larger retail chain stores for a series of seminars on the labeling and advertising requirements of the Acts administered by this Bureau. The labeling requirements of the Wool, Fur and Textile Acts were carefully reviewed but emphasis was placed on the advertising requirements of the Textile and Fur Acts. These requirements are technical and in some instances are difficult to apply. These seminars have proved to be of considerable help to the retail stores involved and as a result advertising practices have noticeably improved. Because of the success of this program similar seminars have been held with smaller retail chains and it is the plan of the Bureau to continue and increase this activity. In this of group education the increased pay-off of enforcement and consumer protection per dollar cost is most evident.

Currently a crisis is developing in the fur industry. In the summer of 1966 a new process of dressing ranch mink skins was started by a dresser of mink pelts in New York and this new process quickly spread through all of the dressers in the New York area. The new process included the addition of iron or copper salts or a combination of the two metals to the dressing solution. In the beginning relatively small amounts of iron or copper were added and the Commission's investigation of the process indicated that such small amounts of metals stabilized the natural color of the skins. However the dressers soon discovered that by adding an additional quantity of iron or copper or leaving the skins in the dressing solution for a longer period of time or by increasing the temperature of the dressing solution dark ranch mink skins could be made still darker.

In the fur market all other characteristics such as sex, size, color, length and density of the fur, etc. being equal, darker pelts are more desirable and therefore of greater value. The new dressing process made it possible for dressers to take a medium price skin and make it appear to be a much more expensive pelt. This innovation has created havoc in the fur business from the mink rancher down to the retail store.

The Fur Products Labeling Act requires that the labeling, invoicing and advertising of all fur products disclose among other things whether the furs have been "**** bleached, dyed or otherwise artificially colored." While there is no difficulty in testing mink fur for the conventional bleach or dye, the new method or dressing carries the iron and/or copper into the medulla or central canal of the hair and in some way affects the melanin or color granules of the fiber. At present the Bureau is working to develop an improved method of detecting whether questionable furs have been so dressed. After a great deal of research into this subject the Commission held a public hearing on the problem and within the next few months it is expected that Rule 19(e) of the Fur Products Labeling

Act will be in force regulating the amounts of iron or copper allowable in a mink product represented as "natural" in contrast to one described as "color altered."

Rule 19(e) in and of itself will not solve this problem. Whenever a method is found that enhances the apparent value of a mink skin from $\frac{1}{3}$ to $\frac{1}{2}$ or more merely by treating it with metal salts there are bound to be many instances of misbranding and false invoicing. It will be necessary for the Bureau in the future to devote more time of its investigators and attorneys to police this problem in order to protect the honest fur dealer and the consuming public.

The Division's textile and fur investigators in the field perform inspections and counsel businessmen regarding the requirements of the four Acts and the rules and regulations. Administrative handling of minor deficiencies in labeling, advertising or invoicing (as the case may be with the particular Act involved) is performed. Immediate informal correction is often made by the person being interviewed and reported to the headquarters office by the investigator.

In the headquarters office, the staff engages in the several activities to achieve voluntary compliance, renders legal opinions and interpretations, maintains records of continuing guaranties filed under the four Acts, issues registered identification numbers to be used in lieu of the manufacturer's or distributor's name under the Wool, Fur and Textile Acts, and maintains inspection and other records concerning the activities of the Bureau. Another important duty is the drafting of proposed rules and regulations for submission to the Commission for consideration and appropriate action.

Consultation with industry members and their counsel is a continuing responsibility of the attorneys in the headquarters office. This may follow inspection trips by men in the field or prior correspondence with the industry member involved. From time to time representatives of large mills or fiber producers will have their production engineers and counsel check with us on proposed or changed tags, labels, tickets, etc., intended to be sent to the cutters who use these labels on the end products.

In addition to the general duties and responsibilities set out above, the Division of Regulation has close contact with the Customs authorities as well as considerable activity with other governmental agencies. Substantial correspondence and many personal conferences are carried on with organizations such as Better Business Bureaus, Chambers of Commerce and Trade Associations which represent all phases of manufacture and distribution of textiles and furs. All of these activities require the expenditure of a considerable amount of time and are most important in obtaining voluntary compliance by business and industry.

An increase of \$208,000 is requested for the Division of Regulation in fiscal year 1970 to provide six attorneys and eleven investigators in order to reduce the inspection cycle time and to provide more careful supervision of the labeling requirements of the Acts, thereby providing better consumer protection from misbranding violations, together with an increase in fur enforcement and increased industry counseling to achieve more voluntary compliance.

DIVISION OF REGULATION WORKLOAD STATISTICS, FISCAL YEAR 1968

Gross sales of firms inspected	\$9, 025, 947, 000
Approximate inventory of firms inspected	1, 218, 265, 000

	Wool	Textile	Fur	Flammable fabrics	Other	Total
Number of inspections.....	3, 370	5, 196	1, 222	4, 513	25	14, 326
Number of products inspected.....	5, 502, 000	44, 603, 000	164, 000	18, 346, 000	43, 000	68, 658, 000
Number of labeling deficiencies.....	250, 581	2, 969, 334	20, 197	-----	1, 336	3, 241, 448
Dollar value of deficiently labeled products.....	\$5, 505, 000	\$21, 213, 000	\$2, 481, 000	-----	\$7, 000	\$29, 206, 000
Records deficiencies.....	147	356	167	2	-----	672
Invoicing deficiencies.....	-----	475	413	2	6	896
Advertising deficiencies (found dur- ing inspections).....	-----	431	116	-----	10	557
Supplier deficiencies.....	833	5, 030	385	16	20	6, 284
Informal assurances obtained.....	685	1, 642	1, 329	-----	-----	3, 656
Registered numbers issued.....	144	1, 064	94	-----	-----	1, 302
Continuing guaranties.....	206	500	94	961	-----	1, 761
Publications issued.....	3, 619	12, 534	2, 335	1, 651	469	20, 608

Ingoing correspondence.....	16, 756
Outgoing correspondence.....	15, 973

REQUESTED INCREASES, FISCAL YEAR 1970—PROJECTED REGULAR PROGRAMS

	Division of Regulation	Division of Enforcement	Office of Director	Total
Personnel:				
Attorney:				
GS-15.....	1	1		2
GS-14.....	1	1		2
GS-13.....	1	1		2
GS-12.....	1	1		2
GS-11.....	1	1		2
GS-9.....	1	2		3
Laboratory technician:				
GS-13.....		1		1
GS-11.....		1		1
GS-9.....		1		1
Investigator: GS-12.....	11			11
Clerk, stenographer, and typists:				
GS-4.....			6	6
GS-3.....			3	3
Administrative assistant: GS-11.....			1	1
Total.....	17	10	10	37
Personnel compensation.....	\$208,000	\$119,000	\$53,000	\$380,000
Personnel benefits.....				28,000
Travel.....				5,000
Communications and rent:				
Communications.....				13,000
Space rent.....				70,000
Subtotal, communications and rent.....				83,000
Other services:				
Exhibits and testing.....				5,000
Alterations.....				5,000
Stenographic reporting.....				2,000
Miscellaneous.....				5,000
Subtotal, other services.....				17,000
Supplies.....				10,000
Equipment.....				20,000
Total.....				543,000

BUREAU OF FIELD OPERATIONS

	Allotment, fiscal year 1969		Requested, fiscal year 1970		Increase, fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	6	\$87,000	6	\$87,000		
Field offices.....	267	2,838,000	332	3,363,000	65	\$525,000
Total personal services.....	273	2,925,000	338	3,450,000	65	525,000
Travel.....		167,000		204,000		37,000
Total.....	273	3,092,000	338	3,654,000	65	562,000

BUREAU OF FIELD OPERATIONS

The Commission maintains field offices in twelve strategically located metropolitan areas of the Country. These field offices and a small headquarters group constitute the Bureau of Field Operations. This Bureau is the investigative arm of the Commission and its enforcement bureaus. Through the field offices it also serves as a liaison between the Commission and other enforcement agencies of the Federal, State, and local governments. In addition, the field offices are the focal point of contact with the business community and other members of the public. In fact, it is from the field office staff that businessmen and the public generally form their impressions of the Commission and its activities since their contacts with the Commission are limited largely to visits from and communications with staff members of the field offices.

In connection with their investigative activities, the field offices have concentrated on advancing the policy of the Commission to obtain voluntary compliance with the statutes administered by the Commission rather than compliance through means of long and costly adversary proceedings. The field staffs have also striven to help various classes of consumer-citizens to protect themselves from being exploited by fraudulent and unethical practices of some business men through knowledge of their methods of operations. In pursuance of this objective, the staff have, largely on their own time, prepared and conducted seminars and conferences, appeared on TV and radio programs, and have made speeches before senior citizens, high school and college classes, ghetto workers and residents, and other interested groups dealing with deceptive practices and unfair methods of competition engaged in by some members of the business community.

The Bureau of Field Operations weathered a severe loss of investigative personnel during Fiscal 1968, but still maintained a creditable performance of all levels of its operation. The Bureau started Fiscal 1968 with 160 field attorneys. During the year the Bureau lost the services of 40 attorneys or 25% of its investigative staff and hired 34 or 21% for a net loss of 3¾%. The number of investigating attorneys on the field payroll at the end of the fiscal year (June 30, 1968) was 154. There was an average number of attorneys of 162.5 for the entire fiscal year, largely due to the staffing for the September 30 quarter of 1967 which reached 171 attorneys. Since then, however, there has been a continuing decline notwithstanding strenuous efforts to maintain staffing at a normal level. While the loss of attorneys in the field involved some deaths, retirements, and transfers, the greater percentage resulted from resignations of attorneys desiring to engage in the practice of law in the private sector. The affluent society with its increasing demand for lawyers makes it extremely easy for young lawyers to obtain much higher remuneration from non-governmental connections notwithstanding the raises that Congress recently made available to government employment in an effort to equalize government pay with private industry.

The workload of the field offices for the fiscal year 1968 was:

Pending cases beginning of year-----	921
Referral to field for investigation-----	991
Total cases in field during year-----	1912
Cases completed-----	1134
Pending July 1, 1968-----	778

While the workload of the field for the fiscal year dropped somewhat, this was largely due to a decrease, as compared with the previous year, of 333 in the number of matters referred to the field offices for investigation. Some of the field offices still have large backlogs, however, due largely to the turnover in trained personnel and the need for hiring and training new men. The number of completed investigations, i.e., 1134 cases, compares favorably, however, with 1129 for the previous year.

In connection with its investigations, the field offices conducted 39 investigational hearings, negotiated affidavits of discontinuance in 128 matters and prepared complaints and consent orders in 58 cases. Consent settlements were negotiated with respondents in 45 of these 58 matters. In addition the staff negotiated settlements in 117 other consent order cases which were prepared by the headquarters staffs of the enforcement bureaus.

The investigations made by the field offices are the more formal aspect of the work of the Bureau of Field Operations. As heretofore indicated the field offices and their staffs act as the principal point of contact with the public, including the business community as well as the consumer. In this connection, the field offices received 1734 written complaints and 3490 oral complaints of alleged violations from businessmen, trade associations, consumers and others, of which 1105 written and 326 oral matters were referred to headquarters for attention. The field offices were able to dispose of 579 written and 3116 oral complaints on an informal basis.

In addition, there were 11,989 other inquires and contacts from the public concerning the work of the Commission and the statutes it administers. To further acquaint the public including educational, trade and consumer groups with the

scope of the Commission activities and the kinds of unethical business practices that are violative of the statutes it administers, the field offices furnished speakers on 238 occasions during the year. The field offices maintained a continuing liaison with Better Business Bureaus, Chambers of Commerce, and attorney generals and other officials of various State agencies. Particular attention was given to contacts with the various offices of the OEO and other legal aid agencies dealing with the ghetto and poverty problems.

Based on the projections of the various enforcement bureaus and the investigative programs charted by the Commission for fiscal 1970, and the experience of the Bureau of Field Operations with its investigative activities, an additional 50 field attorneys and 15 clerical stenographic personnel are requested together with supporting costs totaling \$698,000 for fiscal 1970 as follows:

Increases requested fiscal year 1970

PERSONNEL

Attorney:	
GS-12 -----	8
GS-11 -----	12
GS-9 -----	30
Clerk-Stenographers:	
GS-4 -----	15
Total -----	65
Personnel Compensation -----	\$525, 000
Personnel Benefits -----	39, 000
Travel (Est. minimum 25 days per man) -----	37, 000
Transportation of things -----	8, 000
Communications and Rents:	
Communications -----	\$7, 000
Space Rental -----	36, 000
Total -----	43, 000
Supplies and Materials -----	8, 000
Equipment -----	38, 000
Total -----	\$698, 000

BUREAU OF INDUSTRY GUIDANCE

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director -----	17	\$156, 000	19	\$166, 000	2	\$10, 000
Division of Industry Guides -----	23	346, 500	26	374, 500	3	28, 000
Division of Advisory Opinions -----	7	145, 500	8	159, 500	1	14, 000
Division of Trade Regulation Rules -----	12	147, 000	14	166, 000	2	19, 000
Total, personal services -----	59	795, 000	67	866, 000	8	71, 000
Travel -----		2, 000		2, 000		
Total -----	59	797, 000	67	868, 000	8	71, 000

Through the Bureau of Industry Guidance, the Commission endeavors to obtain industrywide voluntary compliance with statutes it administers by informing and guiding businessmen as to the requirements of such statutes. The Bureau is comprised of three Divisions, each using a different technique to accomplish this vitally important phase of the Commission's work. In carrying out its objectives, the Bureau not only counsels, guides and advises businessmen as to legal requirements applicable to various business practices, but also affords the business community the opportunity to discontinue, voluntarily, unlawful practices and thereby avoid the expense and delay of litigation.

The procedures utilized by the Bureau call for (1) the issuance and administration of industry guides which interpret statutory provisions as applicable to practices of particular industries or practices common to many industries, (2) promulgation of trade practice rules defining specific practices considered to be unlawful and upon which the Commission may rely in litigated cases, (3) the preparation of advisory opinions concerning proposed courses of action, which are binding upon the Commission. These procedures are utilized, respectively, by the Division of Industry Guides, the Division of Trade Regulation Rules and the Division of Advisory Opinions.

During its history of almost fifty years, the concept of industrywide voluntary compliance has repeatedly proved its effectiveness. The program was significantly enhanced in 1962 with the addition of the trade regulation rule and the advisory opinion. As presently constituted, the program provides businessmen an extraordinary opportunity to assess the legality of business programs from their very inception and to make such corrections as may be necessary, in concert with their competitors, to assure that Commission administered laws are observed. When the industrywide voluntary compliance concept is utilized to its fullest extent, not only the business community but consumers and the national economy itself benefit. Fair and equitable competitive conditions prevail in the marketplace and assist to promote and maintain a prosperous business climate. Consumers are afforded the opportunity to make informed purchases, pick out the best buy and avail themselves of legitimate savings, secure in the knowledge that manufacturers and sellers intend to stand behind guaranteed merchandise to the limit of what they have promised.

In fiscal year 1968 the entire industry guidance program continued to be highly effective. The Bureau, operating at essentially the same manpower level as during the previous year, increased the number of advisory requests processed and forwarded to the Commission, increased the number of staff level interpretations given in response to inquiries and also was able to obtain an increased number of Assurances of Voluntary Compliance whereby businessmen voluntarily agreed to discontinue unlawful practices. A number of new industry guides and trade regulation rules were adopted and staff work on several other sets of proposed guides and rules had been completed and the matters were under active consideration by the Commission at the close of the year. Two policy and enforcement statements were made public and a large number of new advisory opinion digests were released.

The program for fiscal year 1970 calls for an intensification of effort along dual lines to help maintain competition and to provide meaningful and effective consumer protection. In conjunction with the consumer protection program, staff efforts will be directed toward alerting consumers to problems known to exist in the marketplace, thereby offering them guidance and assistance in the recognition and avoidance of such problems. This objective will be accomplished in a number of ways including the preparation of consumer-oriented pamphlets on selected subjects. In the past, the Commission has issued policy and enforcement statements directed primarily to industry but which, if given wider circulation, would permit the general public to take cognizance of known problem areas. In addition, when drafting industry guides in particular, attention will be paid to placing them in appropriate formats which will further the industry guidance program while at the same time offering useful information to the general public.

The 1970 program has been designed not only to deal with current anticompetitive and deceptive practices problem areas known or suspected to exist, but within this framework of reference, to deal effectively with problems having important economic and social significance. In this regard, due attention has been paid to unlawful practices which affect consumer health and safety or which are directed at the poor and the aged. At the same time, suspected discriminatory practices in important industries will be given careful consideration and treatment.

OFFICE OF THE DIRECTOR

The Office of the Director has general supervision over the work of the Bureau's three Divisions. It also supervises the work of the Bureau's central record room and stenographic pool.

Increases Requested

In order to expeditiously assist the professional staff of the Bureau's three Divisions \$10,000 is requested for the two GS-4 clerical positions.

DIVISION OF INDUSTRY GUIDES

This Division is responsible for administering the Commission's Guides program, the primary objective of which is to obtain expeditious industrywide voluntary compliance with laws administered by the Commission. Its work falls in four main categories: (1) the establishment of Guides, (2) furnishing advice and guidance concerning the provisions and applicability of the Guides, (3) obtaining through continuous administration of the Guides the greatest possible degree of voluntary compliance with the provisions thereof, and (4) special projects.

Accomplishments—Fiscal 1968

Establishment of Guides—New Guides for the *Watch Industry* were adopted by the Commission to deal with a number of problems which have troubled the industry in the marketing of its products, including misrepresentation of metallic composition of watchcases, claims of durability or suitability, claims of protective features and deceptive claims as to jewels in watch movements.

The Commission promulgated a Guide Against Deceptive Use of the Word "Free" in Connection with the Sale of Photographic Film and Film Processing Service. This Guide is intended to eliminate deception arising from continuous use of the word "free" in the advertising and sale of photographic film processing service.

Four new sets of Guides were released, in proposed form, for the purpose of soliciting public comment on the provisions thereof. Two of the proposed Guides, those for the *Toy Industry* and the *Greeting Card Industry*, deal primarily with practices involving price discrimination and the granting and receiving of different forms of promotional assistance. The two other sets of proposed Guides, for the *Dog and Cat Food Industry* and the *Decorative Wall Paneling Industry*, deal in general with deceptive practice problems.

Staff work on proposed Guides for the *Beauty and Barber Equipment and Supplies Industry* was completed and the Guides were being considered by the Commission at the close of the year. These guides cover practices falling under Section 2 of the amended Clayton Act as well as problems of consumer deception.

Proposed Guides for the *Ladies' Handbag Industry* will be released for public comment during fiscal year 1969. These Guides deal with problems arising from misrepresentation and deception as to material composition of industry products, finish, graining, embossing and processing, and misuse of such terms as "scuff-proof" and "scratchproof".

Special Project and Assignment—A policy and enforcement statement was issued affecting practices in the phonograph record industry. The statement advised that the Commission would take steps to prevent the terms "stereo" and "stereophonic" from being deceptively applied to recordings which were derived from the re-recordings of single channel monophonic phonograph records and which only simulate a stereophonic effect.

A second policy and enforcement statement was issued announcing that Commission action would be taken with respect to misrepresentation of curios, souvenirs, gifts, novelties and toys as genuine and authentic *products of American Indian craftsmanship*.

At the close of the year, the Commission was considering issuance of a third policy and enforcement statement intended to preclude deceptive statements of the safety of *chemical de-icers* and to require disclosures in advertising and labeling of the possible damage to concrete surfaces which may result from application of the products.

Amendment of Guides—Two existing sets of Guides, the *Tire Advertising and Labeling Guides* and *Guides Against Debt Collection Deception* were amended during the year.

Compliance—Surveys designed to enhance the effectiveness of the *Guides for Shoe Content Labeling and Advertising*, *Guides Against Debt Collection Deception*, *Guides for the Household Furniture Industry* and *Guides Against Deceptive Advertising of Guarantees* were continued with satisfactory results achieved through voluntary abandonment of questionable practices on the part of various industry members.

Four hundred and forty-seven alleged violations of Commission administered laws were given attention to and disposed of by the Division. Of this total, 333 matters were disposed of on the basis that the practices in question had been discontinued and would not be resumed.

At the close of the fiscal year, 411 matters were pending for disposition.

PROGRAMS FOR FISCAL YEARS 1969 AND 1970

Projects, type of action	Estimated man-years			
	1969	1970	1971	1972
Promulgation of guides and compliance.....	4.5	7.0	8.5	9.0
Guide revision and compliance.....	2.5	2.5	2.5	2.5
Guide revision.....	3.0	3.0	3.0	3.0
Compliance with guides.....	2.5	2.5	2.0	2.5
Day-to-day compliance activity under guides, special projects and assignments, and interpretive work under guides.....	8.5	9.0	9.0	9.0
Total man-years.....	21.0	24.0	25.0	26.0
Total man-years available.....	21.0			

Increases Requested

The programs planned for fiscal year 1970 will require an increase in funds of \$28,000 to provide for three additional attorneys in the following classifications: two GS-9 and one GS-12.

Work Programs—Fiscal 1970

CONSUMER PROTECTION

The Division's 1970 program to protect consumers has been devised to deal directly and realistically with current problems in the marketplace. Particular attention has been paid to misleading and deceptive practices aimed at marginal economic groups, the infirm and the elderly and two major problem areas have been singled out which appear susceptible of treatment under the techniques available to the Division. The program also envisions a continuing effort to eradicate such problems as deceptive pricing and the false and misleading advertising of guarantees and warranties which plague virtually the entire consumer community.

Guarantees and Warranties for Major Home Appliances—This program will be developed in line with the President's Consumer Message of February 1968, to have guarantees and warranties of major home appliances say what they mean and mean what they say, and to seek ways to improve repair work and servicing. The program, which will be participated in by the President's Advisor on Consumer Affairs and the Department of Commerce, will look toward the preparation of guidelines concerning such guarantees and warranties.

Earn Money At Home Offers—Guides Against Deceptive Advertising of Earn Money At Home Offers will be formulated during fiscal year 1970. Much of the advertising of these offers is aimed at low income groups, the shut-in and the elderly, offering apparent opportunities for performing work in one's home. Generally, the advertising contains statements grossly overestimating the amount of money which can be earned and fail to disclose that consumers are required to purchase merchandise in order to engage in work projects within their homes. Preliminary information indicates that many who attempt to avail themselves of these offers usually invest social security funds, retirement monies and unemployment compensation funds.

Guide Against Deceptive Use of the term "Wholesale"—With the advent of discount selling throughout the country in recent years, a growing number of merchandisers, in order to gain a competitive edge, have adopted the practice of advertising "wholesale" prices to indicate sales below discount as well as conventional prices. This has become particularly true in connection with the marketing of certain products such as carpeting, watches, and jewelry, and sporting goods. In addition, this practice is widely used by some mail order merchandisers. Proposed Guides in this area will spell out "wholesale" price.

Lawn and Garden Power Equipment—Formulation of Guides for this \$300 million dollar industry, which has grown at a startling rate during the past twenty years, will have as a basic objective the elimination of unfair methods of competition and deceptive practices including false and misleading representations as to the quality, capability and performance of products, the conformance of products' design to recognized standards, the use of deceptive guarantees or the failure to set forth terms and conditions of guarantees, fictitious pricing claims and misrepresentations as to savings.

Food-Freezer Plans—Staff study will be commenced for the purpose of preparing a consumer-oriented pamphlet designed to advise families of deceptive

practices which are being utilized in the sale of food-freezer plans. This project is deemed to be of significant importance due to recent disclosures indicating that such deceptive practices are particularly widespread in inner city areas, and directed primarily at the poor and needy. Practices known to exist include misrepresenting that food requirements and freezers may be purchased for less than food alone through conventional outlets, misrepresenting "Utility" grade meats as being U.S. inspected "prime" and "choice" grades, misrepresenting that food freezers are built to commercial standards, falsely characterizing food prices as "wholesale" prices, failing to disclose all terms and conditions of contracts which purchasers must sign and failing to advise that contracts may be sold or discounted to third parties by the operator of the plan. Other practices include representing falsely that food sold is nationally advertised brands, that freezer plans are balanced to meet nutritional requirements and are prepared by "home economists" or "consultants" contrary to the facts, and misrepresenting that food freezers are fully or unconditionally guaranteed.

Work toward the issuance of Guides in other significant industries and products will also be carried on during the year in such areas as deceptive advertising of *Cut Carpet Sizes*, *Household Metal Cookware*, and *Simulated Stone, Marble and Related Products*.

Special Compliance—Household furniture Industry—During fiscal year 1969 the existing Guides for the Household Furniture Industry will be revised in order to deal with current industry practices. Upon completion of this revision project the continuing compliance program in this multi-billion dollar industry will be carried forward for the purpose of persuading the industry as a whole to revise labeling and advertising practices.

Watch Industry—Revised Guides for the Watch Industry were promulgated at the close of fiscal 1968. In order to insure widespread industry compliance with the new Guide provisions, a concerted compliance effort carried through fiscal year 1970 will be necessary.

Debt Collection Industry—A continuing survey of the practices of the 2,500 members of this industry is being conducted in connection with the Guides Against Debt Collection Deception. In order to insure the effectiveness of these Guides as well as to assure equitable treatment of industry members who have already revised their practices, the compliance effort will be continued through fiscal year 1970.

Tire Industry—The current compliance program being conducted in connection with the Tire Advertising and Labeling Guides will be continued through the program year to eliminate, as far as possible on a voluntary basis, deceptive pricing and guarantee representations, as well as representations as to grade, line, level, quality and safety of automobile tires.

Paint Industry—After formulation of Guides for this industry in fiscal 1969, a compliance program extending through fiscal year 1970 will be initiated to insure compliance therewith. Special attention will also be given to compliance with Guides now being revised in such important consumer industries as: *Residential Aluminum Siding*, *Combination Storm Window & Door*, *Orthopedic Appliances*, *Artificial Limb*, *Private Home Study Schools*, and others.

General Compliance Programs—In addition, a compliance program will begin subsequent to the promulgation of *Guides to eliminate deception in referral selling*, to be completed in fiscal year 1969, and compliance programs will be continued in connection with the Guides for the *Jewelry Industry* and the *Deceptive Advertising of Guarantees*. With respect to this last set of Guides, as misleading guarantee advertising problems are eased in one industry, attention is directed toward obtaining such compliance in other industries where problems are known to exist. This continuing activity is occasioned by the multiplicity of products currently sold under guarantees and the failure of manufacturers to adequately disclose the nature, extent and limitations of such guarantees. It is also planned to include the *New and Used Automotive Replacement Parts Industry*, the *Home Heating Furnace Industry* and the *Central Air Condition Industry*.

Advertising Handbook—In order to assist copywriters in the preparation of advertising material, a handbook of "do's and don'ts" will be prepared, setting forth in a general manner the substance of statements by the Commission and courts which should be given consideration in the preparation of non-deceptive advertising. It will provide the advertising community with a reference work which, in one volume, deals with such diverse questions as the advertising of prices and guarantees, how to prepare advertising formats to avoid misleading the public, and other problems.

MAINTAINING COMPETITION

While many of the existing industry guides contain provisions dealing with different types of discriminatory practices generally arising under Section 2 of the Clayton Act as amended by the Robinson-Patman Act, during fiscal years 1969 and 1970 new programs and companion compliance efforts will be directed toward alleviating current problems found to exist in various industries.

Tobacco Auction Markets—A proceeding will be initiated to spell out guidelines to advise industry members on how to legally regulate the orderly administration of space and selling time on tobacco auction markets. Essentially, industry members will be advised of the steps which must be taken to prevent discrimination and unreasonable restriction of entrance and selling time of new warehouses in the tobacco markets. This will affect 200-300 boards of trade throughout the country and have significant effect on competitive and economic conditions in tobacco auction markets.

Broadloom Carpet Industry—Information presently available indicates that discriminatory pricing practices in violation of Section 2(a) of the amended Clayton Act may be widespread in the broadloom carpet industry. It is also believed that violations may exist with respect to Sections 2(d) and 2(e) of the same Act. If such be the case a proceeding will be initiated.

Toy Industry—Proposed Guides for the Toy Industry Relating to Discriminatory Practices will be adopted during fiscal year 1969, dealing specifically with various forms of price discrimination in that industry as well as problems arising in connection with the granting and receiving of various forms of promotional assistance. Because of the relatively large number of members in this industry (1,230 firms), a fruitful and satisfactory compliance program cannot be conducted on a short term basis. The compliance program for this industry will run at least through fiscal year 1970.

Athletic Goods Industry—New Guides for this industry will be promulgated during fiscal year 1969 to replace the 1931 trade practice rules. One of the major thrusts of the new Guides will be toward elimination of price discrimination. A concerted compliance effort will be undertaken in this \$700 million dollar industry in fiscal year 1970.

DIVISION OF TRADE REGULATIONS

The Trade Regulation Rule, the newest of the Commission's industrywide procedures, was designed to eliminate and prevent unlawful practices on a broad, industrywide basis without the expense of costly litigation. Trade Regulation Rules express the judgment of the Commission concerning the substantive requirements of the statutes it administers and, as such, are expected to be observed by all persons to whom they apply. If litigation is necessary thereafter as to any recalcitrant industry member, the Commission may rely upon a Trade Regulation Rule to resolve any relevant issue therein, provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the Rule to the particular case.

Accomplishments—Fiscal 1968

During the fiscal year the Division was actively engaged in ten rulemaking proceedings and giving study to four additional potential rulemaking matters. During the year three final Trade Regulation Rules were promulgated by the Commission concerning the following matters:

- (1) Skin irritation resulting from the handling of glass fiber fabrics;
- (2) Deception as to transistor count of radio receiving sets; and
- (3) Discriminatory practices in men's and boys' tailored clothing industry.

I. MATTERS OF INTEREST IN THE FIELD OF CONSUMER PROTECTION

One of the proceedings in this field concerned the Glass Fiber Curtain and Drapery Fabric Industry which consists of approximately 1100 manufacturers producing roughly six million sets of curtains and fifteen million pairs of draperies valued at approximately sixty million dollars at the manufacturing level. The Rule was promulgated and at the year's end the compliance survey had been initiated. The Rule requires disclosure that skin irritation may result from washing and handling of glass fiber curtain and drapery fabrics.

Another Rule promulgated during the year concerned deceptive transistor count. The practice involved concerned the inclusion in transistor count of dummy transistors and diodes and other transistor devices which do not perform the customary function of detecting and amplifying radio signals. There are

approximately 200 manufacturers, both foreign and domestic doing an annual business at the factory level of one hundred ninety million dollars.

Five other proceedings were worked on during the year which were not finalized. Subsequent to the publication of the Notice in the non-prescription Systemic Analgesic Drug proceeding, the Commission's authority to write Trade Regulation Rules was challenged in the court. In June 1968, the U.S. District Court for the District of Columbia entered its Order dismissing the Complaint filed against the Commission and at the year's end the record accumulated thus far was receiving active consideration. This proceeding is designed to protect consumers as to false and misleading advertising claims as to the efficacy of analgesic products.

Another matter initiated during the year related to the practice by the Extension Ladder Industry of misrepresenting the length of their products. At the year's end a recommended proposed Rule and Notice to appear in the Federal Register was under consideration by the Commission.

Another rulemaking effort relates to the advertising of Economic Poisons. A Notice of Proposed Rulemaking, including a proposed Rule, was published in the Federal Register in January, 1968. The Rule is intended to eliminate advertising claims with respect to Economic Poisons which may represent a very serious public health problem. Currently the public record which has been accumulated is being analyzed. This industry is of considerable magnitude as is evidenced by the fact that retail sales of pesticides in 1967 amounted to 1.4 billion dollars and retail sales of other types of economic poisons which would be covered by the Rule amounted to 4.5 billion dollars. There are approximately 4500 producers of economic poisons.

A rulemaking proceeding which directly protects consumers relates to Aerosol Spray products which are used for frosting beverage glasses. These products when misused are extremely hazardous and may cause death due to asphyxiation or the freezing of the larynx. A proposed Notice of Rulemaking, including a proposed Rule was published in the Federal Register during the year. This Rule would require disclosure of the hazards of inhaling quick-freeze aerosol spray and would be designed to eliminate the loss of life as a result of the misuse of these products.

Finally, a Rule designed to protect consumers relates to deceptive wattage claims and other forms of misrepresentation believed to be prevalent in the Home Entertainment Industry. As of the end of the year, considerable time had been expended on this as well as other projects and it is anticipated that it will be presented at the Commission during the first half of FY 1969.

II. RULEMAKING IN THE FIELD OF RESTRAINTS OF TRADE

Of major interest is the proceeding involving the Men's and Boy's Tailored Clothing Industry which consists of 635 manufacturers doing about two billion dollars in net volume of shipments annually. The practice under consideration concerned widespread violations of sub-sections (d) and (e) of Section 2 of the amended Clayton Act. The final Rule was promulgated during the year and a survey to determine the manner and extent of compliance is receiving active consideration.

A rulemaking proceeding which received considerable attention during the year and which if initiated would be designed to maintain competition relates to promotional practices in the Man-made Fiber Industry which are believed to be violative of sub-sections (d) and (e) of Section 2 of the Clayton Act as amended. The Synthetic Fiber Industry is a giant. It consists of approximately 44 companies with 1964 plant sales in excess of two billion, three hundred eighty million dollars. At the year's end the staff work has been completed in this project and its report to the Commission about to be made.

It is expected that a rulemaking effort relating to promotional assistance practices by the Major Electric Appliance Industry will be completed during the first half of FY 1969. This sizable industry consists of approximately 45 manufacturers and 800 distributors with annual sales approximating 4 billion dollars.

III. COMPLIANCE PROGRAMS

In addition to the compliance programs initiated in the Men's and Boys' Tailored Clothing Industry and Glass Fiber Drapery and Curtain Industry spot checks were made on the Trade Regulation Rules heretofore promulgated. Information received during the various survey and spot checks show that generally the practices prohibited by the various rules have resulted in the elimination of such practices.

IV. SPECIAL ASSIGNMENTS

As a result of an application for a Trade Regulation Rule relating to price discriminations in the Rug and Carpet Industry the Commission directed the under Section 6(b) of the Federal Trade Commission Act by a representative number of members of the industry to ascertain whether there appears to be a pattern of price discriminations in the sale of these products. At the year's end the 6(b) reports filed by the recipients of the Orders were being analyzed by the staff in compliance with the Commission directive.

Still another special project worked on during the year relates to the advertising of manufacturers of automobiles which emphasize power, high speed potential, and racing themes. Pursuant to Commission directive of April 1967, letters were sent to the four major manufacturers alerting them to areas of advertising the Commission may find objectionable and advising them that they had six months wherein to take corrective action. A monitoring program of the advertising of the industry is currently in effect. At the completion of this effort recommendation will be made as to what action, if any, would be appropriate.

PROGRAMS FOR FISCAL YEARS 199 AND 1970

Projects—Type of action	Estimated man-years			
	1969	1970	1971	1972
Rulemaking and compliance.....	10	11	11	11
Special matters.....	1	2	2	2
Total man-years.....	11	13	13	13
Total man-years available.....	11			

Increases Requested

In order to adequately carry forward the planned program for fiscal year 1970, an additional \$19,000 is requested to provide two attorneys; one GS-12 and one GS-9.

Work Programs—Fiscal 1970

The major goals and objectives of the Division of Trade Regulation Rules for the fiscal year 1970 will continue to be directed to and concentrate on matters of consumer protection in special fields and the elimination of trade restraints. In the latter field, emphasis has been placed on the promulgation of rules to correct practices involving discriminatory pricing and advertising allowances under Sections 2(a) and 2(d) of the amended Clayton Act. With respect to consumer protection, particular emphasis is centered on programs affecting health and safety for consumers and the curtailing of offensively deceptive practices.

Once a Trade Regulation Rule is issued, the work of the Division does not end. Normally a period of six to twelve months intervenes between the adoption and effective date of a Rule. This is the period of counseling and interpreting during which the staff assists affected parties. Thereafter a compliance program is undertaken. The procedure usually followed is to write to affected parties approximately sixty days before the effective date of the Rule reminding them of the Rule requirements and offering our assistance if needed. On the effective date, a second letter follows requesting these parties to show the manner of their compliance with the Rule. This is usually followed by such activity as continued monitoring of advertising and periodic spot checks with industry members.

MAINTAINING COMPETITION

New Projects

Dry Bakery Products.—The Commission continues to be faced with price and promotional allowance discriminations under Sections 2(a) and 2(d) of the amended Clayton Act in the Dry Bakery Products Industry. Prior proposals for a Rule have been held in abeyance pending further Commission action in the National Biscuit case, which it is believed will be terminated so that the staff can go forward on a Rule in FY 1970. The industry, while spread among 286 companies, is dominated by the three largest members (National, Sunshine, and United) who do approximately three-fourths of the total value of shipments.

Vend-Pak Products.—This industry is a companion of the Dry Bakery Products Industry. The only distinction between the two is that the product line in this industry is distributed through vending machines. Otherwise, the same problems plague the industry, and in the promulgation of a Dry Bakery Products Rule, the Vend-Pak Industry may be included.

Magazine and Book Distribution.—In the distribution of magazines, books and periodicals there exist some elements of vertical territorial restrictions, price fixing by national publishers and distributors, and exclusive dealing on the part of wholesalers and distributors. These practices as presently brought to our attention have the effect of foreclosing entry in the market and other aspects of monopolization. Some extensive preliminary studies will have to be undertaken prior to formulating rulemaking procedures, but the practices by their nature warrant priority consideration with due regard to this Division's investment of manpower and financial resources.

Compliance Program

Synthetic Fibers.—This proceeding is designed to maintain competition relative to promotional practices in the Man-made Fiber Industry which are believed to be violative of Sections 2(d) and 2(e) of the amended Clayton Act. It is contemplated that a Rule will be adopted during fiscal year 1969 and that efforts to obtain compliance with the Rule will continue through fiscal year 1970. Involved is discriminatory promotional allowances for such fibers as Nylon, Dacron, Fortrel, Kodol, and others.

Men's and Boys' Tailored Clothing.—Continuing survey and compliance work for this industry, involving some 635 manufacturers doing about two billion dollars annually in net volume of shipments, will receive active consideration.

Boys' Apparel.—A Rule dealing with violations of Sections 2(d) and 2(e) of the amended Clayton Act will be promulgated during fiscal year 1969. Need for such a Rule is indicated by the fact that industry members generally fail to furnish written promotional plans. Inasmuch as this industry has approximately 300 members, survey and compliance work to insure effectiveness of the Rule will continue through FY 1970.

Knitted Outerwear.—As is the case in the two aforementioned industries, a rulemaking proceeding will be completed during fiscal year 1969 to discourage and prevent violations of amended Clayton Act Sections 2(d) and 2(e) through failure to use written promotional plans. A compliance program will be inaugurated during fiscal year 1970 and, because of the size of the industry (1,100 manufacturers with one billion dollars in annual sales), such program will extend through FY 1970 and beyond.

Special Projects

Rugs and Carpets.—During the program year, the Division will continue to devote staff time to the Special Reports being filed by industry members at the direction of the Commission. Due to the fact that the material being submitted by the industry requires detailed analysis by the staff to determine whether practices of the industry warrant treatment under the trade regulation rule procedure, it is anticipated that preliminary work preceeding the preparation of a report to the Commission will not be concluded until fiscal year 1970. Further, if it is determined that a rulemaking proceeding is necessary and should be initiated, work on the project may well continue beyond the program year.

CONSUMER PROTECTION

New Projects

Crankcase Additives.—This matter relates to false and deceptive claims for various chemical preparations to be added to lubricating oil of automobiles. Preliminary scientific evidence indicates that most, if not all, such oil additives are of dubious value, some are harmful and most are useless. There are an estimated 121 producers of oil additives, doing approximately 146 million dollars annually.

Power Tools.—The protection of consumers from the shock hazards of household electrical tools and appliances throughout possible promulgation of a Trade Regulation Rule is contemplated in fiscal year 1970. It is expected that this project will follow-up matters considered by the National Commission on Product Safety. The industry involved is tremendous, both in number of manufacturing members and value of shipment of products (estimated at 147 million dollars).

Toothpaste.—Recent television commercials seem to indicate that dentrifice manufacturers are engaged in all-out campaigns claiming that their toothpaste will produce "whiter" teeth, rather than extolling the capabilities of the dentrifice to reduce cavities and clean teeth generally. Involved in this proceeding could be some 20 dentrifice manufacturers, doing over 180 million dollars annually in sales.

Chemical Silver Cleaners.—Dangers exist in the indiscriminate use of this type of silver cleaners. Such cleaners do not polish silver, they simply remove tarnish. Since such cleaners usually contain a poisonous chemical (thiourea or cyanide) they should not be used for cleaning silver pieces that come into contact with food. A proceeding looking to adequate warning of consumers of dangers inherent in such cleaners will be undertaken.

Compliance Program

Major Electrical Appliances.—Rulemaking and compliance relative to violations of Sections 2(d) and 2(e) of the amended Clayton Act is also noted in the Major Electrical Appliance Industry, which consists of approximately 45 manufacturers and 800 distributors doing an annual sales volume of about four billion dollars.

Automotive Lubricating Oils.—In many instances consumers are being offered for use in their automobiles low grade virgin lubricating oils, which are not fit for the high speed, high compression engines used in late model cars. Clearly defined minimum standards for lubricating oils will serve to protect consumers in the operation of their automobiles. Annual sales of lubricating oils run well over one billion dollars annually, with a significant amount being offered in the low grade oils.

Light Bulbs.—Disclosure of lumen output and designated life of electric light bulbs commonly used in homes is the subject of this proceeding. The compliance survey will require examination of sales promotional material, labeling, packaging and advertising to assure proper informational disclosure. There are approximately 27 domestic manufacturers of light bulbs, in addition to about 15 private label dealers and importers, whose products are sold throughout a wide variety of stores.

In addition special compliance attention will be given to existing Trade Regulation Rules covering deceptive practices affecting products such as *Stainless Steel Tableware, Cookware, Permanent Press Wearing Apparel, and Automobile Air Conditioners.*

Rules planned to be issued in 1969 will also receive special attention in 1970 and will include the Glass Fiber Draperies, Curtains and Fabrics, Pesticides, Deceptive Transistor Count (Radios), Analgesics, and others previously discussed.

DIVISION OF ADVISORY OPINIONS

The Division of Advisory Opinions prepares, for the Commission's consideration, proposed advisory opinions in response to requests of individuals, partnerships and corporations. These opinions discuss the legality of proposed courses of action and, when finally rendered, are binding upon the Commission. The Agency retains a right to rescind any opinion, however, should subsequent developments indicate a necessity for so doing. The advisory opinion procedure is offered to businessmen to assist them in avoiding use of practices which may be contrary to laws administered by the Commission.

Accomplishments—Fiscal 1968

While the total requests for advice remained about the same as the number received during the preceding year, 173 processed requests for advisory opinions were forwarded to the Commission. This number compares with the 131 requests forwarded during the preceding year. One hundred and thirty-six opinions were issued by the Commission during the year, representing a substantial increase over the eighty-three opinions issued during fiscal year 1967.

Incoming requests dealt with questions arising under practically all of the numerous statutes administered by the Commission. Most of them, however, came within the scope of the Federal Trade Commission Act and the amended Clayton Act and involved either actual or potential trade restraints or actual or potential deceptive practices.

The questions presented and the opinions rendered by the Commission involved many problems having a high degree of economic or social impact, and involving

complex issues of law. In this regard, in the area of trade restraints, the Commission affirmatively granted opinion clearance to two requests concerning proposed mergers, while disapproving six other merger proposals.

One of the affirmative opinions granting merger clearance followed Commission policy to encourage the growth of regional dairies by permitting a small dairy to be acquired by a somewhat larger regional company. The other opinion approved a proposed combination of two moderately sized building materials corporations which were not in competition with each other since each served different customers in different geographical areas.

An opinion of considerable social and economic significance dealt with a problem faced by minority groups in ghetto areas. The problem in question involved one group of manufacturers who were contemplating an offer to extend credit terms to residents in ghetto areas to assist in establishing retail stores. The applicants were concerned, however, that such an offer might occasion violation of the Robinson-Patman Act's prohibition of price discriminations. Drawing upon its knowledge of competitive conditions within the industry in question, the Commission, through an advisory opinion, was able to open the way for manufacturers to help put minority people into new businesses of their own. As a result, approximately 20 million dollars will be allocated, on extended repayment terms, for some 500 new stores, owned and operated by those who dwell in the inner city in ghetto areas.

Other opinions rendered during the year ranged across such diverse subjects as drug advertising, disclosure of foreign origin of imported products, selective leasing of shopping center space, and computerized collection and dissemination of marketing information, among others.

During the year the Division vigorously implemented an earlier Commission decision to make public digests of its advisory opinions whenever possible. Many businessmen have advised that publication of these digests has been instrumental in persuading them not to embark upon a questionable course of business action which they might have otherwise pursued had not they been made aware of the fact that the Commission regarded the practice in question to be illegal.

Program for Fiscal Year 1970

While the workload of the Division of Advisory Opinions is primarily dependent upon requests for opinions from the business community, it is anticipated that approximately 200 requests will be processed during fiscal year 1969 and that this figure will be exceeded in FY 1970.

In addition, the Commission has recently taken action to require recipients of advisory opinions granting clearance to tri-partite promotional programs, to file compliance reports within six month. Considerable staff time will be invested in processing the forty reports to be rendered to the Commission in connection with currently outstanding advisory opinions. Further, this action will be followed in the future with new advisory opinions dealing with questions arising in connection with Sections 2(d) and 2(e) of the amended Clayton Act.

In this connection, proposed revised Guides for Advertising Allowances and other Merchandise Payments and Services Compliance with Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act are being published and circulated to the public and business community for comment. These proposed Guides, as did the 1967 amendment, call attention to the availability of Commission's advisory opinion procedure and invite those contemplating implementation of tri-partite promotional plans to make use of the procedure. Because of the widespread publicity which the proposed Guides themselves will receive and because the development of three-party promotional plans is becoming increasingly common, it is anticipated that this area of the law will account for a considerable upswing in the Division's workload, both in preparing opinions and processing compliance reports.

A portion of the Commission's available manpower will continue to be devoted to the preparation and indexing of the advisory opinion digests which have proved so valuable.

Increase Requested—Fiscal Year 1970

To meet the anticipated increase in workload, especially that involving the aforementioned compliance reports, an additional \$14,000 is requested to provide one GS-13 attorney.

BUREAU OF ECONOMICS

	Allotment fiscal year 1969		Requested fiscal year 1970		Increase fiscal year 1970	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	38	\$300,000	38	\$300,000		
Division of Economic Evidence.....	27	319,000	31	370,000	4	\$51,000
Division of Industry Analysis.....	29	309,500	38	429,500	9	120,000
Division of Financial Statistics.....	37	321,500	41	350,500	4	29,000
Total personal services.....	131	1,250,000	148	1,450,000	17	200,000
Travel.....		9,000		9,000		
Other expenses.....		15,000		15,000		
Total.....	131	1,274,000	148	1,474,000	17	200,000

BUREAU OF ECONOMICS

The principal responsibilities or objectives of the Bureau of Economics are (1) to review, study, analyze and make reports on economic developments affecting the structure, conduct and performance of the economy with the view to pinpointing actual or potential problems which may adversely affect competition, and to suggest appropriate corrective actions for such problems; and (2) to assist in the implementation of the Commission's law enforcement programs relating to antimonopoly and deceptive practices. In carrying out these responsibilities the Bureau's principal output is information and analyses which give direct support to the development and implementation of Commission actions associated with its efforts to maintain competition and protect the consumer.

For administrative purposes the Bureau is divided into the Office of the Director and three divisions, Division of Economic Evidence, Division of Industry Analysis, and Division of Financial Statistics.

OFFICE OF THE DIRECTOR

The primary function of the Office of the Director is to exercise general supervision over the operations of the Bureau.

The Statistical Services Section and the Stenographic Services Section, which provide statistical and stenographic services for the entire Bureau, are also in the Director's Office.

No additional funds are requested for fiscal 1970 to provide the necessary stenographic and statistical services for the Bureau.

DIVISION OF INDUSTRY ANALYSIS

The function of the Division of Industry Analysis is to plan and carry out a research program designed to provide information and analysis which will first and foremost assist the Commission in the implementation and development of competition and consumer protection programs. They are designed also to provide Congress and other interested Government agencies with information suitable for consideration of legislative and administrative reforms with respect to Government policy towards business. An outline of projected programs for fiscal years 1969 and 1970 and manpower requirements follows:

Accomplishments, Fiscal 1968

Maintaining Competition.—Research programs focusing on the maintenance of competition, which were completed in fiscal year 1968, include an analysis of competitive conditions in the baking industry (*Economic Report on the Baking Industry*). This study examined trends in market structure and business practice and performance characteristics. One of the highlights of the report is the clarity with which it reveals the adverse effects of collusive arrangements on prices. The Division staff also assisted in the completion of two reports, *Automobile Warranties* and *the Use of Games of Chance in Food Retailing*.

In connection with the Division's Study of Pricing Policies Used by Food Retailers, a preliminary draft of the grocery pricing practices in the District of Columbia and in San Francisco was completed in fiscal 1968. Price checks were made of stores located in the low-income areas of the above cities in order to

determine if there were substantial differences in the pricing in the stores serving low and high income sections of these cities. Substantial data have been collected regarding pricing and merchandising practices and a final report on this study is expected to be completed in fiscal 1969.

In fiscal 1968, in addition to the Bureau of Economic's annual summary of merger statistics which indicated the trends in merger activity, the Division of Industry Analysis issued a Special Statistical Report on Large Mergers in Manufacturing and Mining. This report contains specific financial and product information for large mergers for the twenty-year period 1948-1967. In addition to focusing on large mergers, the report classified mergers as to type, i.e., horizontal, vertical, and conglomerate, and listed the names of the acquired and acquiring companies.

Consumer Protection.—In fiscal 1968 the Division of Industry Analysis completed a study on *Installment Credit and Retail Sales Practices of District of Columbia Retailers*. This study undertook to analyze marketing practices of retailers specializing in serving low-income consumers and comparing these practices to retailers serving the general market. It revealed that prices and credit costs to low-income consumers were substantially above those with more affluence. It concluded further that certain impediments to competition prevented merchants from focusing on price and quality in serving their customers, the most notable of which were limited access to installment credit and limited consumer awareness of alternative buying opportunities.

Another area of research involving problems of consumer protection is manufacturer warranties of durable goods. In fiscal 1968 an examination of automobile warranty practices was completed. Subsequently, the study of warranties has been extended to include a variety of "big ticket" consumer goods (refrigerators, washing machines, freezers, etc.). This study is in a preliminary stage and seeks, through voluntary cooperation with manufacturers, to detail the extent of warranty coverage, methods for warranty service and the nature of manufacturer distributor relationships in maintaining warranty systems.

Programs for Fiscal 1969 and 1970

Maintaining Competition

(1) *Concentration and Diversification Study*—During the past two years, the staff has been engaged in the collection of information concerning those firms which constitute the upper size strata of American manufacturing. Although a number of attempts have been made to measure long-term trends in concentration, past studies have suffered from serious data inadequacies. As a result, no definitive long-term concentration series exists. Controversies have arisen as to the direction of change in aggregate concentration, its level, its relation to merger activity, and apparent cyclical changes in concentration.

The Division has solved most of the data collection and reconciliation problems associated with reviewing aggregate concentration trends. In developing a long-time series, the fullest possible use has been made of data resources including unpublished data of the Internal Revenue Service, Bureau of Census, OPA and other present and past Government agencies.

It is expected that fiscal 1969 will mark the completion of that phase of the concentration and diversification study which focuses on: (a) changes in the level of concentration over the last two decades; (b) the impact of mergers as a source of growth for large firms (both absolute and relative); (c) the characteristic of rank changes among the leading firms in the country and the factors contributing to these rank changes; and (d) the pattern of industrial diversification involving large firms, particularly the extent of diversification and the method of attainment.

(2) *Webb Pomerene Associations and the Structure of International Competition.*—In part, because of the Commission's special responsibility with respect to enforcement of the Webb Pomerene Act, and, in part, because of the structural changes occurring regarding the degree of foreign involvement by American corporations, we have undertaken to develop a program which examines the competitive consequences of patterns of American foreign investment. Because of shortages of personnel, this project has not proceeded as rapidly as had initially been contemplated. In fiscal 1970 it is expected that this research program will have to be continued to embrace a detailed review of specific industry sectors. This review will undertake to focus on so-called bottleneck competitive problems in the American economy and the effect of foreign trade and foreign policy on the maintenance or alleviation of these problems.

(3) *Unfair Competitive Practices.*—The principal activity with regard to this area of research involves an evaluation of selling and pricing practices in relation to the marketing of television advertising time. In 1968, an initial data request was submitted to the three major television networks. Information sought included patterns of time sales and the terms of such sales for prime time programs. This information was suggestive of discriminatory patterns in pricing. However, it did not provide a sufficient basis for proceeding to the development of a specific policy action and additional data requests had to be submitted at the end of fiscal 1968. No replies have been received as yet but they should become available in early fiscal 1969. The information sought involves primarily the use of tie-in deals (involving prime and non-prime times and practices with respect to access to sponsorship-type programs versus participation-type time purchases). In fiscal 1970 it is contemplated that a follow-up study in this area designed to review overall access of firms of varying size to key advertising media will be undertaken.

(4) *Study of Conglomerate Mergers.*—In fiscal 1969, the Bureau of Economics contemplates an extended investigation of causal factors and market consequences of the current conglomerate merger. This study, undertaken at the request of the Commission, will involve a large-scale review of motives for mergers, consequences and policy implications. The study will attempt to categorize the different types of conglomerate mergers, the reasons for conglomerate or diversification-type mergers, the market performance of firms engaged in such mergers, and the conglomerate diversification. Though the first stage of this project, which is an overall review and evaluation, will be completed in 1969, it is expected that in fiscal 1970 subsidiary questions arising from the earlier study will be subject to investigation. In particular, we contemplate an examination of the effects of structural changes on various aspects of industrial performance. Special attention will be given to trends in profit and pricing behavior, investment decisions, promotion, and research and development programs for key industry sectors most significantly affected by recent merger trends.

(5) *Trends in Merger Activity.*—For some years now, the Federal Trade Commission has been looked to as the principal source for data on trends in merger activity. Each fiscal year the Commission publishes its annual review of merger activity. Two series are regularly presented in this study. One depicts total merger activity. The other focuses on large acquisitions (\$10 million or more) involving mining and manufacturing firms. Each of these series reached record heights in fiscal 1968. Preliminary data for the current year indicate that still higher levels are being reached.

This statistical program is the key monitor element in our merger enforcement program as well as the key indicator of changing characteristics in the current merger movement which may justify special economic analysis. In recent years one of the most notable aspects of the current merger movement has been the shift toward conglomerate-type mergers.

Consumer Protection

(1) *Warranties.*—It is necessary that this study continue in fiscal 1969 and 1970 in order to develop further an analytical review of manufacturer warranty programs.

(2) *Home Improvements.*—The Commission, as well as the Congress, has become increasingly concerned about problems of consumer welfare with respect to the home improvement industry. Our studies, as well as those of others, reveal a variety of trouble spots involving deception, exorbitant loan fees, etc. Before Congress is a proposal for a special appropriation to study the home improvement industry. Whether or not this appropriation is approved in fiscal 1969, we will undertake a preliminary analysis of the structure of the home improvement industry and undertake to devise a plan where policy implementation will eliminate some of the most obvious flagrant practices in the area. It is anticipated that, once the planning stage is past, additional staff will be required to complete the research in this area.

(3) *Truth in Lending.*—Though Commission enforcement responsibility with respect to the recently passed Truth in Lending bill does not become effective until 1970, we nevertheless are assigning one person in fiscal 1969 to this program. Effective enforcement of Truth in Lending will require careful planning and avoidance of an approach which emphasizes case-by-case enforcement. It is an area in which consumer and business education should be heavily emphasized to encourage insofar as possible voluntary compliance. It is also an area in which

many local and state organizations may be tapped to further the Commission's guidance program. Because of the newness of this program and the breadth of our legislative responsibility, planning resources must be allocated at the program's inception. Detailed manpower requirements for fiscal 1970 are developed elsewhere.

(4) *Analysis of Automobile Insurance.*—The Federal Trade Commission has been directed by Congress to participate at the request of the Department of Transportation in developing and analyzing information suitable for an evaluation of the automobile insurance industry. This project is slated to last two years, at the end of which the Department of Transportation is to submit a special report to Congress. The Department has indicated an interest in requesting special staff papers from the Federal Trade Commission in relation to this research program.

Program Planning and Special Projects.—Experience indicates that this area of the Division's operations absorbs the largest portion of available manpower. Specific activities include the following: special ad hoc projects at the request of the Commission and at the request of other bureaus of the Commission involving the development and planning of enforcement programs, advisory assistance to individual Commissioners on pending matters, analysis regarding economic implications of proposed legislation at the request of the Commission and the General Counsel, preparation of testimony evaluating legislative proposals and providing background information for such proposals, special studies in response to requests of other Government agencies, e.g., Council of Economic Advisors, Small Business Administration, Agency for International Development, and General Services Administration.

It is always difficult to project manpower requirements in association with these activities. Our experience has been that a minimum of one-third to one-half of the staff is tied up at any one time on these special projects. Seven positions are allocated for this category in 1969 and ten are requested for 1970. Both of these are absolute minimum estimates of needs in this area. This is particularly so with the projected application of program planning budgeting within the Commission since the Bureau of Economics is formally directed to provide advisory services in the establishment and implementation of these programs across all bureaus within the Commission.

Increases Requested 1970

Considering the projects under way in fiscal 1969 in the Division which will continue into fiscal 1970, plus the new programs planned for 1970, an additional \$120,000 is requested to provide nine additional economists as follows: one GS-15, one GS-14, three GS-13, two GS-12 and two GS-11.

The following tabulation shows the manpower requirements for the fiscal years 1969 and 1970.

PROJECTED PROFESSIONAL MANPOWER REQUIREMENTS, FISCAL YEARS 1969 AND 1970

	Fiscal year 1969	Fiscal year 1970
I. Maintaining competition:		
(a) Mergers:		
1. Conglomerate.....	5	4
2. Concentration, mergers, and diversification.....	2	2
(b) Webb-Pomerene associations and the structure of international competition.....	1	2
(c) Unfair competitive practices:		
1. Television.....	2	2
2. Retail food pricing.....	1	
(d) Program planning and special projects.....	6	10
II. Consumer protection:		
(a) Truth in lending.....	1	3
(b) Other projects:		
1. Home improvements.....	1	3
2. Warranties.....	1	2
III. Reports to Congress and special statistical reports:		
(a) Trends in mergers.....	3	3
(b) Automobile insurance.....	2	3
Total.....	25	34

DIVISION OF ECONOMIC EVIDENCE

This Division's primary function is to make economic analyses which will aid the Commission in enforcing the laws which it administers and to assist the legal bureaus in the implementation of enforcement programs designed to deal with designated problem areas, all of which are concerned with the principal goals of maintaining competition and protecting the consumer.

Accomplishments, Fiscal 1968

Maintaining Competition.—The Division's primary contribution to the Commission's goal of maintaining competition during fiscal 1968 are stated below.

The Division in 1968 spent most of its effort on matters concerned with Section 7 of the Clayton Act. The Division attempts to develop a logical and coherent approach to mergers and acquisitions as well as to search out and verify factual data needed to support these approaches. In fiscal 1968 the staff screened approximately 1,900 mergers and acquisitions and, in addition, assisted the Compliance Division with divestiture problems arising out of 10 Section 7 orders. All told, the Division's staff spent approximately two-thirds of its time on Section 7 work. For the fiscal year 1968, the Division participated in 51 investigations opened by letters of inquiry, all of which related to Section 7 of the Clayton Act. The Division's staff also worked closely with attorneys in the Merger Division in developing the theory and the evidence to support the issuance of four complaints charging violations of Section 7. The major problem area with respect to mergers and acquisitions is the extremely rapid growth in the number of large mergers, particularly of the conglomerate type, which require in-depth investigation and analysis. At least 170 large mergers (acquisitions where the acquired firm had total assets of \$10 million or more) were recorded for the calendar year 1967, while 82 large mergers have been recorded for the first half of 1968. Prior to 1967, the highest number ever recorded was 101, for the year 1966.

In fiscal 1968 the Division's staff assisted in the development and documentation of several merger complaints involving major conglomerate questions. Another major accomplishment of the Division of Economic Evidence was to participate in the development of Commission enforcement policy statements, most notably applying to product extensions mergers in grocery products, manufacturing.

Preliminary work was also undertaken to develop enforcement policy programs in other industrial sections. Intensive effort by the staff resulted in the issuance of an important Section 7 Clayton Act complaint in the auto parts industry, and a 6(b) survey was initiated and approved covering the automobile parts industry. This survey should yield data to provide an understanding of the structure of this industry and at the same time enable the Commission to cope more adequately with the large number of mergers and acquisitions occurring in this industry.

In addition to its work on mergers, the staff concerned itself with various compliance matters, particularly divestiture orders relating to the dairy industry, advisory opinion matters, and a problem associated with synthetic fibers. The Division also did a study of sugar pricing, a case study of reciprocity, and an analysis of promotional expense for utilities for a subcommittee of the House of Representatives. An economist in the Division also made a substantial contribution in an important price discrimination case, including the preparation of exhibits and testifying as a witness.

Not all of the Division's work related directly to particular legal cases. During the year the Division made considerable progress with its study concerning the manufacture and distribution of household consumer products. This study is being carried out through an analysis of the operations of one of the large multi-line household consumer products manufacturing companies.

Consumer Protection.—Two important projects were completed in fiscal 1968 which contributed substantially to the Commission's program of consumer protection. A preliminary "Economic Report on the Use of Games of Chance in

Food Retailing" was submitted to the Commission. In this study the analytical framework and factual basis for such promotions were presented. This study required more intensive and concerted effort by a few staff members than any other project completed during fiscal 1968.

A "Staff Report on Automobile Warranties" was also completed during the fiscal year. Economists from the Bureau of Economics and attorneys from the Bureau of Deceptive Practices contributed jointly toward the completion of this report. The highlight of the study related to performance records of the manufacturers and dealers under the warranty, consumer's reaction to warranty services, costs of the warranty to the manufacturer and the extent to which the dealer is reimbursed, reasons for consumer complaints concerning services under the warranty. Activities relating to both of the above studies have carried over into fiscal 1969.

In addition to the completion of the above reports, the Division worked closely with the Bureau of Deceptive Practices with respect to the administration of the Truth-in-Packaging law.

Programs for Fiscal 1969 and 1970

Maintaining Competition.—Several of the programs with which the Division was concerned in fiscal 1968 will continue into fiscal 1969 and fiscal 1970.

(1) *Merger Screening and Analysis.*—With merger activity occurring at an all-time rate, it is expected that this activity will require increased efforts on the part of the staff in fiscal 1969 and fiscal 1970, in addition to the economic assistance which the staff regularly makes to the Division of Mergers. Several of the senior staff members will be needed to work on the study of conglomerate mergers which the Commission has requested to make for the Senate Antitrust and Monopoly Committee and Joint Economic Committee.

(2) *Survey of the Automobile Parts Industry.*—This survey, although approved and initiated in fiscal 1968, will continue through fiscal 1969. In fact, most of the work will have to be done this fiscal year. More than 90 respondents are to be surveyed and it will entail considerable man-hours to tabulate and analyze the data obtained.

(3) *Household Consumer Products.*—The study of changes in the structure of this business, which began in fiscal 1968 will continue as one of the major activities for the Division in fiscal 1969.

(4) *Reciprocity.*—The Division will continue to work with lawyers in the Division of General Trade Restraints on investigations of leading companies where reciprocity is believed to be practiced on a systematic basis.

(5) *Magazine and Paper Back Book Industry.*—The Division has been asked to assist the Program Review Officer in understanding the structure of the magazine and paper back book industry and in developing proposals for coping with the absence of competition in this industry.

(6) *Industrywide Enforcement Policy Respecting Mergers.*—In fiscal 1969 the Division has been asked to prepare an enforcement policy statement and merger guidelines for the textile industry. The staff is also studying the forest products industry to see if it is feasible to have guidelines in that area.

Consumer Protection

(1) *Expansion of Report on the Use of Games of Chance.*—In fiscal 1969 the staff has been asked to expand its report on games of chance in food retailing to include the use of games in the gasoline marketing industry. Data on this aspect of the use of games will be obtained from hearings held by the House Select Committee on Small Business.

(2) *Industrywide Investigation of the Hearing Aid Industry.*—The Division has been asked to cooperate with the trial staff if a detailed investigation of this industry is warranted by the results of a preliminary investigation which is now under way.

Increases Requested 1970

Because of the very large increase in mergers and the increased demands upon the Division for assistance in the area, plus the added workload arising from requests to assist the Compliance Division in the enforcement of divestiture orders, an additional \$51,000 is requested to provide four economists: two GS-13 and two GS-12.

DIVISION OF FINANCIAL STATISTICS

The function of the Division of Financial Statistics is to produce the *Quarterly Financial Reports for Manufacturing Corporations*. This report is published jointly with the Securities and Exchange Commission.

Maintaining Competition

The Quarterly Financial Report is a basic source of economic and financial data with which economic concentration in corporate manufacturing is measured. These quarterly summaries contain pertinent information regarding the relative importance in our competitive economy of various sizes of manufacturing corporations. They are also used to measure efficiency, appraise costs, compare the profitability of different industries and various sizes of companies, and as an indicator of the relative movement of sales and profits for the manufacturing segment of the economy.

The Bureau of the Budget and the Senate Subcommittee on Antitrust and Monopoly have requested the Commission to expand these published reports to include newspapers. There is little or no competitive and economic information available about newspapers that might throw light on the solution of the problem as to how economically beneficial joint operating arrangements might be entered into within the context of existing antimerger and antitrust law. The Commission and the Congress could better evaluate the situation if they had economic and financial data showing where our newspapers are, how they operate and exist, what is the extent of their financial difficulties, and why competitive restrictions are claimed to be required. Expanding the FTC-SEC quarterly financial reporting program is the first step in making available to the Commission and to the Congress this type of economic and financial information about newspapers.

Increases Requested 1970

In order to take care of the work required to include newspapers in the Quarterly Financial Report, four additional employees are required as follows: one GS-9 accountant, two GS-7 accountants, and one GS-5 clerk-stenographer at a total cost of \$29,000.

TRUTH IN LENDING (NEW PROGRAM)

	Requested, fiscal year 1970		Increase, fiscal year 1970	
	Positions	Amount	Positions	Amount
Personal services.....	200	\$2, 110, 000	200	\$2, 110, 000
Travel.....		135, 000		135, 000
Total.....	200	2, 245, 000	200	2, 245, 000

ENFORCEMENT OF THE TRUTH IN LENDING ACT

On May 29, 1968, the President signed Public Law 90-321 which is cited as the Consumer Credit Protection Act. The Commission's responsibilities are set forth in Title I, known as the Truth in Lending Act.

The scope of the Commission's responsibility amounts to \$43 billion of the 1967 total of \$99 billion of consumer credit outstanding—more than 43 percent of the

total. To cope reasonably with the magnitude of this enforcement responsibility, the Federal Trade Commission requests \$2,600,000 for fiscal year 1970, the first full fiscal year of operation.

Coverage and Administrative Enforcement

The Truth in Lending Act, Title I of the Consumer Credit Protection Act, requires finance companies, banks, other lenders and retailers to inform borrowers and credit customers of credit charges in terms of annual percentage rate on the declining balance of obligations. These creditors also have to inform borrowers of the dollars-and-cents cost of financing loans and purchases. The truth in lending provisions take effect on July 1, 1969.

Disclosure provisions of the Act generally apply to loans and installment purchases up to \$25,000 and to mortgages of any amount for home buying. (Credit for business or commercial purposes is not covered by this law.) The Act also includes a special provision for revolving charge accounts used by many department stores and some other retailers. Both monthly and annual interest rates on these accounts would have to be stated.

Since advertising is often a primary inducement to consumer purchases, the Act applies comparable standards of disclosure to the advertisement of credit transactions. Advertisements mentioning any figures for credit would have to provide detailed information on annual interest rates, cash prices, incidental charges and other conditions.

Administrative enforcement of the Act follows existing lines of responsibility for those industries subject to federal regulation. The nine enforcement agencies for truth in lending are the Comptroller of the Currency (national banks); the Federal Reserve Board (member banks of the Federal Reserve System, other than national banks); the Federal Deposit Insurance Corporation (federally insured state nonmember banks); the Federal Home Loan Bank Board (federal savings and loan associations); the Bureau of Federal Credit Unions (federal credit unions); the Interstate Commerce Commission (common carriers); the Civil Aeronautics Board (air carriers); the Secretary of Agriculture (activities subject to the Packers and Stockyard Act, except section 406); and the Federal Trade Commission (business generally).

Concerning the Commission's responsibility, the Act provides that except to the extent that enforcement requirements are specifically committed to some other Government agency, the Commission will enforce such requirements. Indicative of the broad range of the Commission's assignment, the Commission's powers under its organic legislation are available in enforcing compliance by any person (or organization) with truth in lending requirements, "irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act."

Magnitude of the Commission Role

The Commission has the lion's share of enforcement responsibility for truth in lending measured by the share of consumer credit (nearly one-half) held by lenders within the Commission's purview. Total consumer credit outstanding in the economy at the end of 1967 amounted to \$99 billion. Assuming that new installment credit in a year approximates the amount outstanding, it appears that consumer credit financed close to \$100 billion of consumer purchases during 1967. This is more than one-fifth of total personal consumption expenditures in 1967 (\$492 billion) as recorded in the national income accounts.

Leaving aside mortgage credit, in 1967 interest and other credit charges paid by consumers for the use of consumer credit totaled about \$14 billion. This outlay approximates the interest payments on the \$300 billion federal debt. It also exceeds the amounts consumers spent for men's and boys' clothing, for furniture and appliances, for electricity-gas-and water, and for doctor and dentist bills.

Consumer credit consists of two major types, installment and noninstallment. At the end of 1967, installment credit totaled \$78 billion or 79 percent of the outstanding consumer credit and noninstallment credit was \$21 billion or 21

percent of the total. As of May 30, 1967, total consumer credit outstanding reached \$100.3 billion. *By the start of fiscal 1970, it is estimated that total consumer credit will amount to \$110 billion.*

Installment credit covers all consumer credit that is scheduled to be repaid in two or more payments. The four main classes of installment credit and the amounts outstanding at the end of 1967 follow: automobile paper (\$31 billion), other consumer goods paper (\$21 billion), home repair and modernization loans (\$4 billion), and personal loans (\$22 billion). On the other hand, noninstallment credit comprises those forms of consumer credit that are to be repaid in a lump sum (e.g. charge accounts, \$8 billion).

To quantify the Commission's share of responsibility of the consumer credit "universe", the accompanying Table I shows the components of consumer credit and estimates the amounts outstanding held by financial institutions and retail outlets. The table identifies the types of credit holders assigned by the new law to the Federal Trade Commission and to the other administering agencies. For example, under personal loans (the fourth column on the left under installment credit), the largest lender (commercial banks) is the responsibility of the banking agencies (symbol 1), and the second listed holder of personal loans—sales finance companies (symbol 6)—falls within the Commission's ambit. Similarly, in the case of charge accounts for the noninstallment credit sector, the Commission has jurisdiction over department stores and other retail outlets.

To focus on the Commission's assigned area within the entire consumer credit field, Table II shows the major types of consumer credit held by all lenders and the shares held by lenders subject to Commission jurisdiction under the Truth in Lending Act. The table establishes that lenders within the Commission's jurisdiction accounted at the end of 1967 for \$43 billion of consumer credit outstanding, which represents 43½ percent of the \$99 billion total. By the start of fiscal 1970, it is estimated that *lenders subject to Commission surveillance will hold nearly \$50 billion of the \$100 billion in consumer credit outstanding.*

Table II also reflects that lenders within the Commission's scope accounted for 42 percent of the noninstallment credit. Such lenders held 31 percent of the automobile paper and 69 percent of other consumer goods paper, as well as 86 percent of charge accounts and 72 percent of service credit.

Industries—The Finance Industry and Retail Outlets Subject to FTC Jurisdiction Under the Truth in Lending Act

The major holders of consumer credit that the Act places within the Commission's authority are as follows:

Major holder group—Credit outstanding on Dec. 13, 1967

	Millions
Finance companies-----	\$23, 073
Sales finance companies-----	16, 851
Personal finance companies-----	6, 222
Department stores-----	6, 805
Furniture stores-----	1, 705
Other retail outlets-----	7, 198
Service credit companies-----	3, 908
Automobile dealers-----	506
Total credit held by lenders subject to FTC-----	43, 195
Total consumer credit, United States-----	99, 228

Table 1
SHORT- AND INTERMEDIATE-TERM CONSUMER CREDIT, DECEMBER 31, 1967 BY TYPE OF CREDIT AND INSTITUTION

(Millions of Dollars)

Total consumer credit		99,228	
Installment credit		77,946	
Automobile paper		31,197	
Other consumer goods paper		21,328	
Repair & modernization loans		3,731	
Personal loans		21,690	
Single-payment loans		8,267	
Charge accounts		7,595	
Noninstallment credit		21,282	
Service credit		5,420	
Department stores		1,250	
Other retail outlets		5,291	
Credit cards		1,054	
Medical		2,835*	
Public utilities		1,512*	
Other		1,079*	
Commercial banks		7,064	
Other financial institutions		1,203	
Commercial banks		7,692	
Sales finance cos.		2,772	
Other financial institutions		11,226	
Commercial banks		2,523	
Sales finance cos.		103	
Other financial institutions		1,105	
Commercial banks		5,808	
Sales finance cos.		5,017	
Other financial institutions		1,336	
Department stores (inc. mail-order)		5,555	
Furniture stores		1,705	
Other retail outlets		1,907	
Commercial banks		17,969	
Sales finance cos.		8,959	
Other financial institutions		3,763	
Automobile dealers		506	

Jurisdiction:

1. Banking Authorities.
2. Federal Reserve Bank Board.
3. Bureau of Federal Credit Unions.
4. I. C. C.
5. Civil Aeronautics Board.
6. Federal Trade Commission.

* Estimate.

Note: Heavy inked boxes include areas of F. T. C. jurisdiction.

Source: Federal Reserve Board, Supplement to Banking & Monetary Statistics, Section 16 (New) Consumer Credit 4 (1965)

TABLE II.—ESTIMATED SHARE OF CONSUMER CREDIT OUTSTANDING AS OF DEC. 31, 1967, HELD BY LENDERS SUBJECT TO THE JURISDICTION OF THE FEDERAL TRADE COMMISSION UNDER THE TRUTH IN LENDING BILL

Major types of consumer credit	Consumer credit (in millions of dollars)		
	Held by all lenders	Held by lenders subject to FTC jurisdiction	Percent held by lenders subject to FTC jurisdiction to all lenders
Consumer credit, total.....	\$99,228	\$43,195	43.5
Installment credit.....	77,946	32,746	42.0
Automobile paper.....	31,197	9,666	31.0
Other consumer goods paper.....	21,328	14,692	68.9
Home repair and modernization loans.....	3,731	113	3.0
Personal loans.....	21,690	8,275	38.2
Noninstallment credit.....	21,282	10,449	49.1
Single payment loans.....	8,267		
Charge accounts.....	7,595	6,541	86.1
Service credit.....	5,420	3,908	72.1

Source: Federal Reserve Bulletin A-48 (April 1968) for data on types of credit of all lenders (col. 2); consumer credit held by lenders subject to FTC based on table I and estimates of FTC Office of Program Review.

(1) The Finance Industry—Finance companies account for \$23 billion in consumer credit, or a majority of the \$43 billion total consumer credit held by creditors within the Commission's reach under the Act. These companies can be classified on the basis of the principal types of receivables on their books. Sales finance companies buy installment paper which arises from retail sales of automobiles, other consumer goods, or from outlays for residential and repair loans. By contrast, personal finance companies specialize principally in making personal cash loans. However, subsidiaries of sales finance companies, formed largely through mergers, also make personal loans. At the close of 1967, sales finance companies had \$2.8 billion in personal loans outstanding and personal (consumer) finance companies held \$5.5 billion.

The Commission's truth in lending mandate in the finance industry covers significant firms operating in a large and critical market. In the sales finance company sector, there are 1,200 companies with gross loans of \$16 billion in 1965, according to the most recent Federal Reserve Board survey of Finance Companies, Mid-1965, reprinted from the Federal Reserve Bulletin 536 (April, 1967). General Motors Acceptance Corp. is the nation's largest captive sales finance company with total capital funds of \$1.1 billion at the end of 1967. C.I.T. Financial Corp. is the largest independent sales finance company with total capital funds of \$828 million at the close of 1967. (A sales finance independent does not get any of financing from a parent manufacturing or retail company; a captive does get such financing.)

The Act states that Congress finds—"the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." Sales finance companies with \$25 million and more in gross loans outstanding in 1965 accounted for about 93 percent of the total gross loans reported in the aforesaid Federal Reserve survey. The five largest captive sales companies ranked by total capital funds at the end of 1967 are: (1) General Motors Acceptance Corp. (\$1.1 billion); (2) Ford Motor Credit Co. (\$322 million); (3) Sears Roebuck Acceptance Corp. (\$266 million); (4) General Electric Credit Corp. (\$245 million); and (5) Chrysler Financial Corp. (\$230 million). Due largely to the merger trend, about 25 percent of the small sales finance companies in 1960 had become subsidiaries of other sales finance companies by 1965 or had gone out of business.

In the personal finance industry sector in 1965 there were 2,500 personal finance companies with gross loans of \$9 billion. Personal finance companies with \$25 million and over in gross loans in 1965 held 80 percent of the total gross loans. The five largest personal finance companies in 1967 rank as follows based on total indicated capital funds: (1) Beneficial Finance Co. (\$506 million); (2) Household Finance Corp. (\$420 million); (3) Seaboard Finance Co. (\$137 million), (4) Liberty Loan Corp. (\$115 million); and (5) General Finance Corp. (\$74 million).

The economic dimensions of the Commission's responsibilities under the Act is a universe or "regulatory market" of 3700 finance companies (with tens of thousands of retail branches) that hold \$23 billion in consumer credit, and the hundreds of thousands of retail outlets (and service credit companies) that account for an additional \$20 billion of consumer credit. These industries account for the Commission's relevant \$43 billion consumer credit field.

(2) *Retail Outlets.*—The Commission's truth in lending assignment under the Act blankets much of the nation's retail trade industries, which sector in 1963 (the last census year) consisted of 1.7 million establishments with total sales amounting to \$244 billion. The Commission's mandate reaches some 4000 department stores which had 1963 sales of \$20.5 billion.

Department stores held \$6.8 billion in consumer credit in 1967, of which about \$5.5 billion represented installment credit on consumer goods and \$1.3 billion was in noninstallment credit (charge accounts). Credit sales in the department store industry represent close to 60 percent of department store sales. Standard & Poor's reports that a significant shift from charge account to installment credit selling has been in process in the department store field during the 1960s. Leading department stores with annual sales in excess of one billion dollars are Federated Department Stores, Allied Stores, and May Department Stores.

The Commission's consumer credit role encompasses the related mail order field which is dominated by two major concerns—Sears, Roebuck which had sales of \$194 million in 1967 and Montgomery Ward with 1967 sales totaling \$166 million. The credit business of Sears accounts for about 57 percent of its sales, that of Montgomery Ward around 47 percent. Gamble-Skogmo obtains some 20 percent of its sales from mail order catalog stores as a result of its 1964 acquisition of Aldens. Another important mail order company—Spiegel—is a subsidiary of Beneficial Finance Co., which is the nation's largest personal finance company.

Another major retail holder of consumer credit within the Commission's scope are furniture stores which held \$3.9 billion in installment credit on consumer goods at the end of 1967. The 1963 Census of Business reports that there were 55,000 furniture, home furniture stores (SIC 571) with total sales of \$6.8 billion. There are as many as 5000 companies making furniture, led by Kroehler Manufacturing Co. with sales of \$104.8 million in 1967 and Basset Furniture Industries with sales volume of \$90.6 million.

Other retail outlets account for \$7.2 billion in consumer credit, which divides into \$1.9 billion of installment credit on consumer goods and \$5.3 billion on noninstallment credit (charge accounts). This category of "other retail stores" represents the following types of retail trade: jewelry stores; lumber, building, hardware dealers; apparel stores; automobile tire and accessory stores; and all other retailers. Using the 1963 Census of Business, these retail outlets combined account for about 250,000 establishments with annual sales of \$33 billion.

Auto dealers hold a significant \$506 million in consumer installment credit (auto paper). At the close of 1967 there were about 28,550 auto dealers handling the passenger cars of domestic manufacturers as follows: General Motors, 12,800; Ford, 7100; Chrysler, 6300; and American Motors, 2300. Installment sales in 1967 accounted for about 68 percent of total auto sales. The Commission must cover the credit disclosure practices of these auto dealers as well as the thousands of used car and imported car dealers.

(3) *Oil Companies—Credit Cards.*—The Commission's truth in lending terrain includes credit cards consisting largely of oil company receivables arising from consumers' use of gasoline credit cards. Most of the major oil companies, such as Texaco, Shell Oil and Gulf Oil, have some type of credit card program. About 70 million oil company credit cards are in existence, involving an estimated \$1 billion in consumer credit outstanding.

Some petroleum companies appear to have agreements with other oil companies to honor the other's credit card in certain geographical areas. Major oil companies have also been extending the services their credit cards offer by signing up hotels, motels and restaurants to honor their credit cards. Since such credit card systems may result in certain monopolistic and deceptive practices, there is a real need for surveillance of the structure, operation, cost disclosure, and competitive implications of credit card programs of oil companies and other involved industries.

(4) *Service Credit Companies.*—The Commission's jurisdictional area extends to service credit companies which held nearly \$4 billion in consumer credit at

the end of 1967. Service credit consists of the amount owed by individuals to professional practitioners and service establishments. The main component of service credit is that owed to hospitals and doctors. Other types of consumer service credit are the amounts owed to colleges and credit for funeral and legal services. Service credit also includes credit for automobile repairs and for television repair services.

Establishing a Bureau of Truth in Lending

The Commission's budget request for \$2.6 million to administer truth in lending will provide the means for reasonably effective enforcement of the Act. There will be established within the Commission a Bureau of Truth in Lending with a 200-man staff. The enforcement program will be designed to cover the industries accounting for the \$43 billion consumer credit field under the enforcement authority of the FTC—a universe of at least a quarter million companies—using scientific sampling procedures. The requested \$2.6 million represents only 6/100 of 1% of the \$43 billion credit universe.

The bureau will concentrate thoroughly and continuously on the credit costs practices of the major finance companies and the large retail outlets, while spot-checking the hundreds of thousands of retailers and thousands of finance companies that constitute the Commission's responsibility under the Act. Investigations of outside complaints on credit cost deceptions will supplement the bureau's internally-generated and planned actions. Emphasis will also be given to a consumer education program.

The main objectives of the bureau will be to achieve true credit cost disclosure by lenders and to provide a meaningful basis for informed credit shopping by consumers. The funds for effective Commission enforcement of the Act should facilitate price competition in credit. To accomplish these ends, the bureau will use the means of guidance, education, and litigation.

The inspection staff will call on finance companies and retail stores in large metropolitan areas and other locations across the nation, and check into credit advertisements, installment contracts and billing statements. These inspections will educate and assist retailers extending credit to get their credit advertising and credit instruments into compliance with the Act. In instances where business cooperation proves unsuccessful and violations stand, the matters will be referred for formal Commission action. The bureau's inspection program will also be directed towards counseling those retailers who deal closely on credit with low income people.

The bureau's professional staff, including economists, credit and business analysts, accountants, and statistical specialists in scientific sampling procedures, will prepare periodic reports for the Commission and for publication that turn the spotlight of publicity on truth in lending conditions in industries and in the economy.

It is anticipated that in order to carry out the clear intent of this Act, the new bureau will be concerned with practices which are closely related to, but not actually covered by it, as, for example, those of debt consolidators. This is considered essential to the development of reports to Congress dealing with the adequacy of the present Act in affording protection from deception in the field of consumer credit.

CONTINUED PLANNING

Included in the foregoing discussion are references in general terms to the plans for bureau operations. Admittedly, these are in very general terms, due to lack of experience in this enforcement program. On the one hand, we know that the Act applies to all finance companies; on the other, we can identify all of the Department Stores in this country, but we do not as yet know which ones are selling goods on credit, even presuming that most are. Presently, we are talking with Dun and Bradstreet to determine what information they can furnish from their data bank that will be of assistance to FTC in planning for this enforcement program.

It is intended that the work of the bureau be computerized—including each examination of each business. We will be enabled, by means of the information fed into our data bank, to make informed determinations with respect, for example, to subject areas warranting greater or lesser attention, by type or size of business, geographic location, etc. The computer, too, will furnish much of the data required for studies of the credit industry.

Subject to changes dictated by experience, it is planned that the bureau will operate through three divisions: Division of Field Inspection, Division of Programming and Studies, and Division of Enforcement and Compliance.

The Division of Field Inspection, comprising approximately one-half the personnel allocated to the bureau, will be staffed by non-lawyers, the majority of them stationed in the field, examining the credit practices of individual businessmen. The initial thrust of their activity will be to sit down with a businessman, determine compliance with the law and regulation, and attempt to informally assist him in making necessary revisions in his practices—reporting to Headquarters so that pertinent data relating to each interview can be incorporated into the computer bank referred to above. There will be a planned system of call-backs to determine whether recommended changes actually have been made to the extent manpower is available. The field staff will also be available for talks to industry associations and consumer groups explaining the regulations, responding to questions, and helping to educate the businessman and the public.

The Division of Programming and Studies, while much smaller, will constitute the major planning arm of the program. It is this division which will plan the business segments in the geographical areas to be inspected by the field examiners, receive and review their reports, continually evaluate the results and direct changes in emphasis on inspections, conduct studies of the effectiveness of the Act and the Commission's program in implementation thereof, prepare reports to the Commission and the Congress as appropriate, and develop broad based educational programs.

As indicated, the principal effort of the Bureau will be to administer the law with a minimum of legal proceedings. It is believed that the regulation will spell out requirements so clearly that compliance therewith is simple and obvious, and that the vast majority of the businessmen will comply when they are educated to the requirements of the law. Thus, with primary emphasis on education during the early stages of administration, *the Division of Enforcement and Compliance*, composed of attorneys, is intended to be the smallest of the divisions, and increased in size only as circumstances require.

REQUESTED INCREASES—TRUTH-IN-LENDING PROGRAM

OFFICE OF THE DIRECTOR		DIVISION OF FIELD INSPECTION	
GS-17 (Director)-----	1	GS-16 (Division Chief)-----	1
GS-16 -----	1	GS-15 -----	1
GS-15 -----	2	GS-14 -----	1
GS-8 -----	1	GS-13 -----	9
GS-7 -----	1	GS-12 -----	20
GS-6 -----	1	GS-11 -----	50
		GS-9 -----	40
Total -----	7	GS-7 -----	1
		GS-5 -----	20
		Total -----	143
DIVISION OF PROGRAMING AND STUDIES		DIVISION OF ENFORCEMENT AND COMPLIANCE	
GS-16 (Division Chief) -----	1	GS-16 (Division Chief)-----	1
GS-13 -----	9	GS-15 -----	1
GS-12 -----	6	GS-14 -----	4
GS-11 -----	4	GS-13 -----	8
GS-7 -----	1	GS-12 -----	5
GS-5 -----	6	GS-7 -----	1
Total -----	27	GS-6 -----	1
		GS-5 -----	2
		Total -----	23
Personnel compensation for above employees-----		\$1,985,000	
Consultant fees-----		125,000	
Total personnel compensation-----		2,110,000	

Personnel benefits-----	\$150,000
Travel -----	135,000
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Communications and rent:	
Communications -----	15,000
Space rent-----	100,000
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Total -----	115,000
Printing and reproduction-----	10,000
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Other services:	
Building alterations-----	20,000
Miscellaneous expenses-----	15,000
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Total -----	35,000
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Supplies and materials-----	20,000
Equipment -----	25,000
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Total request—1970-----	2,600,000

Personnel Benefits.—The amount of \$150,000 will be required for personnel benefits consisting of Civil Service retirement, employee life insurance, health benefits, etc.

Travel.—A total of \$135,000 is requested for travel. This will provide an average of only 45 days travel for 120 employees.

Communication and rents:

Communications.—The amount of \$15,000 is requested for communications to pay for additional telephone equipment installation and service charges which will be required not only in Headquarters but also in various field stations.

Rents.—Additional space will be required to house all of the 200 employees requested for this program. The amount of \$100,000 is requested for 1970 which will provide an average of only 100 square feet per person at an estimated cost of \$5.00 per square foot. Unquestionably, more than 100 square feet per person will be required to provide necessary conference rooms, file space, executive offices, etc., which will hopefully be offset by acquiring necessary space outside the Washington area at a lesser cost per square foot.

Printing and Reproduction.—The amount of \$10,000 is requested for printing and reproduction which will be required for the printing of forms, special reports, etc.

Other services:

Building Alterations.—It is estimated that the amount of \$20,000 will be required for erecting partitions and other alterations in the new space as it has been our experience that few, if any, partitions are installed and considerable other alterations will no doubt be required.

Miscellaneous Expenses.—The amount of \$15,000 is requested for miscellaneous expenses which will undoubtedly be incurred in setting up a program of this magnitude but which currently cannot be otherwise identified. Included are such other necessary expenses as moving costs, employee training, etc.

Supplies and Materials.—The cost of office supplies and materials is estimated at \$20,000 for 1970.

Equipment.—As the Commission has no surplus equipment for the 200 new employees, the necessary desks, chairs, typewriters and other furniture and office machines must be purchased. It is anticipated that the purchase of practically all of this new equipment will be effected during the latter part of fiscal year 1969 at a cost of \$100,000 from funds included in the 1969 Supplemental for the Truth in Lending Program. For 1970 it is estimated that some additional equipment and office machines will also be required and the amount of \$25,000 is requested.

OTHER EXPENSES

The sum of \$4,040,000 is required for costs other than salaries for fiscal year 1970. These costs are itemized in the following table:

Item of expense	Allotment fiscal year 1969	Requested fiscal year 1970	Increases fiscal year 1970
Personnel benefits.....	\$1,064,000	\$1,474,000	\$410,000
Travel and transportation of persons.....	350,000	639,000	289,000
Transportation of things.....	11,000	19,000	8,000
Rent, communications, and utilities.....	362,000	910,000	548,000
Printing and reproduction.....	90,000	111,000	21,000
Other services.....	176,000	287,000	111,000
Supplies and materials.....	206,000	290,000	84,000
Equipment.....	70,000	310,000	240,000
Total.....	2,329,000	4,040,000	1,711,000

PERSONNEL BENEFITS

The sum of \$1,474,000 is required for personnel benefits as shown in the following table. These benefits are statutory and the cost reflects the Commission's pro rata share for these items.

	Allotment fiscal year 1969	Requested fiscal year 1970	Increase fiscal year 197
CSC retirement fund.....	\$914,500	\$1,268,000	\$353,500
CSC employee life insurance.....	49,000	68,000	19,000
Employee health benefits.....	87,000	121,000	34,000
Employers share FICA taxes.....	7,000	10,000	3,000
Public health services.....	4,000	4,500	500
Incentive awards.....	2,000	2,000	
Allowance for uniforms.....	500	500	
Total.....	1,064,000	1,474,000	410,000

TRAVEL AND TRANSPORTATION OF PERSONS

The amount of \$639,000 is required for travel expenses in 1970 which is an increase of \$289,000 over the allocation for 1969. This amount will provide for the payment of transportation expenses, rental of automobiles, subsistence, incidental expenses and mileage costs for the use of privately owned automobiles for official travel.

Of this increase \$135,000 will be required by the new Bureau of Truth in Lending; \$87,000 by the Bureau of Textiles and Furs; \$37,000 for the Bureau of Field Operations; \$14,000 for the Bureau of Deceptive Practices and \$16,000 for the Bureau of Restraint of Trade. These increases are explained and justified in the Bureau requests.

TRANSPORTATION OF THINGS

Funds in the amount of \$19,000 are requested for this item in 1970, which is an increase of \$8,000 over the allocation for 1969. This amount will be needed to defray the additional costs of moving household goods and increased allowances for field employees who are transferred during the year in accordance with P.L. 89-516 and Bureau of the Budget Circular A-56.

RENTS, COMMUNICATIONS AND UTILITIES

Rents and utilities

It is estimated that \$501,000 will be needed for payment to General Services Administration for additional space necessary for the new employees requested, which is an increase of \$445,000 over the allocation for space in 1969. Additional space will be required in the field offices as well as in Washington.

In 1970 it is planned to convert our card oriented computer to a tape system. Rental for four tape stations will require an additional \$25,000 for ADP equipment rental.

	Allotment fiscal year 1969	Requested fiscal year 1970	Increases fiscal year 1970
Additional space rental (GSA).....	\$56, 000	\$501, 000	\$445, 000
ADP equipment rental.....	28, 000	53, 000	25, 000
Copyflo, Xerox and print shop equipment.....	54, 000	54, 000	-----
Total.....	138, 000	608, 000	470, 000

Communication services

Funds in the amount of \$302,000 are requested for communication services which represents an increase of \$78,000 over the allocation for fiscal year 1969. This represents the additional cost of telephone, telegraph, and postal services which will be required in fiscal year 1970 and includes installation of substantial additional equipment as well as service charges.

PRINTING AND REPRODUCTION

Funds in the amount of \$111,000 are requested for printing of the Commission's volumes of Decisions, statutes, court briefs, and miscellaneous administrative printing. This represents an increase of \$21,000 over the allocation for 1969; \$10,000 of this increase is for the new Truth in Lending program and \$11,000 will be required for additional costs of printing voluminous court briefs.

OTHER SERVICES

This account includes all miscellaneous items not otherwise classified. The increases necessary because of increased costs are as follows:

	Allotment fiscal year 1969	Requested fiscal year 1970	Increases fiscal year 1970
Repairs and building alterations.....	\$48, 000	\$100, 000	\$52, 000
Stenographic reporting services.....	32, 000	46, 000	14, 000
Exhibits and testing.....	61, 000	86, 000	25, 000
Employee training.....	20, 000	40, 000	20, 000
Special services, Government agencies:			
BOASI, corporate statistics.....	6, 000	6, 000	-----
Internal Revenue, corporate statistics.....	9, 000	9, 000	-----
Total.....	176, 000	287, 000	111, 000

SUPPLIES AND MATERIALS

Funds in the amount of \$290,000 are requested for supplies and materials representing an increase of \$84,000 over the allocation for 1969. This increase is necessary because of the increased cost of supplies and materials.

Included in this request is the cost of the annual library order for subscriptions and publications amounting to approximately \$48,000 which is no increase over the costs for 1968 and 1969.

EQUIPMENT

Funds in the amount of \$310,000 are requested for new equipment in fiscal year 1970, which represents an increase of \$240,000 over the allocation for 1969 to provide the following items:

Desks, chair and miscellaneous furniture.....	\$95, 000
Typewriters—Exchange for worn and obsolete machines and new for additional employees.....	80, 000
Conversion of computer central processor from card oriented to tape and disc operation.....	45, 000
Calculators and Adding Machines.....	17, 500
(The amount requested for calculators and adding machines is for replacement of obsolete machines over 15 years old.)	
Dictaphones—replacement and new.....	2, 500
Total	240, 000

The above equipment estimates for furniture for 601 new employees are extremely conservative and are dependent on securing a large amount of excess property from other government sources.

FEDERAL TRADE COMMISSION BUDGET JUSTIFICATION TO THE
BUREAU OF THE BUDGET, FISCAL YEAR 1971

FEDERAL TRADE COMMISSION,
Washington, D.C., September 25, 1969.

HON. ROBERT P. MAYO,
Director, Bureau of the Budget, Executive Office of the President,
Washington, D.C.

DEAR MR. MAYO: Transmitted herewith is the budget request and justification of the Federal Trade Commission for the fiscal year 1971.

Respectfully submitted.

PAUL RAND DIXON, *Chairman.*

FEDERAL TRADE COMMISSION SUMMARY OF 1971 BUDGET JUSTIFICATION

The Federal Trade Commission will require \$27,110,000 for its work in fiscal 1971. This is an increase of \$5,710,000 over the amount estimated Congress will appropriate for the current fiscal year.

The increase is necessary to meet three principal needs: first, to provide consumers with more and faster protection from being deceived by spurious advertising and selling; second, the need for a stronger attack on corporate mergers which illegally restrain competition; and, third, a long overdue strengthening of FTC's field staff which despite a steadily mounting workload, now has fewer positions allocated to it than it had six years ago.

While the FTC has received appropriation increases each year since 1962, the increases have been prompted almost entirely by mandatory pay raises; enforcement responsibilities required by the passage of new laws, such as the Truth-in-Lending, the Fair Packaging and Labeling Acts; and the Amended Flammable Fabrics Act. Such increases have obscured the fact that the growth of the nation's economy was proceeding at a rate far greater than FTC's capacity to carry out its basic function to halt unfair methods of competition and unfair or deceptive acts or practices in commerce.

This shortage of funds has required greater reliance on exposing industry-wide illegalities and clarifying the laws' requirements by Industry Guides and Trade Regulation Rules, simplifying and making more use of consent orders, empowering FTC's field offices to negotiate consent settlements, settling more cases by accepting assurances of discontinuance, and making an effort unprecedented in scope to educate and persuade businessmen to comply with requirements of the trade laws. However, there comes a time when stretching a too thin enforcement capacity no longer will suffice. For the Federal Trade Commission, that time has come.

Of direct concern to consumers are FTC's efforts to halt deceptive practices in advertising and selling. Consumer goods and services have been developed at an unprecedented rate, presenting a lucrative market that has attracted many sellers eager to take advantage of unsophisticated buyers. The plight of the latter has prompted widespread demands for more consumer protection; yet, in the past seven years, the FTC has been able to increase its staff for this work by only 25 positions, so that applications for complaint are inundating the staff. A total of 589 applications for complaint were pending at the beginning of fiscal 1969; by year's end, the number had risen to 2,184. Nor is there any hope of bettering the situation without more staff; for example, in fiscal 1968, the Bureau of Deceptive Practices received 7,215 applications for complaint; comparable applications totaled 10,099 in fiscal 1969, and on a straight-line projection we can expect 16,250 in fiscal 1971. Experience has shown that about eight percent of such applications warrant investigation. Thus, about 1300 deceptive practice cases should be investigated in fiscal 1971 in order to keep faith with consumers who appear to have legitimate complaints. It is, of course, possible to ignore these, as

happened in fiscal 1969 when about 900 investigations should have been undertaken instead of only 192.

Such an investigative gap also is present in monitoring of advertising media. Only network radio and TV is scrutinized by lawyers and other professionals to discover law violations. Personnel is not available to monitor regional broadcasts, national print media, and newspapers.

Another dangerously weak spot is the inadequacy of our scientific advice and assistance program. This is the source of FTC's competence in assessing scientific claims for products. The workload of our staff for this purpose has become unbearably heavy, with the result that it can no longer be given further duties without curtailing or stopping significant programs now underway.

As for checking on compliance with existing orders, here again the workload is beyond the capacity of our 11-man staff. In handling complaints of order violations, processing reports of compliance and undertaking compliance investigations, the staff was confronted with a bigger backlog at the end of fiscal 1969 than at the beginning. Failure to keep abreast of the workload produces delay, as well as making it impossible to conduct a badly needed survey of orders outstanding. The last such survey was made more than 15 years ago and demonstrated that about one-fourth of the cases surveyed would result in penalty investigations and about half of these would result in civil penalty proceedings.

In carrying out FTC's responsibilities under the Truth-in-Packaging law, the principal effort thus far has been directed to educating industry on the law's requirements. However, complaints of violations are commencing to pour in, and it is expected they will increase sharply. Also ahead are surveys and market studies desired by Congress to assess the effectiveness of the Act, plus the development of industry and consumer aids looking to a better understanding of the law. In view of what lies ahead, including proposals to amend the statute, substantial issues involving interpretations, definitions and procedures, the present professional staff, already working overtime, needs to be increased from 5 to 11.

With the momentum created by the Truth-in-Lending law, pressure is increasing for informing consumers about the quality as well as the cost of what they buy. Product standards, including safety standards, is an area of consumer interest clearly within FTC's charter, and Congress is taking ever more interest in the problem. For the FTC to be prepared for a more active role in the affirmative disclosure field will require three attorneys in fiscal 1971.

The total increase of \$1,506,000 required for the Bureau of Deceptive Practices would provide 111 positions, including clerical. It also includes provision for an additional assistant Bureau director and four other professionals to handle a management and organization workload that has become too extensive to be handled efficiently with present staff strength.

In the Commission's efforts to halt restraints of trade, the principal additional effort in fiscal 1971 is required to reduce corporate mergers that are eliminating competition. Particular attention will be given the recent upsurge in conglomerate mergers where economic power is being used to discourage the entry of new competitors and where opportunities for reciprocal dealing are being developed. Priority will be given to illegal merger and other trade restraints in the basic consumer industries.

Despite a tremendous increase in corporate mergers (in the past year our preliminary examination of mergers jumped from an original estimate of 2,100 to 2,850), the legal staff of our merger division has averaged fewer than 29 attorneys since 1963. Moreover, with the merger problem veering to conglomerates, their investigations and analyses have become more difficult due to the diverse product lines involved. A further drain on the time and capacity of these attorneys is the need to examine, and take action if necessary, on reports submitted by certain large corporations in compliance with FTC's "pre-merger notification program."

Priority effort continues to be directed at illegal mergers in the following industries: grocery products; automotive parts; cement; commercial and industrial equipment, machines and supplies; mineral, metals and mining; lumber and building supplies; apparel; and paper and paper products. In addition are industries in which merger activity already has been tackled, or is only now becoming conspicuous.

The flood of mergers, many of which warrant challenge, testify to the fact that FTC's anti-merger work has too long been understaffed. To provide an adequate force will require \$321,000 for 26 new attorney positions.

In tackling general trade restraints and discriminatory practices, we anticipate an increase in workload, but we are hopeful it can be handled by the staffs presently assigned to it. Such is not the case, however, in the manpower needed to effect compliance with restraint of trade orders, particularly those halting illegal mergers and requiring divestitures. Also to be processed are an increasing number of merger clearance under final orders requiring respondents to seek prior FTC approval before making an acquisition in any product line covered. For example: 15 orders now require divestitures within particular periods of time up to five years, while 52 orders prohibit future acquisitions without Commission approval. We expect that, in the next several years, this burden will be tripled.

Also in need of strengthening to support all antimonopoly enforcement work as well as to assist in economic studies in the Division of Accounting which needs four more accountants and a clerk at a cost of \$37,000.

The total increase we ask for the Bureau of Restraint of Trade for fiscal 1971 is \$543,000.

That the Commission is provided with information and competent analyses of economic facts to evaluate business problems affecting competition and the consumer is of the utmost importance. Their availability is the key to wise planning and the most effective use of staff and money. Such research also provides Congress and other government agencies with information needed to assess government-business problems.

However, our staff of 29 for such work is too small to carry on continuing planned research in view of frequent interruptions to perform special ad hoc projects. Result: most planned research projects have either had to be delayed or cancelled. In addition, the staff has been too small to give adequate assistance to other Bureaus and the Office of Program Review. Also, manpower has been lacking to perform most of the requests received from other government agencies.

With an additional \$131,000 for our Industry Analysis Division, we would have the capacity in fiscal 1971 to: (1) conduct a follow-up of our research program studying trends and patterns of conglomerate merger activity; (2) determine in what way more antitrust enforcement could alleviate trouble spots in highly concentrated industries, such as the steel industry; (3) find out why consumer oriented industries have experienced increased concentration while producer industries have experienced decreases; (4) make a careful analysis of factors contributing to effective product differentiation. And, in the field of consumer protection, staff strengthening would assure a continuation of economic information needed to support FTC's efforts to encourage advertising and product promotion which inform consumers about the quality and performance of products. It also would make possible a special study of the consumer credit industry, an analysis of the home improvement industry, and a study of the potential role of anitrust in relation to high prices in the medical and drug industries.

It must be emphasized that special ad hoc projects regularly absorb the largest portion of available manpower in the Industry Analysis Division. Fiscal 1971 is likely to prove no exception.

A major increase in staff strength is required for the Division of Economic Evidence inasmuch as its work plays a key role in FTC's entire law enforcement effort, most particularly in its challenge of illegal corporate mergers and its probe into concentrated industries. We ask for an increase of 20 in the Division's professional staff, at a cost of \$249,000. This would key the Division's support capacity to FTC's enforcement Bureaus.

A significant action to make available to the FTC and to the public more and better statistical information about the structure of U.S. industrial corporations would be to centralize in FTC's Financial Statistics Division the reporting program now divided between FTC and the Securities Exchange Commission.

There are 87 multi-billion-dollar manufacturing corporations, according to the most recent FTC-SEC quarterly report. These 87 own nearly half of the total assets of all corporate manufacturers. Of the 569 firms which now own nearly three-fourths of all corporate manufacturing assets, 524 report to SEC and 45 to FTC. While FTC obtains each quarter information as to the ownership, sales, product mix, profitability, and the like of all large privately-owned manufacturing corporations, it does not have similar data for large publicly-owned firms.

Approximately 8300 firms now report to FTC in the FTC-SEC quarterly financial reporting program. If the 2,451 firms which report to SEC were to report instead to FTC, economic information not heretofore available to FTC could be developed for use on a continuing basis. Such centralization, which would be extremely valuable to the Commission in improving investigational planning and deploying its resources, can be accomplished by increasing the Division staff by 10 professional and 10 clerical employee, at a cost of \$180,000.

The largest increase in manpower and money that we ask for any Bureau in fiscal 1971 is for our Bureau of Field Operations. Here the need is crucial to the Commission's law enforcement capacity and its ability to provide guidance, and assistance to state and local governments, businessmen, and consumers. This Bureau is the investigative arm of the FTC and its principal means of communication with the nation.

Its present allocation of personnel is 23 positions fewer than in 1963. This is the fact despite a tremendous growth in the country's business and an even greater increase in responsibilities placed upon the field staff.

Moreover, complexity of cases referred to the field staff, plus increases in evidentiary requirements, plus the fact that many cases involved industrywide considerations more than offset a slight reduction in numbers referred to the field in fiscal 1969. Also, the Commission directed the field offices to expedite many special projects and surveys which required the diversion of large numbers of attorneys from case work investigations. At one time this year, 85 field attorneys had to be assigned to special investigations and educational programs. This Spring, 37 field attorneys were assigned to educating creditors and others to the requirements of the Truth-in-Lending Act. Also, as Federal-State Cooperative programs continue to grow, our field offices are being called on to expand their contribution to the administration of these programs.

Because of the fiscal 1971 workload anticipated for the Bureau of Field Operations and its expanded investigative and compliance work, plus probable special investigations and educational programs, we ask for 100 more field attorneys and 35 clerical personnel which, together with supporting costs, will require an additional \$1,680,000.

Two other major activities of the Commission, the work handled by its Bureau of Textile and Furs and the work handled by its Bureau of Industry Guidance, will not require any substantial additional funds in fiscal 1971. This presumes that enough of the funds requested for fiscal 1970 to provide necessary manpower to increase surveillance of dangerously flammable fabrics and garments will become available. As for the Industry Guidance work, our principal needs are for two additional attorneys to bolster the staff of the Division of Trade Regulation Rules, and two more for the Division of Industry Guides. Because we are not asking for substantial additional funds for these activities should not be interpreted to mean they are coasting, as the report of their work in the full text of this budget justification makes amply clear.

The Office of the General Counsel was reorganized on June 11, 1969, and major changes (described in the full text of this justification) were made. For the Division of Litigation, where a heavier workload is anticipated in appellate court cases as well as district court litigation, plus a rise in subpoena enforcement actions, the staff needs strengthening by two attorneys. For the Division of Legal Services, three more are needed in view of the great increase in projects of the operating bureaus, and the implementation of new statutes, all of which most certainly will generate a heavier demand for the Division's legal services. Also, in fiscal 1971, we have reason to anticipate a sharp increase in requests from the States for advice and assistance regarding their own legislative or enforcement matters involving deceptive or unfair trade practices. In addition, the FTC will continue its policy of inviting a maximum of state and local effort to gain compliance with the trade laws. This, of course, serves FTC's purpose by halting illegalities at state or local level before they develop into regional or national problems.

For the increase in workload for the General Counsel's office in fiscal 1971, we ask for an additional \$113,000.

An increased workload for the FTC in fiscal 1971 appears certain even if only the most pressing of its law enforcement obligations are undertaken. True, the Commission could become so selective in bringing adversary actions that it could operate on an even smaller budget, but were this to happen the consumer and reputable business would have to pay for the saving many times over.

FINANCIAL SUMMARIES
ANALYSIS OF BUDGET AUTHORITY AND OUTLAYS

(In thousands of dollars)

FEDERAL TRADE COMMISSION					Increase or de- crease (-)	Explanation
Account and functional code	1969 enacted	1970 estimate	1971 estimate			
FEDERAL FUNDS						
Federal Trade Commission						
Salaries and expenses	508 NOA	16,890	19,720 D/1,680	27,110)))	5,710	1970 NOA LA Exp NL 19,720 - 19,690 - D/ 1,680 - 1,533 -
ADJUSTMENTS						
Applicable receipts from the public	500 NOA) Exp)	-4	-5	-5	-	1971 NOA LA Exp NL
Total, Federal Trade Commission	NOA	16,890	21,400	27,110	5,710	Trans- mitted 27,110 - 26,353 - D/ - - 147 -

Totals for the FEDERAL TRADE COMMISSION are distributed as follows:

1970			
NOA	LA	Exp	NL
Pending	-	19,690	-
D/	-	1,533	-
1971			
NOA	LA	Exp	NL
Transmitted	-	26,353	-
D/	-	147	-

D/ Proposed for separate transmittal, civilian pay act supplemental.

STATEMENT OF RECEIPTS—FEDERAL TRADE COMMISSION (30-84)

[In thousands of dollars]

Receipt symbol	Receipt account title	Source category	Type	Function	1969 actual ¹	1970 estimate	1971 estimate
9-1040	Fines, penalties, and forfeitures, customs, commerce and antitrust laws	1040	P	508	53	-----	-----
9-2250	Sale of publications and reproductions	2250	P	500	4	5	5
Total special fund receipts					57	5	9

¹ In fiscal year 1969 judgments in the amount of \$45,500 were levied in Federal Courts resulting from criminal and civil penalty suits filed by the Federal Trade Commission. On July 1, 1969, 21 civil penalty suits had been certified and were pending either in the Department of Justice or in Federal Courts. Inasmuch as this Commission has neither control over the amounts assessed nor subsequent collections no accurate estimate can be made of amounts that will be received in 1970 or 1971.

FEDERAL TRADE COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Federal Trade Commission, including uniforms or allowances therefor, as authorized by law (5 U.S.C. 5901-5902), and services as authorized by 5 U.S.C. 3109 and not to exceed \$500 for official reception and representation expenses, **[\$19,500,000] \$27,110,000: Provided,** That no part of the foregoing appropriation shall be expended upon any investigation hereafter provided by concurrent resolution of the Congress until funds are appropriated subsequently to the enactment of such resolution to finance the cost of such investigation.

1970 appropriation pending in U.S. Senate:

President's budget to Congress..... \$19,940,000
H.R. 12307 passed by House of Representatives..... 19,500,000

FEDERAL TRADE COMMISSION SALARIES AND EXPENSES

PROGRAM AND FINANCING (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Program by activities:			
1. Antimonopoly:			
(a) Investigation and litigation	6,054	6,955	8,683
(b) Economic and financial reports	1,187	1,308	1,743
(c) Trade regulation rules and industry guides	350	418	492
2. Deceptive practices:			
(a) Investigation and litigation	4,907	6,210	9,002
(b) Trade regulation rules and industry guides	704	836	983
(c) Textile and fur enforcement	1,685	2,950	2,687
3. Consumer credit enforcement	390	1,874	1,876
4. Executive direction and management	385	438	484
5. Administration	950	990	1,160
Total program costs funded ¹	16,612	21,619	27,110
Unfunded adjustments to total program costs:			
Loss on disposition of fixed assets	-30	-30	-----
Change in selected resources ²	+223	-189	-----
10 Total obligations	16,805	21,400	27,110

¹ Includes capital outlay as follows: 1969, \$126,000; 1970, \$220,000; 1971, \$261,000.

² Selected resources as of June 30 are as follows:

	1968	1969	1970	1971
Stores	10	11	12	12
Unpaid undelivered orders	143	365	175	175
Total selected resources	153	376	187	187

FINANCING AND OUTLAYS (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Total obligations (from program schedule).....	16,805	21,400	27,110
Financing:			
Unobligated balance lapsing.....	85		
New obligational authority.....	16,890	21,400	27,110
New obligational authority:			
Appropriation.....	16,900	19,720	27,110
Transferred to "operating expenses, public buildings service," General Services Administration (75 Stat. 353).....	-10		
Appropriation (adjusted).....	16,809	19,720	27,110
Proposed supplemental for civilian pay increase.....		1,680	
Relation of obligations to outlays:			
Total obligations (affecting expenditures).....	16,805	21,400	27,110
Obligated balance, start of year.....	927	1,280	1,457
Obligated balance, end of year.....	-1,280	-1,457	-2,067
Adjustments in expired accounts.....	-22		
Outlays, excluding pay increase supplemental.....	16,430	19,690	26,353
Outlays from civilian pay act supplemental.....		1,533	147

TRUST RECEIPTS AND EXPENDITURES (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Deposit funds net.....			
Relation of obligations to expenditures:			
Obligated balance, start of year.....	95	88	100
Obligated balance, end of year (-).....	-88	-100	-100
Expenditures.....	7	-12	

FEDERAL TRADE COMMISSION—ANALYSIS OF BUDGET AUTHORITY AND OUTLAYS (IN THOUSANDS OF DOLLARS)

(Totals for the Federal Trade Commission are distributed as follows)

	1970				1971			
	NOA	LA	Exp	NL	NOA	LA	Exp	NL
Federal funds: Pending in Congress (est).....	19,720		19,690		27,110		26,353	
Separate transmittal: (C) Civilian pay.....	1,680		1,533				147	
Total Federal funds.....	21,400		21,223		27,110		26,500	
Intragovernmental transactions.....	-1,925		-1,925		-2,440		-2,440	
Total Federal Trade Commission.....	19,475		19,298		24,670		24,060	

ADVANCES AND REIMBURSEMENTS
PROGRAM AND FINANCING (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Program by activities: Economic study for Department of Transportation on automobile insurance.....	57		
Financing: Receipts and reimbursements from: Administrative budget accounts.....	-57		
New obligational authority.....			
Relation of obligations to outlays:			
Total obligations.....	57		
Receipts.....	-57		
Obligations incurred, net.....			
Outlays.....			
Object Classification:			
Positions other than permanent.....	49		
Personnel benefits.....	4		
Travel and transportation of persons.....	4		
Total obligations.....	57		

NARRATIVE STATEMENT FOR PRINTING PROGRAM AND PERFORMANCE

The Commission has the duty of preserving free competitive enterprise through prevention of monopolistic and unfair trade.

1. *Antimonopoly.*—All types of monopolistic restrictions, including price-fixing conspiracies, boycotting, price discriminations, and illegal mergers and acquisitions, are corrected; economic data and criteria are brought to bear on monopoly and related problems; and supervision is provided over the registration and operations of associations of American exporters engaged solely in export trade. In 1971 investigation and trial of merger and other antimonopoly cases will be expedited, with particular emphasis on illegal mergers and other trade restraints in the basic consumer industries; compliance activities, particularly those halting illegal mergers and requiring divestitures, will be expanded; and activities supporting enforcement efforts will be strengthened.

2. *Deceptive practices.*—False and misleading advertising and other unfair or deceptive practices are prevented by corrective action, including the affirmative aid of voluntary trade-practice conferences and advertising guides; business and the public are protected from misbranding and nondisclosure of fiber content of manufactured wool products and household textile articles; consumers and merchants are protected from unfair practices with respect to furs and fur products; and the public is protected from dangers inherent in flammable fabrics. In 1971 consumer protection and educational activities will be expanded; additional clarification, procedures and enforcement of the Fair Packaging and Labeling Act will be required; compliance with all outstanding Commission orders will be expedited; the program of scientific advice and assistance will be expanded; strong emphasis will be placed on deceptive advertising of food and drugs and stronger programs designed to assure affirmative disclosure and standardization of products will be implemented.

3. *Truth-in-Lending.*—Inspections and other enforcement activities of the program will be expanded substantially as recruiting, training, and organizing permit.

4. *Executive direction and management.*—These also include the adjudicatory functions of the Commission.

SELECTED WORKLOAD DATA

	1969 actual	1970 estimated	1971 estimated
Applications for complaint received.....	11, 927	14, 300	18, 075
Investigations initiated or reopened.....	626	930	1, 775
Investigations completed or closed.....	954	1, 055	1, 500
Investigations pending, yearend.....	1, 664	1, 475	1, 705
Informal corrective actions.....	5, 768	6, 000	6, 300
Complaints issued.....	220	279	362
Complaints approved for consent order.....	215	245	310
Orders to cease and desist issued.....	221	265	310
Voluntary compliance actions.....	511	560	745
Compliance actions completed.....	2, 093	2, 210	2, 310
Complaints pending litigation, yearend.....	38	45	50
Trade regulation rules and guides, issued or revised.....	8	8	9
Advisory opinions issued.....	128	135	140

SALARIES AND EXPENSES

OBJECT CLASSIFICATION (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Personnel compensation:			
Permanent positions.....	14, 017	17, 979	22, 504
Positions other than permanent.....	50	60	60
Other personnel compensation.....	29	50	50
Special personal service payments.....	6	11	11
Total personnel compensation.....	14, 102	18, 100	22, 625
Personnel benefits: Civilian.....	1, 037	1, 362	1, 722
Travel and transportation of persons.....	377	515	745
Transportation of things.....	7	11	17
Rent, communications, and utilities.....	374	594	879
Printing and reproduction.....	165	103	171
Other services.....	255	244	369
Supplies and materials.....	229	251	321
Equipment.....	259	220	261
Total obligations.....	16, 805	21, 400	27, 110

PERSONNEL SUMMARY

Total number of permanent positions.....	1,306	1,508	1,922
Full-time equivalent of other positions.....	5	5	5
Average number of all employees.....	1,281	1,390	1,700
Average GS grade.....	9.2	9.2	9.2
Average GS salary.....	\$11,905	\$12,256	\$12,021
Average salary of ungraded positions.....	\$7,621	\$7,980	\$7,980

ANALYSIS OF CHANGES IN PROGRAM REQUIREMENTS

(In thousands of dollars)

	1965 actual	1969 actual	1970 estimate	1971 estimate
Budget authority (Federal funds).....	13,459	16,900	21,400	27,110
Outlays (Federal funds).....	13,662	16,430	21,223	26,500

ANALYSIS OF CHANGES IN BUDGET AUTHORITY

1970 estimated appropriation.....	19,720
Anticipated supplemental requirement: Supplemental required for pay raise costs.....	1,680
1970 current estimate.....	21,400

Increases over 1970:

Program increase to provide increased Restraint of Trade enforcement mainly in the merger field and to expand our programs of consumer protection:

Office of General Counsel.....	113
Bureau of Restraint of Trade.....	543
Bureau of Economics.....	625
Bureau of Deceptive Practices.....	1,506
Bureau of Field Operations.....	1,680
Bureau of Textiles and Furs.....	27
Bureau of Industry Guidance.....	57
Executive and administrative support and general operating costs.....	1,159
	5,710

Total 1971 request..... 27,110

Distribution of budget authority by appropriation: Federal Trade Commission: Salaries and expenses..... 27,110

FEDERAL TRADE COMMISSION CONSOLIDATED SCHEDULE—ANALYSIS OF CIVILIAN PERSONNEL COMPENSATION

	1969		1970		1971 proposed
	In preceding budget	Actual	In preceding budget	Proposed for 1971 budget	
A. Total civilian personnel compensation.....	\$14,433,000	\$14,097,032	\$16,782,000	\$18,089,000	\$22,614,000
B. Adjustments for changes in pay scales not reflected in 1969 obligations in 1970 budget:					
1. Wage board increases:					
(a) Increases effective during the year.....					
(b) Increases effective in prior years.....				-4,430	-5,200
(c) Anticipated additional increases to be effective in 1970.....					
2. Pay Act increase:					
(a) Increase effective during year.....				-1,555,000	
(b) Increases effective in prior years.....					-1,555,000
C. Adjusted personnel compensation.....	14,433,000	14,097,032	16,782,000	16,529,570	21,053,800
D. Average number of all civilian employees.....	1,306	1,185	1,561	1,508	1,922
E. Average compensation.....	11,051	11,896	10,751	10,961	10,954
F. Percent change in average compensation 1971 over 1970.....					-0.06

COMPARATIVE SUMMARY: SALARIES AND EXPENSES, FISCAL YEAR 1970-71

	Estimated funds available fiscal year 1970				Total request for the fiscal year 1971				Increase requested fiscal year 1971			
	Positions	Personal services	Travel and other	Total	Positions	Personal services	Travel and other	Total	Positions	Personal services	Travel and other	Total
Commissioners' office	41	\$711,000	\$8,000	\$719,000	41	\$711,000	\$8,000	\$719,000				
Office of program review	5	75,000		75,000	6	93,000		93,000	1	\$18,000		\$18,000
Office of Executive Director	8	131,000	2,000	133,000	8	131,000	2,000	133,000				
Office of Executive Director	3	53,050			3	53,500						
Office of Information	5	77,500			5	77,500						
Office of Administration	108	926,500	6,000	932,500	124	1,032,500	6,000	1,038,500	16	106,000		106,000
Office of Director	6	83,000			7	92,000			1	9,000		9,000
Management Staff	5	76,000			7	92,500			2	16,000		16,000
Division of Personnel	21	187,500			23	201,500			2	14,000		14,000
Division of Data Processing	16	126,000			21	164,000			5	38,000		38,000
Division of Administrative Services	60	453,500			66	482,500			6	29,000		29,000
Office of the Comptroller	26	242,000	500	242,500	30	267,000	500	267,500	4	25,000		25,000
Office of Comptroller	5	77,000			5	77,000						
Division of Finance	21	165,000			25	190,000			4	25,000		25,000
Office of the Secretary	62	444,000	500	444,500	79	534,000	500	534,500	17	90,000		90,000
Office of Secretary	12	116,000			14	128,000			2	12,000		12,000
Division of Legal and Public Records	50	328,000			65	406,000			15	78,000		78,000
Office of General Counsel	60	904,000	6,000	910,000	69	1,007,000	16,000	1,023,000	9	103,000	10,000	113,000
Office of General Counsel	6	88,000			9	105,000			3	17,000		17,000
Division of Litigation	28	448,000			30	482,000			2	34,000		34,000
Division of Legal Services	17	255,500			20	292,500			3	37,000		37,000
Division of Legislation and Federal-State Cooperation	9	112,500			10	127,500			1	15,000		15,000
Office of Hearing Examiners	24	440,000	8,000	448,000	24	440,000	8,000	448,000				
Bureau of Restraint of Trade	208	2,991,000	83,000	3,074,000	261	3,507,000	110,000	3,617,000	53	516,000	27,000	543,000
Office of the Director	46	412,000			62	508,000			16	96,000		96,000
Division of Mergers	35	598,000			61	919,000			26	321,000		321,000

Division of General Trade Restraints.....	35	620,000			35	620,000						
Division of Discriminatory Practices.....	46	713,000			46	713,000						
Division of Compliance.....	33	422,000			39	484,000			6	62,000		
Division of Accounting.....	13	226,000			18	263,000			5	37,000		
Bureau of Deceptive Practices.....	217	2,813,500	140,000	2,953,500	328	4,273,500	186,000	4,459,500	111	1,460,000	46,000	1,505,000
Office of the Director.....	24	275,000			38	402,000			14	127,000		
Division of Consumer Credit.....	32	375,000			32	375,000						
Division of Special Projects.....	18	260,500			38	525,500			20	265,000		
Division of Food and Drug Advertising.....	53	561,000			70	800,000			17	239,000		
Division of General Practices.....	47	688,000			89	1,273,000			42	585,000		
Division of Compliance.....	15	257,000			23	363,000			8	105,000		
Division of Scientific Opinions.....	18	297,000			28	435,000			10	138,000		
Division of Consumer Information.....	10	100,000			10	100,000						
Bureau of Textiles and Furs.....	168	1,856,000	123,000	1,979,000	168	1,856,000	150,000	2,005,000			27,000	27,000
Office of the Director.....	22	173,500			22	173,500						
Division of Enforcement.....	24	370,000			24	370,000						
Division of Regulation.....	122	1,312,500			122	1,312,500						
Bureau of Field Operations.....	391	4,322,000	247,000	4,569,000	526	5,852,000	397,000	6,249,000	135	1,530,000	150,000	1,680,000
Office of the Director.....	6	93,500			6	93,500						
Field Offices.....	385	4,228,500			520	5,758,500			135	1,530,000		
Bureau of Industry Guidance.....	59	865,000	2,000	867,000	65	922,000	2,000	924,000	6	57,000		57,000
Office of the Director.....	17	166,000			18	171,000			1	5,000		
Division of Industry Guides.....	23	379,500			25	401,500			2	22,000		
Division of Advisory Opinions.....	7	158,500			7	158,500						
Division of Trade Regulation Rules.....	12	161,000			15	191,000			3	30,000		
Bureau of Economics.....	131	1,368,000	24,000	1,392,000	193	1,988,000	29,000	2,017,000	62	620,000	5,000	625,000
Office of Director.....	38	325,000			50	385,000			12	60,000		
Division of Economic Evidence.....	27	349,000			47	598,000			20	249,000		
Division of Industry Analysis.....	29	344,500			39	475,500			10	131,000		
Division of Financial Statistics.....	37	349,500			57	529,500			20	180,000		
General operating expenses.....			2,661,000	2,661,000			3,581,000	3,581,000		920,000		920,000
Total.....	1,508	18,089,000	3,311,000	21,400,000	1,922	22,614,000	4,496,000	27,110,000	414	4,525,000	1,815,000	5,710,000

ACTUAL OBLIGATIONS, FISCAL YEAR 1969

	Employment June 30, 1969	Personal services	Travel and other	Total obligations
Commissioner's offices.....	35	\$614, 817	\$55, 547	\$670, 364
Office of program review.....	1	38, 467	2, 578	41, 045
Office of executive director.....	8	118, 701	9, 525	128, 226
Office of executive director.....	3	48, 320		
Office of information.....	5	70, 381		
Office of Administration.....	103	827, 311	74, 493	901, 804
Office of Director.....	6	65, 533		
Management staff.....	5	66, 322		
Division of Personnel.....	20	156, 516		
Division of Data Processing.....	11	89, 367		
Division Administrative Services.....	61	449, 573		
Office of the Comptroller.....	20	190, 103	14, 310	204, 413
Office of Comptroller.....	5	66, 437		
Division of Finance.....	15	123, 666		
Office of the Secretary.....	58	367, 504	26, 768	394, 272
Office of the Secretary.....	12	101, 947		
Legal and Public Records.....	46	265, 557		
Office of the General Counsel.....	54	852, 873	101, 651	954, 524
Office of General Counsel.....	7	203, 830		
Division of Litigation.....	27	444, 586		
Division of Legal Services.....	14	116, 065		
Division of Legislation—Federal-State Cooperation.....	6	88, 392		
Office of Hearing Examiners.....	23	404, 778	37, 669	442, 447
Bureau of Restraint of Trade.....	189	2, 604, 391	288, 099	2, 892, 490
Office of Director.....	50	376, 081		
Division of Mergers.....	32	462, 413		
Division General Trade Restraints.....	33	555, 679		
Division Discriminatory Practices.....	34	638, 841		
Division of Compliance.....	28	355, 601		
Division of Accounting.....	12	215, 776		
Bureau of Deceptive Practices.....	163	1, 879, 373	250, 493	2, 147, 866
Office of Director.....	29	310, 480		
Division of Consumer Credit.....	11	64, 877		
Division of Special Projects.....	21	240, 317		
Division of Food and Drug Advertising.....	21	243, 581		
Division of General Practices.....	47	538, 797		
Division of Compliance.....	16	239, 140		
Division of Scientific Opinions.....	18	260, 181		
Bureau of Textile and Furs.....	114	1, 230, 057	144, 318	1, 374, 375
Office of Director.....	20	147, 383		
Division of Enforcement.....	21	272, 635		
Division of Regulation.....	73	810, 039		
Bureau of Field Operations.....	247	2, 947, 279	390, 612	3, 337, 891
Office of Director.....	5	83, 182		
Field Offices.....	242	2, 864, 097		
Bureau of Industry Guidance.....	55	789, 463	62, 301	851, 764
Office of Director.....	18	147, 076		
Division of Industry Guides.....	22	350, 045		
Division of Advisory Opinions.....	8	146, 595		
Division of Trade Regulation Rules.....	7	145, 738		
Bureau of Economics.....	148	1, 219, 014	146, 025	1, 365, 039
Office of Director.....	57	288, 203		
Division of Economic Evidence.....	27	331, 130		
Division of Industry Analysis.....	28	269, 932		
Division of Financial Statistics.....	36	329, 749		
General Operating Expenses.....			1, 098, 624	1, 098, 624
Totals.....	1, 218	14, 102, 131	2, 703, 013	16, 805, 144

NUMBERS OF CIVILIAN PERSONNEL

	Number of employees at end of year					
	1969 actual		1970 estimate		1971 estimate	
	Full-time in permanent positions	Total	Full-time in permanent positions	Total	Full-time in permanent positions	Total
Total employment in budget schedules (except disadvantaged summer youth employees).....	1,165	1,182	1,385	1,390	1,850	1,870
Number of disadvantaged summer youth employees excluded above.....		28		40		40
Total employment, Federal Trade Commission.....	1,165	1,210	1,385	1,430	1,850	1,910

REPORT OF MOTOR VEHICLE DATA—DOMESTIC

AGENCY, FEDERAL TRADE COMMISSION; VEHICLE TYPE, OTHER SEDANS; DATE, SEPT. 30, 1969

	Past year 1969	Current year 1970	Budget year 1971
A. Net fleet, July 1:			
1. Actually on hand, July 1.....			
2. Add vehicles on order but outstanding, July 1.....			
3. Deduct vehicles included in A1 awaiting disposal.....			
4. Net fleet, July 1 (A1 + A2 - A3).....			
B. Acquisitions:			
1. All new orders placed, including those not yet delivered.....			
2. Acquired by forfeiture.....			
3. Acquired by transfer.....			
4. Total acquisitions (B1 + B2 + B3).....			
C. Disposals accomplished and scheduled:			
1. Carryover disposals accomplished (nonadd).....			
2. Newly scheduled disposals accomplished.....			
3. Newly scheduled disposals, unaccomplished June 30.....			
4. Total newly scheduled disposals (C2 + C3 = 4a + 4b1 through 4b4).....			
(a) For replacement (nonadd).....			
(b) Not for replacement (nonadd):			
(1) Transfers to other agencies.....			
(2) Donation to non-Federal recipients.....			
(3) Sold.....			
(4) Other (explain).....			
D. Newly scheduled disposals being replaced (nonadd):			
1. Meeting both age and mileage standards.....			
2. Meeting mileage standard only.....			
3. Meeting age standard only.....			
4. Not meeting either standard (explain).....			
5. Total (D1 + D2 + D3 + D4 = C4a).....			
E. Net fleet, June 30 (A4 + B4 - C4):			
1. Deduct new vehicles ordered but not received.....			
2. Add newly scheduled disposals not accomplished (C3).....			
3. Add carryover disposals not accomplished (A3 - C1).....			
4. Actually on hand, June 30 (E - E1 + E2 + E3).....			
F. Vehicles used on a term basis:			
1. Assigned from interagency motor pools.....	4	3	4
2. Rented commercially.....		1	1
3. Total (F1 + F2).....	4	4	5
G. Total vehicles available full time (E + F3).....	4	4	5

REPORT OF MOTOR VEHICLE DATA—DOMESTIC—Continued

AGENCY, FEDERAL TRADE COMMISSION; VEHICLE TYPE, OTHER SEDANS; DATE, SEPT. 30, 1969—Continued

	Past year 1969	Current year 1970	Budget year 1971
H. Obligations and related data:			
1. Obligations for vehicles ordered.....			
2. Cost of vehicles acquired otherwise.....			
3. Proceeds from disposals:			
(a) Applied for replacements.....			
(b) Deposited to miscellaneous receipts.....			
(c) Total (H3a+H3b).....			
I. Cost of vehicles used on a term basis:			
1. From interagency motor pools.....	\$4,300	\$4,400	\$4,800
2. Rented commercially.....		700	900
3. Total (I1+I2).....	4,300	5,100	5,700

SCIENTIFIC RESEARCH AND DEVELOPMENT ACTIVITIES AS REFLECTED IN THE 1971 BUDGET
[In thousands of dollars]

Account title	Net budget expenditures					
	Conduct of research and development			Research and development facilities		
	1969	1970	1971	1969	1970	1971
Salaries and expenses, (Exp.).....	365	385	385			

The Federal Trade Commission conducts no program of scientific research and development and has so reported to the Bureau of the Budget in past years. Funds for scientific research have never been specifically requested in this Agency's budget requests.

The definitions of scientific research as set forth in the more detailed instructions issued by the National Science Foundation include "social science." The Bureau of Economics in this Commission is of the opinion that expenditure for applied research in social science is a part or a by-product of the specialized economic studies and has reported expenditures in this field to the National Science Foundation.

SUMMARY OF ELECTRONIC DIGITAL COMPUTER ACQUISITIONS
[Dollar amounts in thousands]

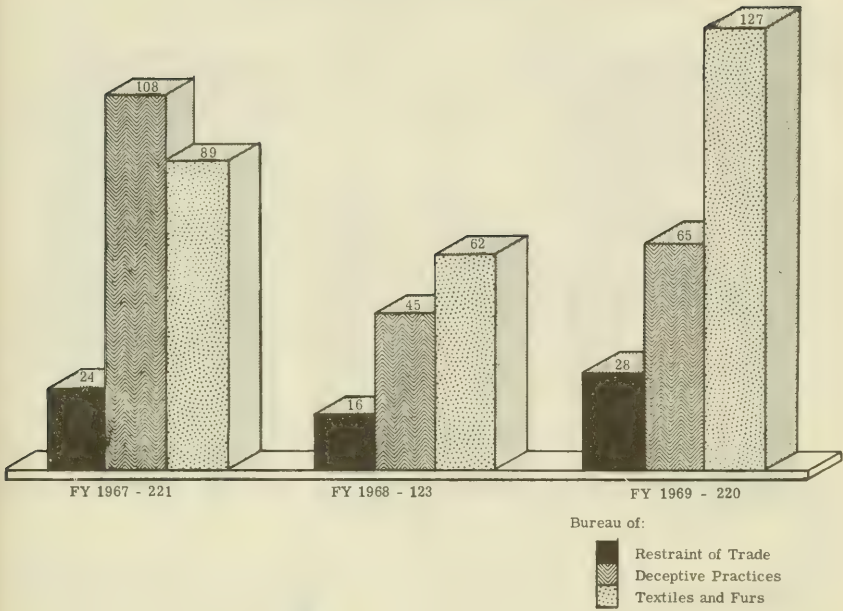
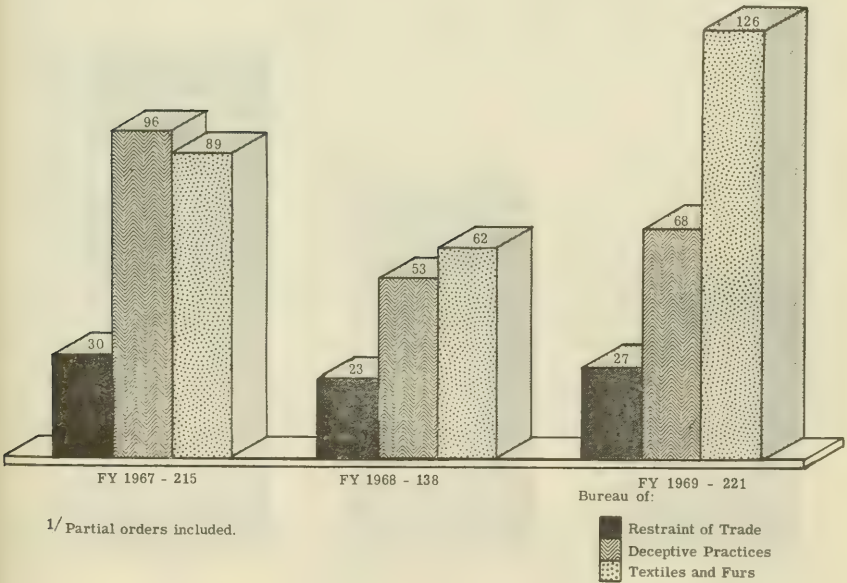
	1970		1971	
Acquisitions	Number	Obligations	Number	Obligations
Additions: None				
Replacements: None				
Conversions: Computers converted from lease to purchase				

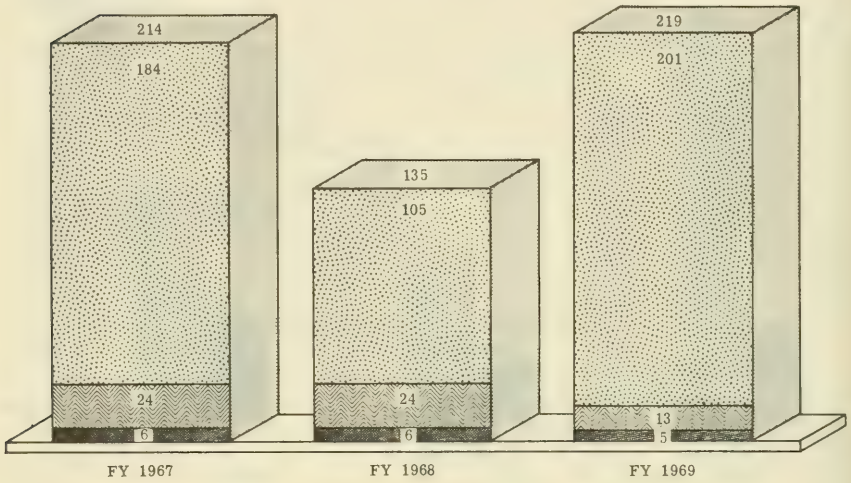
	1969		1970		1971	
Inventory	Number	Amount	Number	Amount	Number	Amount
Installed, as of June 30:						
Owned	1	\$139	1	\$139	1	\$139
Leased						
Total	1	139	1	139	1	139

ADDITIONAL AND REPLACEMENT COMPUTERS TO BE ACQUIRED

Activity and location	Computer model	Planned date of installation	Obligations	
			Purchase	Lease
1970 Replacements: None.....				
1971:				
Additions: None.....				
Replacements: None.....				

COMPLAINTS ISSUED BY THE COMMISSION

ORDERS TO CEASE AND DESIST ISSUED BY THE COMMISSION^{1/}

CASES^{1/} DISPOSED OF BY ORDERS TO CEASE AND DESIST - CONTEST AND CONSENT

^{1/} Partial orders excluded accordingly. Also excludes dismissals, declaratory and withdrawals, etc.

Type:

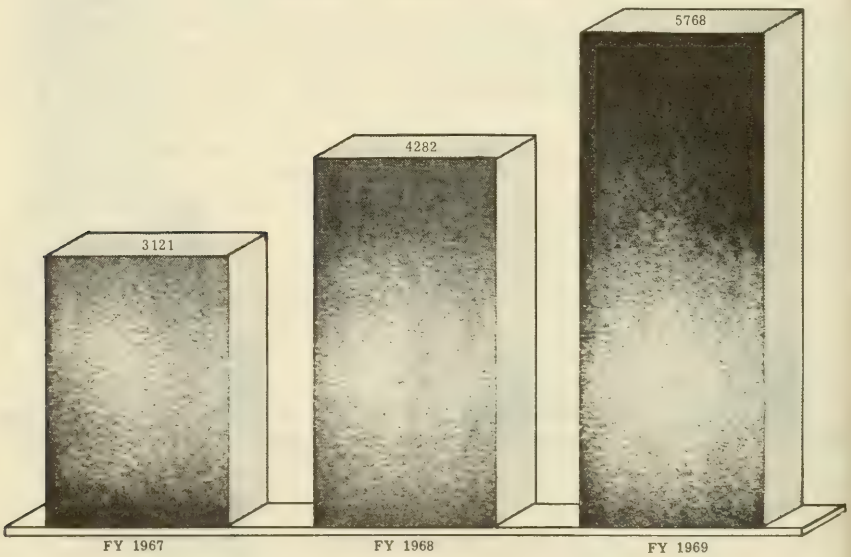


Consent (C & D Series)

Contest

Admissive Answers and Defaults

INFORMAL CORRECTIVE ACTIONS



COMMISSIONERS AND COMMISSIONERS' OFFICES

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Commissioners.....	5	\$192,000	5	\$192,000		
Commissioners' offices.....	36	519,000	36	519,000		
Total personal services.....	41	711,000	41	711,000		
Travel.....		8,000		8,000		
Total.....	41	719,000	41	719,000		

The funds requested will provide the salaries and expenses of the Commissioners and the staffs in their offices. In fiscal year 1970, 41 positions are allocated to Offices of Commissioners consisting of attorneys, advisers, administrative assistants, stenographers and messengers.

No additional positions are requested for fiscal year 1971.

OFFICE OF PROGRAM REVIEW

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	5	\$75,000	6	\$93,000	1	\$18,000

The main job of this office is to devise ways and means for the Commission to improve strategic planning and enable the Commission to focus its limited resources on the significant problem areas in the antitrust and consumer protection fields. The office aims to make decision-making on starting Commission investigations rational and economical by developing the formal means by which reasoned policy alternatives on potential resource uses are presented to the Commission.

This office makes recommendations to the Commission on program areas in the economy where the Commission could commit its manpower. The office prepares enforcement policy position papers for the Commission that set forth the decision options on the policy issues. The office also refines criteria for instituting new investigations, works with the enforcement bureaus on the process of developing program plans, and evaluates the bureaus' program proposals. The major ongoing long range project of this office is the development of a total system for planning the Commission's program and resource allocations on a rational basis.

An additional \$18,000 is requested for 1971 to provide one GS-14 attorney.

By adding the requested attorney to this office for program evaluation, the office would have the two attorneys and two economists that a Budget Bureau Staff Report (No. CF-60-124) recommended for a Commission high level program review staff in 1960. This planning unit so reinforced can seek out on a limited basis and locate primary trouble spots in the economy in which the Commission should apply its efforts. This analytical staff would also provide the Commission with policy guidance by evaluating competing proposals for project-type investigations and by recommending to the Commission appropriate division of Commission resources among major missions.

OFFICE OF THE EXECUTIVE DIRECTOR

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of Executive Director.....	3	\$53,500	3	\$53,500		
Office of Information.....	5	77,500	5	77,500		
Total personal services.....	8	131,000	8	131,000		
Travel.....		2,000	8	2,000		
Total.....	8	133,000	8	133,000		

The Executive Director, as the Commission's chief operating official manages the Federal Trade Commission's activities to achieve effective and economical operations. He has responsibility for operational and administrative direction of all the Commission's Bureaus and Field Offices.

The Office of Information reports to the Executive Director and its overall policy, advisory and educational functions have been given additional emphasis.

No additional positions are requested for 1971.

OFFICE OF ADMINISTRATION

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of Director.....	6	\$83,000	7	\$92,000	1	\$9,000
Management staff.....	5	76,500	7	92,500	2	16,000
Division of Personnel.....	21	187,500	23	201,500	2	14,000
Division of Data Processing.....	16	126,000	21	164,000	5	38,000
Division of Administrative Services.....	60	453,500	66	482,500	6	29,000
Total.....	108	932,500	124	1,038,500	16	106,000
Travel.....		6,000		6,000		
Total.....	108	932,500	124	1,038,500	16	106,000

The Office of Administration gives policy guidance and general supervision to the management and organization programs, administrative services activities and personnel programs of the Federal Trade Commission. Plans for effective organization and administration of the Commission's management programs. Formulates and puts into effect basic administrative policies. Develops long-range plans relating to needs for personnel, space, supplies, equipment, etc. This office consists of the Management Staff and the Divisions of Personnel, Data Processing, and Administrative Services.

Management interns are assigned to the Office of Administration and are detailed during their training period to administrative positions throughout the Federal Trade Commission. An increase of \$9,000 is requested for one GS 9 management intern.

MANAGEMENT STAFF

The Management Staff in the Office of Administration is responsible for conducting agency-wide organizational and procedural studies; coordinating and issuing procedural and policy statements through a Directives System in the form of an Administrative Manual, Administrative Bulletins, and notices; conducting the Workload, Production and Manpower Reports System which also includes a Highlights narrative for all program functions; operating the Progress Report System covering the status of formal and informal casework; and the performance of special studies as assigned.

A recent survey indicated the necessity for expansion of management analysis activities in order to provide for economic and efficient correspondence, reports, and forms control activities as well as overall analysis and study of organization and procedures within the Commission. Truth-in-Lending will require the development of new computer systems applications. In order to provide these expanded services, an additional \$16,000 is requested to provide one GS-11 management analyst and one GS-4 clerk-steno.

DIVISION OF PERSONNEL

The Division of Personnel initiates, develops and administers personnel policies and programs in the spheres of recruitment, appointment and placement, training, position classification, performance ratings, employee relations, welfare, and health and recreation.

Also this Division has been given the responsibility for position management and manpower utilization surveys and maintenance of necessary controls.

An orientation pool for stenographers and typists predominately consisting of employees initially entering on duty with the Commission has been established

under the Division of Personnel. This group expedites overflow work from the substantive bureaus and is used for relief assignments to Commissioners' Offices, the Office of the Executive Director, and other top offices throughout the Commission.

Additional workload because of new consumer protection activities including Truth-in-Lending and the administration of the new Flammable Fabrics Act will require \$14,000 to provide one GS-9 personnel technician and one GS-4 clerk-steno.

DIVISION OF DATA PROCESSING

The Division of Data Processing operates a Burroughs computer and peripheral equipment to service operating bureaus' needs for data processing. These include both administrative and substantive program activities. On the administrative side, this division has the continuing job of machine preparation of payroll, the maintenance of equipment inventories, the maintenance of workload statistics for attorneys, and among other administrative programs, the maintenance of personnel information concerning both employees and attorney applicants.

In regard to the substantive programs of the Commission, this Division prepares information relating to financial statistics (a sample of 9,000 businesses are covered by the F.T.C. segment of this study), various economic and legal programs, including rates of return for the Division of Accounting, and master case cards on legal cases currently being worked on in the legal divisions of the Commission.

This Division, in connection with the above programs and others, is responsible for advising operating officials in regard to adequacy of information supplied to accomplish objectives, the development of programs as required for various administrative and operating studies, and the establishment of good, workable priorities for the expeditious handling of data processing activities.

A data bank has been established covering all complaints and other information that will pinpoint industries and products, geographic areas, and practices on which to focus the attention of this Commission because of emerging consumer protection problems.

It is also planned to include in the data bank pertinent corporate and financial information concerning business corporations. Storage and accessibility of this mass of data will require a capacity far in excess of our current ability. To provide ready and feasible access will require two disc storage units. To provide this capacity and to annualize the cost of tape drives now being installed will require an increase of \$25,000 for 1971.

Additional computer applications will require the services of one GS-11 programmer, one GS-9 programmer, one GS-7 computer operator and two GS-3 card punch operators at a cost of \$38,000.

DIVISION OF ADMINISTRATIVE SERVICES

The Division of Administrative Services is a central administrative unit established for the purpose of publishing the material made public under Section 6(f) of the Federal Trade Commission Act; for the procurement of supplies and equipment; and for supplying other services essential to the functioning of the Federal Trade Commission. The Commission's Library is also located in this Division.

The Publication Branch of the Division of Administrative Services clears for format, economy of reproduction, and distribution, all material printed or duplicated by the Federal Trade Commission within the limitations of the laws and regulations as applicable thereto. This branch also operates a Class A Printing Plant established under the provisions of the regulations by the Joint Committee on Printing of the United States Congress; and provides photographic, photostat and drafting services. These services are performed by the following sections:

The Composition Section edits for format and typography, material to be printed by the Government Printing Office or printed or duplicated in the Federal Trade Commission Printing Plant and provides stenographic services when bureau pools are over-burdened. During fiscal year 1969 over 1,459 pages of copy were produced by this activity for lithographic reproduction in the printing plant.

The Photographic Section provides the Commission with photographic, xerox and photostat services for use in connection with the Commission's legal pro-

ceedings and economic reports. Production reports for this section show that over 1,275,222 photographic, photostat and xerox prints were produced during fiscal year 1969.

Functions of the Printing Plant are the printing of the Commission's orders, press releases, legal and economic reports, speeches, Trade Practice Rules, pamphlets, forms, letters, etc. Production during the fiscal year 1969 was more than 20,400,347 pages.

The Library System of the Federal Trade Commission consists of: (1) the Commission Library; (2) the Medical Library in the Division of Scientific Opinions; (3) a small library in the Office of the Hearing Examiners; and (4) a small library in each of the Commission's 11 field offices.

These libraries provide facilities for research by personnel of the bureaus and offices of the Commission and assist in disseminating information regarding the antitrust laws and trade regulations.

The combined holdings of these collections total more than 150,000 bound volumes. Extensive files of legislative documents and statistical publications of other Government departments and agencies, and of trade associations are also maintained.

More than 400 different periodicals are received, indexed and routed among the staff on a weekly, monthly, quarterly or other frequency basis. Approximately 90,000 reference questions were answered during the year and more than 175,000 books are loaned for use outside the library.

The Procurement and Services Branch is responsible for providing services and controls in the necessary housekeeping functions as follows: procurement and maintenance of supplies, equipment, furniture, etc.; space control and building maintenance; communications including mail, telephone and telegraph and messenger.

The new functions of Truth-in-Lending, increased flammable fabrics activities, and comprehensive review of the truthfulness of advertising of drugs cited by the Food and Drug Administration, will require six clerical positions (two GS-4, two GS-3, and two GS-2) at a cost of \$29,000.

OFFICE OF THE COMPTROLLER

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Comptroller.....	5	\$77,000	5	\$77,000		
Division of Finance.....	21	165,000	25	190,000	4	\$25,000
Total personal services.....	26	242,000	30	267,000	4	25,000
Travel.....		500		500		
Total.....	26	242,500	30	267,500	4	25,000

This Office is the focal point for all the budgetary and financial management functions of the Commission. Here the Commission's budget is formulated and presented to the Bureau of the Budget and to Congress in final form.

In addition to the budgetary processes, this Office is responsible for the maintenance of all fiscal records of the Commission and controls the various records that reflect the salary, savings bonds, taxes, Social Security, retirement and annual and sick leave of all employees of the Commission, including the field offices. This Office and its Division of Finance performs the audit, prior to payment, of all vouchers covering payment for travel expenses, communications, and supplies and equipment. The Division of Finance also maintains the various ledgers and records that are necessary to accurately reflect the financial position of the Commission at all times, and prepares the basic statistical data under the direction of the Comptroller for the various financial statements and reports rendered to the Commission, the Bureau of the Budget, the Treasury, the General Accounting Office and the Congress.

An additional \$25,000 is requested in 1971 to provide one GS-7 Accountant and three GS-5 clerical positions.

OFFICE OF THE SECRETARY

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Secretary.....	12	\$116,000	14	128,000	2	\$12,000
Legal and public records.....	50	328,000	65	406,000	15	78,000
Total personal services.....	62	444,000	79	534,000	17	90,000
Travel.....		500		500		
Total.....	62	444,500	79	534,500	17	90,000

The Secretary and his immediate office receive and handle mail on all phases of the Commission's work. He signs all orders and certain other official papers. He also is responsible for liaison with the Congress and Government agencies and for decisions on informal cases not submitted to the Commission.

The Assistant Secretary for Minutes takes the minutes of, and records the executive meetings of the Commission, prepares directives for the signature of the Secretary and keeps the docket of pending matters before the Commission.

DIVISION OF LEGAL AND PUBLIC RECORDS

The Division of Legal and Public Records embraces the Formal Docket, Informal Docket, Correspondence, Public Reference and Distribution Sections.

The Formal and Informal Docket Sections are responsible for the establishment, management, safety, completeness and accuracy, uses and retirement of the legal and related records of the Commission.

The Correspondence Section receives incoming mail, opens, date stamps, establishes index and tickler when appropriate, conducts history search and forwards letters to proper office for action.

The Public Reference Section furnishes information and assistance to the public, and to the staff of the Commission in relation to public, legal and court proceedings and in matters of related procedure. The Section is responsible for the custody, location, safety, conditions, etc., of dockets, files, exhibits, etc.

The Distribution Section controls the supply and distribution of all publications issued by the Commission, such as economic reports, annual reports, trade practice rules, etc.

Increase requested—1971

An additional \$90,000 is requested for two GS-4 clerk-stenographers for the Office of the Secretary and two GS-5, six GS-4 and seven GS-3 clerical positions for the Division of Legal and Public Records.

OFFICE OF THE GENERAL COUNSEL

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of General Counsel.....	6	\$88,000	9	\$105,000	3	\$17,000
Division of Litigation.....	28	448,000	30	482,000	2	34,000
Division of Legal Services.....	17	255,500	20	292,500	3	37,000
Division of Legislation— Federal-State Cooperation.....	9	112,500	10	127,500	1	15,000
Total personal services.....	60	904,000	69	1,007,000	9	103,000
Travel.....		6,000		16,000		10,000
Total.....	60	910,000	69	1,023,000	9	113,000

The General Counsel is the principal legal counselor and adviser to the Commission. In many respects, his responsibilities are similar to other chief law officers within the Government. He represents the agency before the courts of the United States; prepares memoranda for the agency and its operating bureaus

on questions of law, policy, and procedure; evaluates federal and state legislative proposals directly affecting, or bearing upon, the agency's missions; serves as liaison officer in both adjudicatory and nonadjudicatory matters involving the agency and other Government offices; and, among other assignments, represents the agency and each employee as Tort Claims Officer in matters arising under the Federal Tort Claims Act, and as the administrator of workman's compensation claims filed pursuant to the Federal Employee's Compensation Act.

In at least two material respects, the responsibility of the Commission's General Counsel differs from that of most chief legal advisers within the Government. First, he is a lawyer to lawyers—the counselor to the Government's second largest employer of attorneys. Secondly, the mission of his Office is also affirmative in nature as opposed to being strictly a service operation. The Office is expected to propose and implement affirmative programs that will advance the overall goals of the Commission.

REORGANIZATION OF THE OFFICE

With the appointment of a new General Counsel in May of 1969, the Commission requested a reevaluation of the functions and structure of the Office. On the basis of a thorough review of the past performance of the Office vis-a-vis the current demands of the Commission for legal advice and court representation, the General Counsel recommended, and the Commission ordered on June 11, 1969, a reorganization of the Office.

The essential changes in Office functions and organization directed by the Commission may be summarized as follows:

A. Executive positions within the Office were reduced from ten to five.

B. Administration of two statutes was transferred from the Office to operating bureaus within the Commission.

(1) The office of Assistant General Counsel for Export Trade was abolished and immediate supervision of the Webb-Pomerence Act was assigned to the Bureau of Restraint of Trade.

(2) Supervision of Lanham (Trademark) Act complaints and actions was assigned to the Bureau of Deceptive Practices.

C. The Division of Consent Orders was abolished. The primary function of this Division had been the supervision and control of negotiations looking towards the disposition of matters by settlement orders under the procedure provided in Part 2 of the Commission's published rules. The General Counsel's study revealed that the operations of the Division had evolved to a point where they mainly duplicated work performed by the various trial staffs of the Commission. Accordingly, the Commission assigned primary supervision of consent order negotiations to the trial staffs. The Office of General Counsel retained the responsibilities of: (1) providing advice, when requested, as to whether the allegations of a complaint supporting a cause of action and require the order proposed; and (2) representing the agency in settlement negotiations after a matter has been litigated before the Commission.

D. The office of Assistant General Counsel for Federal-State Cooperation was abolished and its duties were assumed by the Division of Legislation—Federal-State Cooperation.

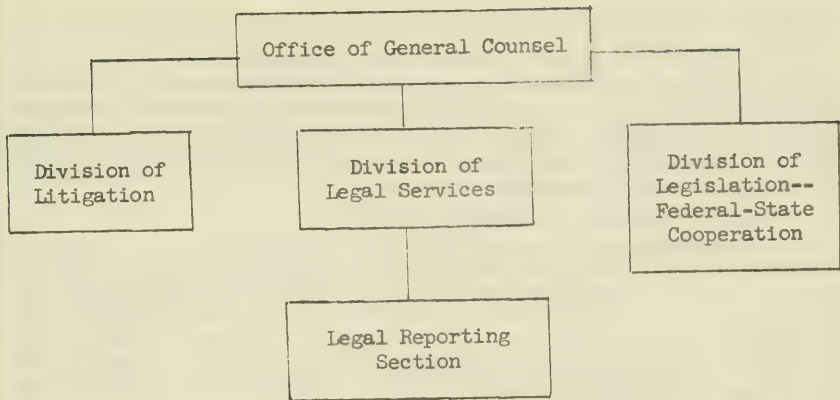
E. A new office unit, the Division of Legal Services, was established.

F. The Office of Assistant General Counsel for Voluntary Compliance was abolished and its duties were assigned to the Division of Legal Services.

G. The job descriptions of attorneys assigned to the Office were redrawn to accord with the Commission's belief that such attorneys should be generalists who could be readily redeployed within the Office to: (1) meet sharp variances in Commission demands for the several services extended by the Office; and (2) effectively coordinate affirmative Office projects.

THE POST-REORGANIZATION STRUCTURE OF THE OFFICE OF GENERAL COUNSEL

The organizational structure of the Office now comports with the following diagram:



DIVISION OF LITIGATION

The function of this Division is to represent the Commission in the federal courts.

Any party against which the Commission has issued an order to cease and desist may petition a federal court of appeals for review. The Commission may apply, through the Department of Justice, for federal district court orders enforcing subpoenas or Commission orders requiring special reports. Disobedience of a court's decree enforcing a Commission order or subpoena may be punished as a contempt. Collateral suits challenging the Commission's jurisdiction or procedure may be brought under certain circumstances in the federal district courts. The Division handles these and similar matters both directly and in participation with the Office of the Solicitor General in Supreme Court matters, and with offices of the various United States attorneys in certain other cases affecting the Commission. The Division also has the responsibility for seeking injunctions *pendente lite* in certain Commission cases before the courts of appeal and district court restraining orders against dissemination of false food, drug or cosmetic advertising in applicable cases.

General Case Workload

The workload of the Division is variable; and since the vast majority of it arises from actions taken by the Commission or parties being investigated or proceeded against, its timing and volume is governed by factors over which the Division has little or no control. With respect to court litigation, during fiscal 1969 the Division handled 94 cases, six more than the previous year. It completed litigation in 45 cases, as compared to a total of 27 in fiscal 1968. Eleven of the completed proceedings involved deceptive business practices, 26 were restraint of trade cases, and 8 were extraordinary matters such as suits against the Commission for declaratory judgments and injunctions.

Workload Expected in Fiscal 1971

A. From Current Cases:

At the beginning of fiscal 1970, the Division's assignments included 55 cases open for further action or pending final disposition in the courts. A number of these cases involve appeals from Commission cease-and-desist orders which, because of a combination of such factors as voluminous record, important, complex, and vigorously disputed legal issues, masses of economic data, and great financial consequences to the corporations involved, are considered to be major cases. Of this category, the following are examples of matters believed likely to require substantial efforts carrying over into fiscal year 1971:

1. *United States Steel Corporation*.—Respondent, one of the country's largest cement producers, acquired the second largest ready-mix concrete producer in the New York Metropolitan Area. It is appealing a Commission decision that found the acquisition to be unlawful and which requires divestiture. The case involves the relatively unexplored issue of the "failing company defense."

2. *L. G. Balfour Company et al.*—This matter involves monopolization and other unfair acts and practices in the national college fraternity insignia products

market. The record consists of approximately 6,000 pages of testimony and 800 exhibits.

3. *P. F. Collier & Son Corporation*.—The Commission's decision found that respondent, a national seller of encyclopedias, utilized a number of deceptive practices in the sale of its products. On appeal, respondent has conceded that it engaged in deception but has raised several complex issues concerning Commission procedures and the liability of a parent corporation for the actions of a subsidiary. The record in this matter consists of approximately 4,500 pages of testimony and some 600 documentary exhibits.

B. From Projected Commission Activity:

At the beginning of the fiscal year there were approximately 38 complaints in various stages of litigation within the Commission. Additionally, as indicated in their last budget presentations, the Commission's operating bureaus anticipate increases in adjudicatory proceedings in fiscal 1970. While there can be no certainty as to which cases will ultimately be decided adversely to the respondents involved and thereafter appealed to the courts, on the basis of past experience it is estimated that three-fourths of the matters litigated before hearing examiners are eventually causes for court presentations by the General Counsel.

In addition to appellate matters, it is expected that the volume of district court litigation will increase substantially in fiscal 1971. The Commission may expect to be sued more frequently. The Fair Packaging and Labeling Act and the Consumer Credit Protection Act should, because of their newness and vast coverage, occasion suits for declaratory and injunctive relief. (In the first two months of fiscal 1970, five petitions for declaratory relief have been filed against the agency.)

For several reasons, the number of subpoena enforcement proceedings should be expected to multiply. First of all, the *Guignon* decision of the 8th Circuit Court of Appeals has provided respondents with a new delaying tactic. Reversing a half century of administrative and judicial practice, the *Guignon* opinion held that the Commission lacks the authority to enforce its own subpoenas and must proceed through the office of the Attorney General. Realizing that the agency must process subpoena papers through the Department of Justice which, after review, assigns the matters to the various U.S. Attorneys, respondents appear to be buying time by opposing compulsory process. From early 1967 until the late fall of 1968, the only subpoena enforcement proceeding handled by the Office involved *Guignon*. Since the *Guignon* decision became final, the Office has been called upon to process *nine* matters involving a total of *twenty-three* subpoenas.

The other reasons for anticipating a rise in subpoena enforcement actions are: the number of industrywide investigations proposed by the operating bureaus; and the fact that there are several multi-respondent complaints presently either approved by the Commission or in preparation by the staff. In the latter respect, Office experience indicates that a multi-respondent action usually generates subpoena problems and injunction suits against the Commission.

DIVISION OF LEGISLATION—FEDERAL-STATE COOPERATION

This Division is the liaison between the Commission and Congress with reference to legislative matters. It prepares advice and comments for the Commission on enrolled bills, bills pending in Congress, and draft bills submitted to the Bureau of the Budget. It drafts, or assists in the drafting of, Commission legislative proposals which, after clearance by the Bureau of the Budget, are submitted to Congress. It prepares for inclusion in the agency's Annual Report, a list of legislation which the Commission believes is required to increase the effectiveness of its operations. Additionally, it provides assistance to the Chairman, the individual Commissioners, and staff officials, when they are summoned to testify before Congressional committees. If formal statements are required in connection with such appearances, the Division usually prepares a draft of such statement for approval of the summoned witness.

Division personnel represent the Commission at meetings called by the Bureau of the Budget, Executive Departments of the Government, individual members of Congress, and members of the staffs of Congressional committees to discuss proposed legislation affecting the operations of the Commission.

A major part of the Division's efforts are devoted to implementing the Commission's program of Federal-State Cooperation. This program encourages the states to enact laws similar to the Federal Trade Commission Act. It serves and facilitates cooperative effort with state and local agencies and officials for the purpose of increasing the protection of the consumer from unfair and deceptive practices. If such practices can be stopped at the state or local level, before they grow into problems of interstate proportions, the need for federal action will be minimized and the Commission can, thus, devote more of its resources to dealing quickly and effectively with problems of regional and national significance.

The Division seeks to implement the Commission's policy in this area by (1) supplying current information to state and local officials; (2) referring complaints to local agencies and extending enforcement assistance when requested; and (3) assisting in the implementation and, when requested, drafting of legislation directed against unfair and deceptive practices.

General Workload

With respect to proposed legislation, the Division, in fiscal 1969, furnished advice and comment to the Commission on 39 bills pending in the Congress, 8 draft bills submitted to the Bureau of the Budget by other federal agencies, and 3 enrolled bills pending Presidential signature or veto. Frequent conferences with representatives of executive agencies, members of Congress, and staff personnel of Congressional committees were held to assist in the preparation of legislation and presentation of views of the Commission and the individual Commissioners. Members of the Commission appeared before Congressional committees to give oral testimony on 7 proposals for legislation during the year.

The increasing interest of the states in the Commission's program of encouraging Federal-State cooperation was evident during the year as the states directed to the Commission 477 requests for advice and assistance regarding legislative or enforcement matters involving prevention of deceptive and unfair trade practices. This was an increase of 70 percent over the 281 similar requests received in fiscal 1968. The increase is indicative of the general level of added emphasis on consumer protection in the states.

The complaints regarding interstate practices received from state officials numbered 575, an increase of 33 percent over the previous year. The intrastate matters referred by the Commission to state officials for action numbered 161, an increase of 80 percent over the number referred last year.

The States of Colorado, North Carolina, Pennsylvania, and South Dakota enacted consumer protection laws during the year.

State offices of consumer protection and Attorneys General were, and are being, furnished on a continuing basis with a variety of informational materials concerning enforcement actions by the Commission and by state governments against deceptive and unfair trade practices. This serves as a training medium and method of correlating such activities throughout the country, as well as an encouragement to states which have not yet established such programs.

Workload Expected in Fiscal 1971

In ordering reorganization of the Office of General Counsel, the Commission determined that a more thorough and affirmative approach to legislative drafting and counseling was in order. Accordingly, the Division will be providing more advance background counseling than in the past, and will, through cooperation with the agency's operating bureaus, continually draft, and support with statistics and case histories, proposals for advancing the Commission's missions and closing loopholes in the laws it administers.

In fiscal 1971, the Division expects a substantial increase in the number of bills pertaining to consumer protection laws, mergers and other areas of Commission interest. There is every indication to believe that the consumer protection movement will accelerate during the coming years. Moreover, two recent studies, the *White House Task Force Report on Antitrust Policy (1968)* and the *Report of President Nixon's Task Force on Productivity and Competition (1969)*, have called for reexaminations of the Robinson-Patman Act, one of the Commission's principal statutes.

The major affirmative project of the Division for 1971 will be the acceleration of the Commission's program of Federal-State cooperation. Among the Division's goals in this program are the following:

1. Increasing the outward referrals of consumer complaints involving companies with minimal transactions in interstate channels. For years the Commis-

sion has been criticized for pursuing such matters to the alleged neglect of its nationwide obligations. Until recently, however, the American consumer could only turn to the Commission with his complaints. Now, however, some 26 states have enacted consumer protection laws, and experience has shown that these states will act upon matters referred by the Commission, providing, in most instances, that the Commission is willing to proffer technical information and advice that will enhance the probability of successful prosecutions.

Through more effort, principally directed at analyzing matters in their preliminary stages, the Division intends to more than triple the number of referrals made in calendar year 1968. In that year, a total of 121 matters were transmitted to state agencies.

2. Aiming at obtaining enactment of, or improvement of, general consumer protection laws in ten additional states where such legislative proposals are in the embryonic stage, or where legislation is particularly needed because of low income concentrations; and

3. Expanding liaison with state and local officials. Until now, the Office's liaison effort has focused primarily upon the National Association of Attorneys General. While the Office must continue to "lobby" or assist the members of this Association, it is believed that Commission liaison with the various Attorney's General is now such that primary attention should be paid to other groups of state officials, such as the U.S. Conference of Mayors, the National Association of Counties, and the National District Attorneys Association. For effectuation of the Commission's overall goals regarding Federal-State cooperation, municipal and county ordinances might well be more important than state statutes.

The greater goal of such efforts would be the enactment of effective legislation by every state. This will not be achieved by the end of fiscal 1971; nor, for that matter, can one guarantee enactment of any consumer legislation. However, increased effort in this area would advance legislation, or at least the interest of state officials in consumer legislation within the states. Contacts, offers of assistance, and assistance would be repeatedly extended to these states.

In addition to keeping drafts of model general consumer laws current with developments in the states, the Office intends to prepare model laws to complement or displace Commission jurisdiction in the consumer credit and fair packaging areas. At least preliminary attention to the drafting and promotion of model state laws complementing Commission jurisdiction in regard to textiles, furs and flammable fabrics will be made in fiscal 1971.

DIVISION OF LEGAL SERVICES

Over the past several years, there has been a steadily increasing demand for the preparation of legal memoranda on evidentiary, jurisdictional and procedural problems; the drafting and redrafting of special Commission reports and other public statements, and the examination of requests by private counsel and the public for Commission information, documents and files. The increase in such matters is attributed to, among other things, the several new statutes administered by the Commission; a number of changes in the Commission's rules and procedures (particularly those procedures wherein agency action is publically proposed for the purpose of obtaining the views of all affected individuals or companies prior to a final determination by the Commission); the Freedom of Information Act; and the Commission's increasing reliance on public hearings on national or industrywide practices.

The study that led to reorganization of the Office concluded that the aforementioned assignments should be handled by the General Counsel through a centralized unit within his Office. Accordingly, the Division of Legal Services was established for the purpose of handling day-to-day legal services and special assignments for the Commission and its operating bureaus.

Among the routine obligations of the Division are the following:

1. *Analysis of Recent Decisions.*—Federal court decisions and federal agency determinations are scrutinized for possible effects upon Commission policies. When a decision is deemed significantly relevant to the Commission's missions or procedures, a preliminary memorandum of law is immediately forwarded to the Commission. If the Commission concludes that the matter requires further study, a comprehensive brief is supplied.

2. *Review of Requests for Investigational Resolutions.*—Prior to the issuance of investigational subpoenas and Special Report Orders authorized by the Federal Trade Commission Act, the agency usually adopts an investigational resolution.

Upon either staff or Commission demand, the Division reviews such resolutions. The purpose behind such review is the anticipation and prevention of court actions that might delay Commission efforts.

3. *Assistance to Other Commission Offices.*—For the purpose of anticipating and preventing court actions which may delay Commission efforts, the Division maintains continuous liaison with other Commission bureaus, divisions and other units and provides *ad hoc* advice and assistance on questions of law, policy and procedure.

4. *Handling of Nonadjudicatory requests for Commission Documents and Information.*—The Division reviews all such requests and immediately advises the Commission as to their disposition. Additionally, it maintains a continuing survey of other agency determinations and court rulings on requests made pursuant to the Freedom of Information Act.

5. *Proposed Complaints and Orders; and Settlement Negotiations.*—The Division performs the aforementioned duties retained by the Office after abolishment of the Division of Consent Orders.

6. *Miscellaneous Administrative Duties.*—The Division handles all correspondence and requests pertaining to voluntary agreements under the Defense Production Act of 1950 and small business pools authorized or proposed by the Small Business Administration Administrator. It also processes tort claims for the Commission and provides advice to Commission employees on matters covered by the Federal Employee's Compensation Act.

Expected Workload, 1971

Demands for routine legal services depend on the operations of the Commission, actions by the public or parties which are subjects of Commission investigations or other proceedings, and court and federal agency rulings. In view of the great increase in projects of the operating bureaus, and the implementation of the new statutes, the Division expects a greater workload in 1971 with respect to the provision of day-to-day legal services.

Previously, special legal assignments had been handled by the General Counsel and other arms of the Commission. In calendar year 1968, the Office handled a total of 27 special matters. Within the first six weeks after reorganization of the Office, the Division received 38 special assignments.

Major Office Project for Fiscal 1971

While primarily a service organization, the Office of General Counsel is also required to propose and implement affirmative projects furthering the overall goals of the Commission. As its major project in this regard for 1971, the Office intends to commence a comprehensive program directed at more effectively utilizing and expanding Commission authority to mitigate injury to consumers and competition resulting from deceptive practices and restraints of trade.

It is well settled that the Commission is empowered to proceed against anti-competitive practices in their incipency. However, experience has demonstrated that while challenge may be made in the incipient stage of a practice potentially harmful to the consumer and competition, arrest of the practice is frequently achieved only after much injury has been accomplished.

The basic approach to defense against charges such as attempts to monopolize, predatory pricing practices, and false advertising and marketing methods is greatly influenced by the profitability of the practice involved. To some extent, this factor is weighed against the possible ramifications of private treble damage actions encouraged by trial records developed by the Government. Empirical knowledge has confirmed, *ad nauseum*, an increasing preference for prehearing, adjudicatory, and appellate tactics and strategy that permit continuance of challenged practices which are eventually found to be unlawful and proscribed—but proscribed only after they have dealt severe injury to the consumer and competition. For example, as a result of nearly a decade of endeavor by the Commission, and several years of followup effort by the Department of Justice on the basis of the Commission's work, it was proven that the basic patent and the "wonder drug," the antibiotic, tetracycline, has been obtained through fraud, and that its price for many years had been fixed through unlawful conspiracy. The results of the Government's actions to date have been a \$120 million settlement of public claims and a proscriptive order that is presently under appeal. However, the results pale in insignificance when one considers how many American consumers may have suffered extended, debilitating sicknesses or died because of inability to meet the high, collusively fixed price for the antibiotic, and

because of the Government's inability to mitigate the effects of this abhorrent conspiracy.

The Office's effort toward implementing the Commission's determination to reduce the adverse impact of trade restraints and unfair and deceptive practices will involve four areas of the Office's work: legal research, interbureau liaison, litigation and legislation. The effort will concurrently follow two avenues; each with short term and long term objectives.

One avenue of approach will concern injunctions. Its lesser goal will be more effective employment of the Commission's present, limited injunctive powers. Its greater or ultimate goal is the expansion, through broader court decisions and legislation, of the Commission's authority to enjoin unlawful practices.

The second avenue will concern expedition of Commission proceedings before hearing examiners and the courts. Its short-range objective will be a definitive analysis of the reasons for present delay in such matters and recommendations for the alleviation, if not the elimination, of such delay. The long-range goal would be the implementation, and revision as experience dictated, of the proposed procedures.

The project will proceed from the following basic presumptions:

(a) if imaginative theory offers a reasonable prospect of overturning an old case or fitting a matter within a narrow court holding, injunctive litigation will be instituted;

(b) if reasonable doubts concerning Commission injunctive authority are encountered, they will be resolved through litigation; and

(c) if changes in Commission policies or procedures offer the prospect of mitigating public injury through increased use of injunctive actions and expedition of adjudication, they will be tried.

Summary—Increases requested 1971

Office of General Counsel (3) : 1 GS-5 clerk-steno, 2 GS-4 clerk stenos..	\$17, 000
Division of Litigation (2) : 1 GS-14 attorney and 1 GS-13 attorney..	34, 000
Division of Legal Services (3) : 2 GS-12 attorneys and 1 GS-11 attorney..	37, 000
Division of Legislation—Federal-State cooperation: 1 GS-13 attorney..	15, 000
Total personnel compensation (9 new positions)-----	103, 000
Travel -----	10, 000
Total increase-----	113, 000

OFFICE OF HEARING EXAMINERS

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	24	\$440, 000	24	\$440, 000		
Travel.....		8, 000		8, 000		
Total.....	24	448, 000	24	448, 000		

Hearing examiners have complete charge of cases from the time the Commission issues its complaint until the initial decision is rendered. The responsibilities of the examiners are many and entail time-consuming efforts in the conduct of pretrial conferences and formal hearings. In all instances the examiner acts as the official hearing officer and rules on offers of proof, admissibility of evidence and all procedural and other interlocutory motions.

Since the Commission revised its Rules of Practice which resulted in acceleration of trials the number of cases assigned per hearing examiner has been reduced. This revision has enabled the hearing officer to conduct consecutive hearings and continue to final disposition of matters more expeditiously.

The staff has been reduced by eight hearing examiners since 1965 and no replacements are contemplated during fiscal 1971.

BUREAU OF RESTRAINT OF TRADE

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	46	\$412,000	62	\$508,000	16	\$96,000
Division of Mergers.....	35	598,000	61	919,000	26	321,000
Division of General Trade Restraints.....	35	620,000	35	620,000		
Division of Discriminatory Practices.....	46	713,000	46	713,000		
Division of Compliance.....	33	422,000	39	484,000	6	62,000
Division of Accounting.....	13	226,000	18	263,000	5	37,000
Total personal services.....	208	2,991,000	261	3,507,000	53	516,000
Travel.....		63,000		83,000		20,000
Other expenses.....		20,000		27,000		7,000
Total.....	208	3,074,000	261	3,617,000	53	543,000

The Bureau of Restraint of Trade is responsible for administration and enforcement of the restraint of trade aspects of Section 5 of the FTC Act and Sections 2, 3, 7 and 8 of the Clayton Act, as amended.

The reach of Section 5 of the Commission's organic act is broad. Section 5 not only encompasses conduct prohibited by the Sherman Act, but was designedly much more broadly drafted, enabling the Commission additionally to combat in their incipient trade practices which exhibit a strong potential for stifling competition. In large measure, definition of "unfair methods of competition" resides with the Commission itself.

It was intended by Congress, that the Commission, in dealing with unfair methods of competition, discrimination, and illegal mergers or acquisitions, should broaden the Government's enforcement base in providing cumulative remedies against activity detrimental to competition. The interlacing of enforcement responsibilities between the Commission and the Department of Justice was thus specifically intended to augment existing enforcement through the operation of a separate body specially competent by reason of experience, information and careful study of business and economic conditions to address itself to the special problems of industry and their remedy. The different facilities, procedures and sanctions provided in this dual responsibility in the vital area of antitrust, find full application in the necessity for containment of the pervasive, complex and varied problems of an economy grounded on competitive enterprise. The range of practices under the broader jurisdiction of this Agency enlarges with the advent of each new method of competition emerging.

Increasing enforcement responsibility also attends the continued rapid expansion of the economy. In order to best husband resources, the Commission heretofore initiated a course of increasing reliance of nonadjudicatory procedures. Further clarification of the laws' requirements has been provided through publication of various compliance guidelines and in rendering advisory opinions concerning proposed courses of action having specifics as well as general application. Promulgation of industrywide enforcement policy statements, a further preventive measure, has proved effective with respect to merger activity in specific industries. Greater emphasis upon use of consent settlement and voluntary discontinuance procedures was additionally undertaken in order to speed up and broaden enforcement coverage. Procedures seeking to minimize operational delay and time consumed in litigative processes were also instituted. Enforcement needs however, continue to outpace such measures and further planning and expediting measures are currently under study.

The resource consuming and protracted processes of case-by-case adjudication cannot, in any realistic enforcement program, be avoided. In order to preserve enforcement integrity (in the instance of enforcement-policy declarations, for example) enforcement policy, when challenged must be supported by prompt enforcement action. Where adjudication is necessary to preserve or establish policy, issues of fact or law frequently cannot be resolved except by litigation. When it becomes necessary to test the breadth of Commission orders, necessary to reach anticompetitive practices involving first impression issues or necessary to preserve enforcement continuity, resources must be rendered available and so committed if effective enforcement is to be maintained.

Resources must additionally be regularly committed to develop information bearing upon and defining business practices of varying current dimensions at different marketing levels and in a spectrum of industries, together with indicated economic and competitive circumstances and effects. Substantially all

mergers, acquisitions and joint ventures of significance are publicly reported shortly after and sometimes before consummation. These must be preliminarily examined or screened and selections made for further investigative development and analysis. The Commission's recently inaugurated premerger notification program looks to before-the-fact disclosure relative to major mergers and requires even more immediate assignments of manpower. The further responsibility to detect as well as evaluate other forms of anticompetitive practices adds to the work processes relative to investigations under Section 5 of the FTC Act and Sections 2 or 3 of the Clayton Act.

The rapidly increasing acceleration of the merger movement within the economy critically increases the need for additional attorneys in that statutory area. This does not mean, however, that the rate or significance of trade law violations otherwise are to any extent abating. The problem of increasing industry concentration is not confined to concentration resulting from mergers or other forms of physical integration. Industry concentration by combination or conspiracy and adverse changes in the number and size distribution of competing companies in particular markets as a result of discrimination or other unfair methods of competition also constitute critical aspects of the problem.

The benefits of a wide choice among suppliers, prices leveled downward by competition and maximization of service and product quality, which number among the benefits which attend effective competition, remain the presumed right of purchasers at all marketing levels culminating with the level represented by the consuming public. The Commission's enforcement responsibilities, accordingly, apply to discriminations or other unfair practices by which these benefits may be unfairly or discriminatorily denied as well as to practices directly involving intensification of market concentration, whereby such benefits may be foreclosed. The extent of *non-competition* in already highly concentrated industries, in addition, demands substantial current study and attention.

Balancing enforcement value against administrative cost in these various areas is most difficult. Preventive measures are hard to equate with corrective measures. Formulas for quantification of the high burden of cost which marks the absence of competition, as reflected in high noncompetitive price levels in certain oligopolistic industries, or prices raised through conspiracy, cannot be applied to measure the merit of policing actions which serve to maintain a status quo of effective competition. The Bureau, however, continually strives to effect a satisfactory enforcement balance as to each of its assigned statutory areas of responsibility.

Bureau workload summary	fiscal year 1969	Estimated fiscal year 1970	Estimated fiscal year 1971
Applications for complaint: ¹			
On hand beginning of year.....	² 367	436	511
Received or reopened.....	1,775	1,800	1,825
Disposed of.....	1,706	1,725	1,825
Pending end of year.....	436	511	511
Formal investigations:			
Pending beginning of year.....	³ 752	644	544
Initiated or reopened.....	181	180	215
Completed or closed.....	289	280	300
Pending end of year.....	644	544	459
Complaints issued:			
Pending beginning of year.....	24	20	21
Approved for negotiation or reopened.....	24	35	35
Dispositions:			
Consent settled.....	19	20	24
Litigated.....	9	14	15
Other.....			
Pending end of year.....	20	21	17
Litigated cases:			
Pending beginning of year.....	20	20	34
Complaints issued or reopened.....	9	24	23
Docketed order disposed of.....	9	10	15
Pending end of year.....	20	34	42
Voluntary compliance.....	45	45	55

¹ Division totals do not necessarily total Bureau summary because of matters handled directly by the Office of the Director. Applications for complaint include basic source, i.e., letters of complaint, field reports, merger announcements, and other sources.

² Adjusted figure.

³ Includes 2 export trade matters transferred to General Trade Restraints June 10, 1969, and 28 investigations, Compliance.

Bureau program—1970 and 1971

The work programs of each of the Bureau's enforcement divisions, reported in detail below, are geared to the particularized expertise, experience and enforcement criteria applicable to each division's statutory province.

Where practices fall within more than one statutory area, or when one division as a result of prior involvement has developed special competence with respect to the economic and marketing conditions in a particular industry, appropriate assignment of primary enforcement responsibility is determined by the Bureau, with provision for such interdivisional correlation of activity as may be necessary. The operations of the five divisions of the Bureau are substantially interdependent and complementary.

The Division of Accounting operates essentially as a service division. The work of the Division of Compliance is also closely allied with work projects of the three enforcement divisions. Compliance assumes responsibility for all final restraint of trade orders including prescriptive orders and those requiring divestiture, as well as orders to cease and desist, to assure compliance with the requirements of such orders and, as may prove necessary, to initiate enforcement or civil penalty proceedings in the event of serious order violation.

In the merger area, vigorous enforcement by the Commission and by the Antitrust Division of Justice relative to vertical and horizontal mergers, has already significantly curtailed threatening concentration trends in a number of industries. The issuance of enforcement policy guidelines has also operated to brake particular kinds of mergers in specifically addressed industries. Continued active enforcement however, is essential.

The current upsurge of conglomerate mergers additionally requires careful attention and analysis. Complex issues are presented such as the extent of justified corporate diversification, the extent to which economies of scale can be realized, synergism, the inducement of tax benefits, the role of management inefficiency, the particular effects of conglomerate acquisition of major industry factors in markets already highly concentrated and the significance of continued increases in the overall aggregation of economic power. Certain conglomerate mergers may operate to affect a heightening of barriers to new entry. Such mergers may otherwise tend to weaken competition by eliminating significant potential competitors or by providing opportunities for reciprocal dealing. Particular attention to these matters will be provided in the ensuing fiscal period and particularly as anticompetitive effects may be discerned in consumer goods industries where market concentration continues to intensify.

Problems of noncompetition in particular highly concentrated industries are similarly under study. The existence of discretionary market power in the hands of a few industry leaders sufficient to control and administer prices and extent of production is a matter of serious antitrust concern. Additionally, product differentiation, and other means by which barriers are raised against the entry of new competition, are being examined, looking to the possibility of corrective action under existing statutes. What reallocation of resources within the Division of General Trade Restraints may be necessary upon completion of these studies is not yet determinable. Further definition of the law, particularly the reaches of Section 5 of the Federal Trade Commission Act, however, is anticipated in the Bureau's planning.

Close attention will continue to be given the practice of systematic reciprocal dealing, wherever such practice is found prevalent and competitively pernicious. Such business arrangements may fall within projects classified by industry but also frequently cut across industry classifications.

The basic consumer industries merit priority consideration and anticompetitive practices in such industries will receive primary attention during fiscal 1971 in all statutory areas.

"Power buyer" induced discriminations in the form of special prices, allowances or promotional services, particularly to major retail food chains, will provide a principal base for Robinson-Patman enforcement.

The primary areas of enforcement action projected to fiscal 1971, accordingly, fall within the following areas. *Food and Grocery Products*, involving Section 7 and Section 2 Clayton Act applications and Section 5 of the FTC Act. Associated matters, with various sub-industry breakdowns, will remain active in each enforcement division as well as in Compliance. With increasing market concen-

tration at all levels, high price levels, discrimination and increasing product differentiation, this most basic industry must receive first priority attention. *Automotive Parts*, involving Section 7 and Section 2 of the Clayton Act and Section 5 of the FTC Act. This complex industry not only manifests substantial consumer interest but is competitively significant in the various markets representing the thousands of independent parts distributors and replacement and repair establishments that it supports. Each of the enforcement divisions is substantially committed at this time and will remain so throughout fiscal 1971. *Apparel*, involving matters under Sections 7 and 2 of the Clayton Act and Section 5 of the FTC Act. Mergers and containment practices on the part of manufacturers of synthetic and natural fibers present the most significant problems to be met in fiscal 1971. *Compliance with TBA Orders*, under Section 5 of the FTC Act. The method and extent of compliance with the orders of the Commission governing the distribution, through petroleum company outlets, of TBA products (tires, batteries, and accessories) is a matter of particularly far reaching effects on competition in the automotive service and supply industries and will require substantial attention through fiscal 1971. *Special Studies and Activities*, including the Section 7 conglomerate merger study, the study of high concentration industries, the pre-merger notification program, and implementation of outstanding enforcement policy statements. These will be particularly active in both fiscal 1970 and fiscal 1971. *Lumber and Building Supplies*, pursuant to Section 7 of the Clayton Act. The recent rash of acquisitions among manufacturers of products as critical as construction materials, creates a threat to the public interest that requires particular attention in the ensuing fiscal period. *Hearing Aid Industry*, involving Section 5 of the FTC Act. The Bureau regards this matter as meriting special emphasis because of its impact on a consumer group least able to pay, providing, by example, the concern of the Commission with consumer oriented restraint of trade matters. *Cement Industry*, pursuant to Section 7 of the Clayton Act. This is an area in which the Commission is already deeply committed. At least through fiscal 1971 its priority must remain high.

Unpredictable changes in circumstance during this fiscal year may modify these priorities, of course, and bring to the forefront other of the major projects being developed by the enforcement divisions, discussed in detail below.

OFFICE OF THE DIRECTOR

The Office of the Director coordinates and supervises the work of the Bureau's five divisions. In addition to the immediate staff of the Director, a central stenographic pool and records section is maintained which serves all operating divisions.

Through this Office, liaison is maintained with the Antitrust Division of the Department of Justice and with other governmental departments. Planning and programing activities of the Bureau are also centered here. The Director's staff also includes a special Legal Advisor on food industry matters who serves all organizations of the Commission.

An additional \$96,000 is requested for one GS-14 attorney to assist Bureau planning activities and for 15 clerk-stenographers (nine GS-4 and six GS-3) to meet the increasing workload of the operating divisions.

DIVISION OF MERGERS

The Division of Mergers is responsible for the investigation, litigation and rule-making proceedings relating to corporate mergers and acquisitions, and for joint ventures and interlocking directorates, under Sections 7 and 8 of the Clayton Act and under Section 5 of the FTC Act where applicable.

WORKLOAD STATISTICS

	Fiscal year 1969	Estimated, fiscal year 1970	Estimated, fiscal year 1971
Preliminary investigations:			
Mergers examined.....	2,850	3,000	3,050
Joint ventures examined.....	185	190	195
Applications for complaint:			
On hand beginning of year.....	26	29	29
Received.....	157	160	160
Disposed of.....	154	160	170
Pending, end of year.....	29	29	19
Formal investigations:			
Pending, beginning of year.....	153	135	125
Initiated or reopened.....	47	50	75
Completed or closed.....	65	60	70
Pending, end of year.....	135	125	130
Complaints issued:			
Pending, beginning of year.....	7	8	8
Approved for negotiation or reopened.....	14	15	17
Dispositions:			
Consent.....	6	5	10
Litigated.....	7	10	7
Other.....			
Pending, end of year.....	8	8	8
Litigated cases:			
Pending, beginning of year.....	11	12	16
Complaints issued or reopened.....	8	10	12
Docketed orders issued.....	7	6	8
Pending, end of year.....	12	16	20

Workload, Fiscal Year 1969-1970

The Division of Mergers workload continues to expand significantly. During 1969, the workload of formal investigations was 200, comprised of 47 new investigations and 153 pending from the prior year; however, manpower shortage necessitated a reduction of 40 percent in new matters to be investigated (75 estimated vs. 47 initiated), and an 8 percent increase in the number of investigations closed (60 estimated vs. 65 actually completed), in order that the overall workload could be reduced commensurate with professional manpower available during the year. At the same time, due to the tremendous increase in merger activity, our preliminary examination of mergers jumped from the estimate of 2,100 to 2,850, while joint ventures dropped from an estimated 195 to 185. These statistics indicate an inability to add further to the workload, while at the same time accelerating disposition of matters heretofore carried as a part of the normal yearly docket. The staff handled 19 docketed cases in 1969, a 36 percent increase over 1968.

The legal staff of this Division has not increased since 1963. The allocation has remained at 32 attorneys, but the number actually available averaged less than 29 during 1969 because of hiring limitations. Unlike the other enforcement units of the Commission, this Division does not utilize the field offices to conduct investigations. Accordingly, its staff must handle both the investigation and the formal litigation of all merger cases, plus any Section 8 matters involving interlocking directorates, and other attendant responsibilities.

The Division's major enforcement effort continues to focus upon conglomerate transactions, which usually require a disproportionate amount of investigational time and analysis because of the diverse product lines involved. The Division works closely with the Bureau of Economics with respect to individual cases, and also in the conduct of industrywide studies as directed by the Commission. A joint effort is also made to give preliminary study to reported mergers and acquisitions, and a flexible selection procedure is followed in choosing those transac-

tions which will be studied in depth. Major criteria used in determining which mergers will be investigated include the following:

- (1) Importance of the industry to the national economy;
- (2) Industry structure, degree of concentration present (whether increasing or decreasing) and conditions of entry into the industry;
- (3) Competitive significance of the merger within the industry involved;
- (4) Concern expressed by members of the industry as to probable competitive effects;
- (5) Remedy to be anticipated;
- (6) Possibility of developing new and novel theories of law with respect to mergers, and
- (7) The economic and legal resources available for challenging the transaction.

Insofar as it is possible, the Division of Mergers has endeavored to give priority in its enforcement activities to the basic areas of food, clothing and shelter, and to implement overall policy as it is expressed at the Commission level.

Merger Division Program, 1970 and 1971

A major concern of antitrust enforcement and particularly the Division of Mergers for 1971 and beyond, will be that of conglomerate acquisitions and mergers. An in-depth study of the conglomerate merger movement directed by the Commission is nearing completion, and in the first half of 1970 it is anticipated the Commission will publish its report in this area. This will involve additional and continuing work for the Division, over and above its regular responsibilities for challenging illegal mergers as they occur from day to day.

Four industries are now operating under Commission "Enforcement Policy" pronouncements:

- (1) Product extension mergers in grocery products manufacturing;
- (2) Food distribution industry;
- (3) Vertical mergers in the cement industry; and
- (4) Prospective and future mergers in the textile mill products industry (effective November 22, 1969).

These policy statements include guidelines for future mergers in particular industries. They are the means by which the Commission attempts to obtain voluntary compliance, on an industrywide basis, with Section 7 of the Clayton Act in specific industries. To date, and since the issuance of the first two such statements for the cement and food distribution industries in 1967, this approach has been highly successful to slowing down and stopping developing merger trends in these four industries. Accordingly, issuance of similar pronouncements for other industries are expected.

The continuing nature of these industrywide programs create common problems with respect to workload and manpower requirements for the Division. With respect to food and cement, Section 6(b) reports requiring advance notice of proposed mergers are regularly received and must be promptly reviewed for probable statutory violations. The publication of new policy statements, such as for textile mill products during 1969, compounds manpower requirements for these continuing programs and often adds to the litigation docket by revealing mergers which might otherwise remain unreported, and hence unchallenged.

A new and separate but important demand upon available manpower is the recent pronouncement relating to the "pre-merger notification program", issued May 6, 1969. Under this program, which was instituted under Section 6 of the FTC Act, advance notification and special reports are required from large corporations entering into contracts, agreements or understandings to merge or acquire the assets of another corporation within a specified asset category. Again, over and above the administrative problem of analyzing and screening these reports there will be an added amount of investigative and litigative work to be done to keep the program viable by challenging those transactions which appear to violate the

statute. All of these policies and programs have a limiting and restricting effect upon the normal case-by-case approach generally relied on by this Division.

A current evaluation of the Division's enforcement program indicates ten industry categories which are considered the priority group, and about the same number which make up a backlog of non-priority work to be done as resources become available. These listings are subject to change, and are shifted from priority to non-priority as the situation demands.

Priority Projects

The *grocery products* industry was the subject of a Commission enforcement policy statement and has remained active. Eleven investigations are pending, six were opened during 1969, and four complaints are anticipated during the next few months. *Automotive parts* is a field which will require considerable manpower due to vigorous opposition which is developing from three complaints which have issued. This is an area of considerable public interest and one in which successful litigation could have a salutary effect upon future merger trends. The *Cement* industry is also under an enforcement policy statement. In addition, there has been and there will continue to be active litigation for several years. Four new investigations were opened in 1966 and additional complaints are expected to issue. The industry is in a continuing state of flux due to recent Commission action, with eight additional matters under investigation and one decided case being considered for reopening and modification of the order. The industry uses a major portion of the Division's available manpower.

The demands upon resources available to take care of the four enforcement policy programs mentioned above, and including work incident to the pre-merger notification program, have been grouped under a *Special Projects* heading, which is expected to require the equivalent of several man-years of professional time during the fiscal period. Another project grouping called *Commercial and Industrial Equipment, Machines and Supplies*, acts as a repository for approximately fourteen separate investigations which are not directly related to a common industry, but which involve heavy equipment manufacturers in general and the supplies incident thereto. *Minerals, Metals and Mining* was the outgrowth of a major conglomerate merger involving a leading copper producer and a leading coal mining operation. The litigation of this case will be concluded in 1970, but there remains six investigations and one recommended complaint outstanding. In *Lumber and Building Supplies* the merger activity has increased. There are nine investigations outstanding in this major adjunct of the overall building industry and increased merger activity in this areas may be expected to occur.

Of the three remaining priority industry categories, the *Apparel Industry* has continued its merger pace and there is a current workload of eight separate investigations pending. In *Paper and Paper Products* one complaint has issued and two other comprehensive investigations are under way. Finally, there are always isolated investigations under way as a result of current merger activity in unrelated industries, and in this *Miscellaneous* category a total of fourteen are outstanding. One recommendation for complaint is anticipated in the near future.

Non-priority projects

The remaining industries of concern to this Division are either those which have been the subject of considerable attention in past years and are phasing out, or consist of newly emerging industries, from the standpoint of merger activity. The *Vending* industry is an example of the former, and a recent order of divestiture against one leading industry member has resolved some of the major issues involved in the remaining six investigations which are outstanding. *Department store* mergers is another area which has received considerable attention in the past, and presently two investigations are active. Another industry group, *Drugs, Pharmaceuticals, Cosmetics and Sundries*, has been reduced to one complaint

in the consent order stage which is expected to be litigated. Other project groupings which have passed their zenith and have become caretaker operations include *Baking, Confectionery, Plastics* and a varied group involving the theory of *Reciprocity*.

Industries which have emerged and are receiving increasing attention include *Insurance* and *Truck-Trailers and Shipping Containers*. In the *Fertilizer* industry, one case was settled with a consent requiring substantial divestiture and five remaining investigations are being reconsidered on a policy level in view of drastic technological changes which have taken place in the chemical-fertilizer field.

SUMMARY BY PROJECTS

Priority	Fiscal year 1969	Estimates, fiscal year 1970	Estimates, fiscal year 1971	Estimates, fiscal year 1972
Grocery products.....	2.5	3.0	6.0	4
Automotive parts.....	5.0	5.0	6.0	5
Cement.....	4.0	4.0	6.0	5
Special projects.....	2.0	3.0	5.0	6
Commercial and industrial equipment, machinery and supplies.....	2.5	3.0	6.0	6
Metals, minerals and mining.....	3.0	2.0	2.0	2
Lumber and building supplies.....		2.0	4.0	5
Apparel.....	1.0	2.0	4.0	5
Paper and paper products.....	1.0	1.0	3.0	2
Miscellaneous.....	3.0	3.0	6.0	7
Nonpriority:				
Baking.....	0.25			
Department stores.....	0.25	0.5	1.5	2
Drugs, pharmaceuticals, cosmetics and sundries.....	1.0	1.0	2.0	1
Food distribution.....	0.5	0.5	1.5	2
Furniture.....		0.25	2.0	2
Insurance.....	0.25	1.0	2.0	3
Plastics.....	2.0			
Reciprocity.....	0.25			
Truck-trailers and shipping containers.....	0.5	0.75	1.0	1
Total, man-years.....	29	32	58	58
Total, attorneys available.....	29			

Increases requested 1971

An additional \$321,000 is requested for 26 new attorney positions, consisting of 4 GS-13s, 8 GS-12s and 14 GS-11s, to initiate or reopen formal investigations.

DIVISION OF GENERAL TRADE RESTRAINTS

The Division of General Trade Restraints has responsibility for investigations and other proceedings relating to restraints of trade and unfair methods of competition under Section 5 of the FTC Act.

The responsibility of this Division is substantially broader in coverage than that of other divisions in the Bureau. It seeks to maintain close touch with industry problems in many markets, examining a diversity of methods of competition, restrictive practices and conduct which may tend to stifle competition and, if permitted to persist, ultimately to unreasonably restrain trade. In addition, it has responsibility under the broad coverage of Section 5 of the FTC Act to consider entrenched practices and methods of competition which, because of economic environments in which they may exist, or the extent to which they may interfere with the free conduct of trade, also fall within the prohibitions of Section 5. Thus, the Division, on the one hand, must disperse attention to many matters still at incipient stages of development, while also closely attending such fully developed problems as, for example, oligopolization, inherently coercive marketing relationships, product differentiation and barriers to market entry.

At the close of 1969, this Division was responsible for 242 formal investigations involving 125 different industries and 14 different types of alleged illegalities, from classic price fixing to advertising rate discriminations.

WORKLOAD STATISTICS

	Fiscal year 1969	Estimate, fiscal year 1970	Estimate, fiscal year 1971
Applications for complaint:			
On hand beginning of year.....	269	302	302
Received.....	983	1,125	1,150
Disposed of.....	950	1,125	1,150
Pending end of year.....	302	302	302
Informal investigations:			
Pending beginning of year.....	69	62	87
Initiated.....	243	295	310
Completed.....	250	270	300
Pending end of year.....	62	87	97
Formal investigations:			
Pending beginning of year.....	267	242	212
Investigations initiated.....	73	75	80
Completed or closed.....	98	105	111
Pending end of year.....	242	212	181
Complaints issued:			
Pending beginning of year.....	9	7	7
Approved for negotiations.....	2	5	5
Disposition:			
Consent.....	3	4	4
Litigated.....	1	1	1
Pending end of year.....	7	7	7

GENERAL TRADE RESTRAINTS PROGRAM—1970 AND 1971

Discussed below are the major projects to which this Division will commit its resources during 1970 and 1971. The projects are listed in order of economic priority.

Concentrated Industries-Producer Goods.—By direction of the Commission, this Division, in cooperation with the Bureau of Economics has undertaken a pilot program in development of a "Plan of Study of Important, High Concentrated Industries". Six industries are proposed, with the steel industry scheduled for initial analysis. The remaining five industries are automobiles, drugs, electrical machinery, energy industry and chemicals.

This aspect of enforcement is aimed at the important undifferentiated sector of the economy, i.e., the *producer goods* industries. Such industries appear to be characterized by high concentration ratios, high entry barriers and poor performance in terms of higher-than-competitive prices, expanded internal costs and often, poor records of technological advance. An in-depth legal and economic analysis of these problems is of vital antitrust importance.

Consumer Goods Industries.—The Division is also engaged in separate consideration of problems of concentration and structure in consumer goods industries. These matters include inter alia, entry barriers erected through massive advertising, product differentiation, exclusive dealerships, exclusive territorial assignments and the like. Investigations in these areas will be developed, as manpower can be allocated to them, looking to test case proceedings under Section 5 of the FTC Act. Because these are pilot matters realistic manpower projections cannot be made. They involve, however, a particularly significant aspect of Section 5 enforcement.

Reciprocity.—The practice of reciprocal trading when systematically pursued, results in substantial foreclosure of competition and rigidification of markets. Tacit or express agreements to enter into mutual purchasing and/or selling arrangements for either related or disparate goods, serves to substitute negotiated private advantage for the public benefits which result from open competition. The Commission initiated this project in 1965. The Division has to date secured four affidavits of discontinuance and has presently under investigation twenty further matters involving reciprocity. Some of the industries involved are chemicals, paper and paper products, auto parts, vending machines, dairy products, paints, petroleum and coal.

Food Products (Retail and Wholesale).—Any illegality that limits the buying power of the food purchaser merits serious attention. High market concentration is not conducive to price competition. Anticompetitive practices may well result in further elimination of small and medium size competitors. Accordingly, substantial manpower is committed for investigation of a variety of illegal practices prevalent in the food industry, both on the wholesale and retail levels. Complaints of predatory pricing, conspiracy, resale price maintenance and sales below cost are regularly received.

Investigations are pending looking into alleged attempts to monopolize the sale of coffee, cereal, frozen foods, package desserts and pet food. Alleged price fixing among growers and canners of asparagus on the West Coast, already investigated, is presently awaiting action by the Commission. Investigation of several major beer producers and a leading retail food chain has been completed, involving alleged vertical price fixing and allocation of customers. The granting of free fountain equipment and other services by a major soft drink producer as an inducement for exclusive dealing remains under investigation. A further significant matter recently docketed for investigation involves an alleged attempt by certain major retail chains to foreclose new entrant competition in the sale of food at retail in the Washington, D.C. metropolitan area.

Confinement (Natural and Man-Made Fibers).—The Commission has directed an industrywide investigation relative to the anticompetitive effects of "confinement" programs by concerns engaged in the manufacture, distribution and sale of fibers used in the manufacture of various fabrics. Essentially, this practice involves an arrangement whereby the manufacturer of the fiber sells to a manufacturer of, for example, wearing apparel on the condition that said manufacturer will only use it in the manufacture of agreed upon end products. Nine major manufacturers including DuPont, Kodak, Fibers Industries, Hercules, Inc., Monsanto Chemical, Allied Chemical, Beaunit Corp., American Enka and American Cyanamid, are presently under investigation.

Petroleum Industry.—Three distinct projects under this heading include the *Gasoline Industry*, where several investigations are pending involving alleged price fixing, predatory pricing and other unfair practices. *Petroleum Coke*, where an industrywide investigation with respect to the competitive effects of long-term supply contracts has recently been completed, and a recommendation for complaint forwarded to the Commission. The *LP Gas Industry*, in connection with which alleged price fixing, boycott and monopolization charges on the part of the major producers, are under investigation.

The *Hearing Aid Industry* has been designated by the Commission as one meriting special attention. The reported high and almost uniform prices within this industry affect principally the elderly, a group least able to afford any loss with respect to the benefits of effective price competition. Eleven investigations are presently in process.

Among the remaining major matters, particular note should be made of the *Newspaper Industry*, where the Commission has directed full-scale investigation of alleged discriminatory rate structures, and *TV Advertising* where, with the Bureau of Economics, this Division is studying alleged discriminations in advertising rates. *Office Equipment*, *Drugs*, particularly the matter of alleged price fixing in the sale of quinidine, and *Bus Tires*, where restrictive tire leasing arrangements are under study, also represent areas of major manpower commitment for the current and ensuing fiscal year.

Franchising and Miscellaneous.—Current concern with the franchise form of business undertaking, brings before the Division a number of methods and practices under this format, which, strictly speaking, must be resolved under traditional concepts of law. These matters frequently involve allegations of price fixing, tying or exclusive dealing terms or customer and territorial allocations.

These and other practices are under surveillance at this time in the ready-mixed concrete industry, farm equipment, TV, propionic acid, calcium and sodium propionates, auto parts, cosmetics, linen rentals, footwear, home appliances and furniture. These exploratory and informational investigations represent a continuing surveillance and preventive program.

Small Business.—In addition, this Division utilizes informal procedures to resolve a number of matters at early stages of controversy. The successful resolution of complaints from individual businessmen on an informal basis, has increased steadily from 30 in 1966 to 102 in 1969. Manpower limitations prevent use of this procedure on a broader scale.

The following summary identifies projects to which the Division of General Trade Restraints major effects are currently directed, with projections for the period 1970 through 1972, together with an estimate of the man-years allocated to each project.

SUMMARY OF PROJECTS

	Fiscal year 1969	Estimate, fiscal year 1970	Estimate, fiscal year 1971	Estimate, fiscal year 1972
Concentrated industries:				
Producer goods.....	0.25	1.5	2	4
Consumer goods.....	.75	2.0	2	4
Reciprocity.....	1.0	2.5	3	3
Food products.....	3.0	3.0	3	3
Natural and manmade fibers.....	.25	1.5	2	3
Petroleum products industries.....	3.0	3.0	2	2
Hearing aids.....	1.0	2.0	3	3
Advertising:				
Newspaper.....	3.0	2.5	2	2
TV.....	1.0	1.0	1	1
Office equipment.....	2.0	2.0	1	1
Drugs.....	0.5	0.5	1	1
Bus tires.....	.25	0.5	1	1
Franchising and miscellaneous.....	8.0	7.0	6	6
Informal dispositions.....	4.0	4.0	4	4
Total man years.....	28.	33.	33	36
Total attorneys available.....	27			

No additional positions are requested for fiscal year 1971.

DIVISION OF DISCRIMINATORY PRACTICES

The Division of Discriminatory Practices is responsible for the investigation and trial of cases relating to violation of Sections 2 (a), (c), (d), (e) and (f) and Section 3 of the Clayton Act and Section 5 of the FTC Act on the part of buyers who knowingly induce or receive discriminatory allowances or services from suppliers.

WORKLOAD STATISTICS

	Fiscal year 1969	Estimate, fiscal year 1970	Estimate, fiscal year 1971
Applications for complaint:			
On hand beginning of year.....	67	81	106
Received.....	315	325	350
Disposed of.....	81	106	325
Pending end of year.....	81	106	131
Formal investigations:			
Pending beginning of year.....	299	242	177
Investigations initiated.....	53	60	70
Investigations completed or closed.....	120	125	120
Pending end of year.....	242	177	127
Complaints issued:			
Pending beginning of year.....	13	9	11
Approved for negotiation.....	8	15	10
Dispositions:			
Consent.....	10	10	10
Litigated.....	2	3	3
Pending end of year.....	9	11	9
Litigated cases:			
Pending beginning of year.....	4	5	13
Complaints issued or reopened.....	2	10	7
Docketed orders issued.....	1	2	6
Pending end of year.....	5	13	14
Voluntary compliance.....	15	20	20

Division program—1970 and 1971

The primary objective of amended Section 2 of the Clayton Act is preservation of an equality of opportunity among businessmen, to assure, to the extent reasonably practicable, that businesses at the same functional level start on equal competitive footing. Effective enforcement is aimed at forestalling monopolistic con-

centration of economic power. To achieve this goal, smaller, viable competitors must be protected from unlawful discriminatory practices. This provides them opportunity to compete and survive.

Discriminatory practices are discovered largely as a result of complaints from those alleging resultant injury and upon the basis of information secured during the course of investigation. The Division has developed considerable expertise as to industries particularly prone to price discrimination and other forms of discriminatory practice adversely affecting competition. Project teams have been organized for these industries. The Division is extremely selective in its screening process and eliminates approximately 80 percent of complaints received from entry into the investigational workload.

A. Major projects

The major project areas below will actively continue through 1970 and 1971, and very probably through 1972.

Food Distribution (Chain Grocers).—The food industry is probably the largest volume business in the national economy. Retail sales exceed \$75 billion. Nine investigations involving chain grocers and suppliers are in process. Probable cases in litigation by 1971 requiring substantial manpower commitments include: *Colonial Stores, Inc.*, charging alleged unlawful inducement of promotional allowances, which in anticipation of appeal before the Commission, will probably carry over into 1971; *United Fruit Company, et al.*, a seller-customer proceeding under Sections 2(a) and (f) of the amended Clayton Act, bringing to challenge a tendency to monopoly on the part of the inducing customer; *Purex Corporation Ltd.*, involving discriminations in price of private brand goods; and complaints appear likely against *The Kroger Company* and *Alterman Foods, Inc.*, for alleged violations of Section 5 of the FTC Act in receiving discriminatory promotion allowances.

Apparel Industry.—Industry sales exceed \$26 billion. This project arose through Commission directed industry surveys which disclosed that manufacturers of men's, women's and children's wearing apparel granted substantial discriminatory advertising and promotional allowances to large specialty stores and chain department stores. Consent cease and desist orders were issued against 302 manufacturers. In addition, several contested orders were issued.

This Division was assigned the task of reviewing the compliance reports and cooperative advertising plans submitted. Two hundred and forty of these cases have already been forwarded to the Commission. The remaining sixty-two are being processed and should be completed by mid-1971. Litigation involving companies refusing to take consent orders will carry beyond 1971.

Dairy Industry.—A high level of concentration in the dairy industry has been caused by (1) horizontal mergers in the industry over the years, (2) forward and backward integration, and (3) a continuing decline in the number of independent dairies that can remain viable in the face of worsening marketing conditions. There are severe barriers to new entrants due to the strength of large national and regional chains, and competitive conditions prevailing in the wholesaling of fluid milk and dairy products.

The Commission continues to receive large numbers of complaints from independent dairies who claim they are being threatened with extinction because of pricing practices of large national and regional dairies. They charge that these large dairies are selling vendor and private label to large grocery chains at prices which are substantially lower than the prices charged independent grocers. Lower prices received by the major retail chains permit them to use milk as a loss leader and in frequent weekend specials. The price structure thus becomes depressed. In these circumstances, home delivery sales continue to decline. Although private label is usually sold by grocery chains for a few cents less than vendor brands, only a very small part of the discriminatory prices received by chains appears to be passed on to consumers.

The objective here is to forestall further concentration by insuring that viable independent dairies will be given an opportunity to compete and eliminate the competitive impact of price advantages which chain grocers have over independent grocers. It is anticipated that some time prior to 1971, at least two or three presently docketed investigational matters will result in recommendations for complaint. Litigation will undoubtedly extend into 1972. Two matters nearest complaint are *Pairie Farms Dairy, Inc.*, and *The Borden Company*. Six other investigations are pending in the field.

Fresh Fruit and Vegetables.—Industry sales approximate \$7.5 billion. Involvement comes as a result of numerous industry complaints that the broker-

age provisions of the Commission's Trade Practice Rules for the Fresh Fruit and Vegetable Industry are being violated. Shippers allege that competitors grant brokerage to large buyers or to field brokers when the latter acts as agents of the buyers. The Commission recently issued complaints charging five retail food chains and six "ground" or "field" brokers with violations of Section 2(c) of the amended Clayton Act in connection with their purchases of fresh fruit and vegetables. The chains are *Jewel Companies, Inc.*, *Borman Foods Stores, Inc.*, *H. C. Bohack, Inc.*, *First National Stores, Inc.*, and *Food Fair Stores, Inc.*

Tri-Partite Arrangements.—This project was undertaken pursuant to Commission direction. Investigations of the effects of two such arrangements (involving 10 top chain grocers) are in progress. Pursuant to such arrangements participating suppliers directly or indirectly grant preferential advertising allowances or services to participating retail grocery chains. The programs make no provision for granting allowances or furnishing services on a proportionate basis to competing retailers. Litigation of this matter appears likely by 1971.

Publishing Industry.—This project was also undertaken pursuant to Commission direction. Industry sales approximate \$1.1 billion. An educational and advisory phase, was designed to eliminate payment of discriminatory allowances by publishers of hardback and prestige softback books to large retailers. The Division now proposes service of orders on approximately 50 publishers pursuant to Section 6(b) of the FTC Act, requiring the filing of special reports setting forth the terms and conditions under which advertising and promotional allowances are made available to customers. The Division reasonably anticipates that such reports will disclose violations of Section 2(d) of the Clayton Act, as amended. The goal of this project is to bring about industrywide compliance with the *Commission's Guides for Advertising Allowances and other Merchandising Payments and Service*. This project will require substantial manpower in 1971 and will probably continue into 1973.

B. Other Projects.

Drug Industry.—Investigations involve the following problems: (1) institutional and professional purchase and resale in derogation of private markets; (2) diversion by exempt or noncompetitive sources into regular commercial channels; (3) arbitrary offering and pricing of bulk and non-standard package sizes; (4) price and discriminatory concessions; and (5) dual distribution. Six investigations pending in the field should be completed and evaluated in 1971.

Baking Industry.—The Commission continues to receive complaints from independent bakers because of discriminatory and below cost selling of bread by large national and regional bakeries. Private label is the most serious problem in the industry. Vertical integration by grocery chains has cut into the market share of independents. Five investigations in progress should be completed and evaluated by the end of 1971.

Automotive Replacement Parts.—Industry sales total \$1.7 billion. A continuing program of surveillance of discriminatory pricing is necessary because of the many complaints received from competing manufacturers, warehouse distributors and jobbers with regard to volume discounts and functional discounts to buyers who do not perform the function for which the discounts are granted. The Division is also investigating private label items sold to major oil companies. Eight investigations are in progress which will require substantial manpower commitments in 1971.

Major Appliance Industry.—Because of manpower commitments to pending projects and nonproject activity, the Division has not been able to focus sufficient attention on this industry. Industry sales at retail are over \$10 billion. The industry comprises approximately 100 manufacturers and 1300 distributors. Manufacturers and jobbers are reported to grant special discounts and advertising allowance to large department stores, discount chains and other large buyers. Private label is a significant factor. The opportunity of independent appliance dealers to compete effectively is involved as well as the general availability to consumers of wider supplier choices at competitive prices.

Miscellaneous.—A significant number of man hours is devoted to matters in varying stages of development which involve a range of industry problems and a miscellany of product lines. The following are examples: frozen foods distribution, dry cleaning fluid, household aluminum foil, wrapping film, scales, plastics, shoes, coffee, ornamental light fixtures, citrus products, furniture, men's and boys' leisure hats, shower curtains, cellophane, photographic equipment, fishing equipment, sporting goods, cement, bicycle tire, industrial bleach and

fertilizer. This type of probing and inquisitorial activity represents a continuing surveillance process.

Additional work commitments are required in obtaining compliance with voluntary assurances; proposed legal guides and questions concerning legal guidelines, review of advisory opinions (38 in 1969), and obtaining compliance with the broadened requirements under Sections 2(d) and (e) of the Clayton Act pursuant to the *Fred Meyer* decision. Twelve cases in the latter category, involving toiletries, are now being processed. It is anticipated that work of this nature will continue through 1971.

SUMMARY OF PROJECTS

	fiscal year 1969	fiscal year 1970	Estimated, fiscal year 1971	Estimated, fiscal year 1972
Food distribution.....	5	5	8	8
Apparel industry.....	3	4	1	1
Dairy industry.....	3	3	4	4
Fresh fruit and vegetables.....	2	6	3	2
Tri-partite arrangements.....	2	2	5	5
Publishing industry.....	2	2	3	3
Drug industry.....	1	2	3	3
Baking industry.....	1	2	1	1
Automotive parts.....	2	2	2	2
Major appliance industry.....	1	1	1	1
Miscellaneous industries and activities: Completion of litigation, pending investigations, new investigations and complaints, obtaining voluntary assurances and processing advisory opinions, guides and rules.....	11	13	15	16
Total man-years.....	33	43	46	46
Total attorneys available.....	33			

No additional positions are requested for fiscal year 1971.

DIVISION OF COMPLIANCE

One of the main objectives of the Commission is to insure that the prescriptive and proscriptive language of final orders which it enters is translated into meaningful action and relief in the marketplace. It is the primary responsibility of the Division of Compliance to insure that these objectives achieve timely fruition. This Division assumes responsibility for all final orders issued by the Commission as affecting the broad area of restraint of trade and antimonopoly issued pursuant to the provisions of Section 5 of the FTC Act, Section 2(a), (c), (d), (e) and (f), and Sections 3, 7 and 8 of the Clayton Act, as amended.

During 1969 the Division sent 22 major investigations to the field offices and certified two major civil penalty cases to the Attorney General. At year end, and active workload of 217 cases remained on hand. Pertinent statistics typical of the volume and variety of the workload handled follows:

WORKLOAD STATISTICS

	Fiscal year 1969	Estimated, fiscal year 1970	Estimated, fiscal year 1971
Advisory opinions issued.....	26	35	50
Compliance reports processed.....	188	195	200
Inquiries from public concerning final orders.....	421	500	600
Complaints of order violation.....	9		
Conferences with public.....	142	160	200
Investigational hearings.....	1	4	6
Subpoenas, sec. 6 orders and resolutions prepared.....	8	10	15
Active case load:			
Pending beginning of year.....	262	217	227
Received.....	42	50	60
Disposed of.....	87	40	60
Pending end of year.....	217	227	227
Civil penalty:			
Pending beginning of year.....	2	2	5
Certified.....	2	2	3
Suits concluded.....	0		
Pending end of year.....	2		
Returned by Attorney General without filing.....	2		

In 1969, of over 1,500 final orders committed to the jurisdiction of the Compliance Division, a marked increase in workload was noted in the areas of merger and divestiture activity involving final orders. This workload is expected to increase appreciably by 1971. In addition to handling complex divestitures, this Division also must process an increasing number of merger clearances under final orders which have been issued requiring any covered respondent to seek prior Commission approval before it makes an acquisition in any of the covered product lines.

Compliance activity under Section 7 orders falls into three general categories: (1) Divestitures; (2) processing acquisitions subject to Commission approval; and (3) special provisions which appear in various orders. The need to increase manpower commitments in this most vital anticoncentration undertaking is great. For example, by 1971 the Division of Mergers projects ever increasing activity, and Compliance therefore must anticipate handling an increased number of final orders in such basic areas affecting our national economy as grocery products, construction materials, automotive parts, apparel, paper and paper products, and drugs. With the ever increasing activity in the area of mergers and acquisitions, we must realistically project the need to buttress substantially the present Compliance staff. For example, at the present time 15 orders presently require divestitures; 1 major divestiture case is in civil penalty litigation before the courts; another major case alleged acquisitions without prior Commission approval and is also before the courts. Both of these matters are extremely important to the development of meaningful case law as affecting the efficacy of final orders in this critical area. These cases will require substantial manpower commitments continuing through 1971. The projection time-wise of these 15 orders, for example, is illustrated by the fact that 3 require divestitures to be made now; 5 require divestitures within the next year; 2 require divestitures within the next two years; 1 within the next three years; and 3 within the next five years.

The processing of requests to make acquisitions involving the Section 7 area is an ever increasing activity. Fifty-two orders which are presently final prohibit future acquisitions in various industries without prior Commission approval. For example, 4 of these orders run for a period of five years; 43 run for a period of ten years; and 2 run for a period of twenty years. Thus, these moratorium provisions will continue at least beyond two fiscal years and some beyond fiscal 1986. We must anticipate that within the period of the next several years this burden might well be tripled. Superimposed upon the above considerations is the fact that 25 final Section 7 orders involve special requirements. These orders variously involve noncompetition prohibitions, affirmative requirements to grant licenses on products or processes, feathering requirements as to disposition of shares of stock, prohibition on types and methods of advertising, affirmative requirements as to quantitative sales of products to particular trade sources, and limitations on supply arrangements. These special provisions in present orders alone run into fiscal 1979.

Typical 1969 achievements by this Division included: The culmination of successful efforts to establish a new factor in the liquid bleach industry: the entry of a new competitive factor in the dairy industry in the Southwest; a new entrant into the baking industry in the Southwest; and new entrants in the following industries—department stores, household cleaning pads, and plastics. There were also other very significant divestitures in other industries.

During 1969 the Robinson-Patman Act area also saw some significant results in insuring the eradication of prohibited practices involving major factors in the following product lines, among others: carpets, automotive replacement bulbs, macaroni products, automotive bearings, shower curtains, various food products, cosmetics, railroad equipment, and furniture.

This Division was also instrumental, by way of illustration, in eradicating price fixing activities in certain bread markets involving major industry factors and in the electric shaver industry. A variety of other actions insured the continued elimination of proscribed practices under orders in other industries including scrap steel and shrimp processing equipment.

Because of manpower limitations, the Division continues, as it has for the past several years to be behind in servicing many aspects of these final orders. By 1971, even with the most conservative estimate of increasing workloads in these areas, at least 14 man-years will be required on a continuing basis to handle Section 7 final orders alone.

Similar workload increases at the Compliance level are projected in both the Section 5 and Robinson-Patman Act areas. The Division of General Trade Restraints anticipates ever increasing case loads in price fixing, oligopolistic practices, producer goods in concentrated industries, food products, fuel, retail food industry, office equipment and other product and industry lines which will result in more compliance work by this Division.

The same practical considerations pertain to increased activity by the Division of Discriminatory Practices in food distribution, dairy products, fresh fruits and vegetables, publishing, automotive parts, drugs, and other commodities.

SUMMARY OF PROJECTS

	Fiscal year 1969	Estimated, fiscal year 1970	Estimated, fiscal year 1971	Estimated, fiscal year 1972
Orders re section 5 FTC Act and section 2(a), (c), (d), (e) and (f) Clayton Act, as amended:				
Procuring and analyzing compliance reports, various in- dustries.....	7.5	6	6	7
Initiating and reviewing compliance investigations.....	2.0	3	3	4
Conduct of investigational hearings.....	.5	2	3	4
Initiation and conduct of civil penalty cases.....	1.0	2	3	4
Special projects including special commission directions.....	1.0	1	1	1
Achievement of order divestitures.....	3.0	4	6	7
Processing of requests to make acquisitions subject to commission approval as required by final orders.....	2.0	3	5	8
Investigational hearings re violations of section 7 orders.....	.5	1	1	3
Administration of special compliance features in orders, e.g., granting of licenses, supply arrangement limitations, advertising limitations, etc.....	.5	1	1	2
Total man-years.....	18.0	23	29	40

Increases requested 1971

An increase of \$62,000 is requested to provide four GS-11 and two GS-9 attorneys.

DIVISION OF ACCOUNTING

The Division of Accounting prepares analyses and studies of the pricing policies of respondents or proposed respondents in connection with the Commission's law enforcement work in regard to: (1) alleged price discrimination, illegal brokerage, discriminatory promotional allowances and services under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; (2) cost data submitted by respondents or proposed respondents in justification of alleged price discriminations under the Robinson-Patman Act; (3) alleged price fixing in cases arising under Section 5 of the FTC Act; (4) alleged sales below cost in violation of the FTC Act; (5) compilation of statistics concerning financial position and operating results of companies under Section 6 of the FTC Act; and (6) evaluation and analysis of financial data of companies and competitors involved in mergers under Section 7 of the Clayton Act.

This Division performs accounting services primarily for other Divisions of the Bureau. Consequently, its workload depends largely upon the activity of these Divisions. During 1969, the Division furnished accounting services on 64 matters of investigation and litigation: 22 involved violations of Section 2 of the Robinson-Patman Act, 34 involved violations of Section 5 of the FTC Act, seven involved mergers under Section 7 of the Clayton Act, and one involved Section 12 of the FTC Act.

In addition, the Division provides accounting services for the Bureau of Economics, and on occasion, for other Bureaus in the Commission, and for the Congress. Annually, it prepares for publication "Rates of Return for Identical Companies in Selected Manufacturing Industries".

Currently, two staff members are engaged in work on the Commission's Conglomerate Merger Study and other related accounting work for the Bureau of Economics. It is anticipated that the Division of Accounting will provide services for the Truth-in-Lending which became effective July 1, 1969.

During FY 1969, casework for the Bureau required approximately 8.5 man-years; services for the Bureau of Economics and other Bureaus necessitated approximately 2 man-years; and the report on "Rates of Return for Identical

Companies in Selected Manufacturing Industries" required one man-year. Changes recommended in the latter report, if approved by the Commission, will increase the workload for this project to 1.5 man-years.

Increases requested for 1971

An additional \$37,000 is requested to provide two GS-11 accountants, two GS-9 accountants and one GS-5 clerical position.

BUREAU SUMMARY—INCREASES REQUESTED 1971

In order to carry out the programs described in detail for this Bureau in 1971, an additional 53 new positions (37 professional and 16 clerical) are requested, together with supporting costs, or a total increase of \$543,000 as follows:

Office of the director (16) : 1 GS-15 attorney (planning), 9 GS-4 clerk-stenos, and 6 GS-3 clerk-typists.....	\$96, 000
Division of mergers (26) : 4 GS-13 attorneys, 8 GS-12 attorneys, and 14 GS-11 attorneys.....	321, 000
Division of compliance (6) : 4 GS-11 attorneys, and 2 GS-9 attorneys.....	62, 000
Division of accounting (5) : 2 GS-11 accountants, 2 GS-9 accountants, and 1 GS-5 clerk-steno.....	37, 000
Total personnel compensation (53 new positions).....	516, 000
Travel	20, 000
Stenographic reporting.....	7, 000
Total increases requested.....	543, 000

BUREAU OF DECEPTIVE PRACTICES

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	24	\$275, 000	38	\$402, 000	14	\$127, 000
Division of Consumer Credit.....	32	375, 000	32	375, 000		
Division of Special Projects.....	18	260, 500	38	525, 500	20	265, 000
Division Food and Drug Advertising.....	53	561, 000	70	800, 000	17	239, 000
Division of General Practices.....	47	688, 000	89	1, 273, 000	42	585, 000
Division of Compliance.....	15	257, 000	23	363, 000	8	106, 000
Division of Scientific Opinions.....	18	297, 000	28	435, 000	10	138, 000
Division of Consumer Information.....	10	100, 000	10	100, 000		
Total personal services.....	217	2, 813, 500	328	4, 273, 500	111	1, 460, 000
Travel.....		56, 000		86, 000		30, 000
Other expenses.....		84, 000		100, 000		16, 000
Total.....	217	2, 953, 500	328	4, 459, 500	111	1, 506, 000

I. MISSION AND GOALS OF THE BUREAU

The Bureau of Deceptive Practices is the front-line attack force shouldering major responsibility in the Commission's battle against consumer deception. In addition to the vast responsibility inherent in Section 5 of the FTC Act, Congress has recently passed some of the most far reaching consumer legislation in history. The FTC and, in turn, this Bureau have responsibility for enforcement of two of these Acts, namely, Title I of the Consumer Protection Act, know as the Truth-in-Lending Act, and the substantial portion of the Fair Packaging and Labeling Act not specifically designated to FDA.

While Congress has appropriated some funds to implement the program for Fair Packaging and Labeling and Truth-in-Lending, and funds are included in our 1970 appropriation now pending in Congress, unfortunately, the staff for the Commission's basic responsibilities and ever increasing program requirements in the consumer protection field has increased only 25 positions in seven years. Thus, while our economy has been experiencing an unparalleled growth accompanied by fantastic increases in the needs and demands for consumer protection, the Bureau's growth has for all practical purposes been nil.

Consumer problems are broad and complex and also have important implications for the nation's social well-being. Acute manifestations of consumer discontent, even anger, are evidenced by the report of the National Advisory Commission on Civil Disorders that consumer frustrations were among the twelve most deeply held grievances which led to the disorders of American cities. The housewives' boycotts and the rapid increase in the number of consumer organizations are also manifestations of consumer unrest. The individual complaints received by the Federal Trade Commission about the marketplace are appalling. Since the Congress has discovered the consumer at the Federal level it is indeed timely that the regulatory agencies and the executive branch of the government also recognize the potency of his force as well and tool-up to meet his complaints.

The answers of course do not rest in any one area or any one agency of government. But the Government's responsibility is implicit, not only to guarantee a sound economy but, to assure social well-being. To construe government involvement with consumer problems as "anti-business" is to miss entirely the thrust of consumer economics. Elimination of marketplace malfunctions ultimately serves both consumers and producers by insuring economics of stability and growth. Government responsibility for the financial well-being of its citizens by a promotion of full employment and economic growth has been established policy since the passage of the Employment Act of 1946. There is a reasonable corollary between government protection of consumer rights in the marketplace and its long accepted role as the protector of the ethical businessman against those who compete unfairly. Thus it is argued that the charter of the Bureau of Deceptive Practices is to fully identify it with the cause of the consumer but at the same time it is a step fully compatible with the historic mission of the FTC.

Under the budget plans for FY 1971 it is planned that the Bureau of Deceptive Practices:

1. Be recognized as the consumer voice in the Federal Trade Commission and act as the ear for the Commission for input reflecting general problems received from individual consumers. Moreover, the Bureau will make recommendations to the Commission on consumer policies and consumer legislation; and study the plans and programs of other Federal agencies affecting consumer interest. Additionally, the Bureau staff in cooperation with the Assistant General Counsel for Federal-State Cooperation will act as consultants and supply comments or assistance concerning consumer legislation and ordinances when so requested by the states, local governments, or private groups.

2. Provide input to the Office of Information concerning (1) all consumer activities in the FTC and to recommend policies and provide appropriate guidance and assistance to assure fulfillment of the requirement to keep the public adequately informed as to FTC consumer activities; and (2) planning, developing and implementing comprehensive public relations programs and campaigns to inform and educate the general public, the business community, and special interest groups, concerning the objectives of the consumer affairs programs of the FTC.

3. Maintain effective liaison with national and state organizations having consumer programs by—

- a. assisting and planning educational and legislative conferences or workshops;

- b. assisting and identifying specific problems which can be resolved by effective actions on the part of organizations; and

- c. disseminating information regarding state level and city level consumer affairs in coordination with the Assistant General Counsel for Federal-State Cooperation; and identifying consumer problem areas common to the states which appear to require legislation.

4. Participate in consumer education by—

- a. providing leadership in the fields of Federal Trade Commission interest by developing long-range plans for nationwide programs, in coordination with Federal and State educational authorities with the objective of developing and advancing consumer education for use both in and out of the conventional classroom, to include television and other communications media designed to meet the needs of both child and adult of differing income and environmental levels;

- b. stimulating the development of experimental programs in conjunction with educators, administrators, and interested community, civic, and professional groups;

c. preparing reports, articles and other informative and evaluative materials on consumer education programs; and

d. maintaining liaison with appropriate Federal, State and local officials in educational associations.

Everybody has found the consumer—the legislator, the government administrator, the corporate executive and, most importantly, the citizen who has discovered that as a consumer it pays to complain. Demands for solutions to the aggravations and frustrations of the consuming public impel a widening of the objectives of the Bureau of Deceptive Practices. Such goals include: (1) development of techniques for identifying nationally-important marketplace problems; (2) responding to individual consumer complaints; (3) legislation to fill existing gaps in consumer protection laws; (4) consumer education as the subject relates to marketplace; (5) a program for improving producer-consumer relations; (6) a marketplace information program for consumers; (7) effective liaison with consumer organizations and organizations with identifiable consumer interests; (8) participation in, and sponsorship of, significant institutes and seminars on consumer problems in concert with law schools and other graduate disciplines (i.e., economics and business administration schools) trade association and labor unions, and organizations of state, county and city officials; (9) sponsorship, annually, of a national marketplace conference with participants recruited from consumer spokesmen, businessmen, government, and the academic community; and (10) the development of a government program to achieve “. . . uniform and intelligible consumer product standards . . .”.

In sum, this budget attempts to meet realistically the now strident demands of the American consumer and businessman for a fair shake and an honest deal.

BUREAU WORKLOAD SUMMARY

	Fiscal year 1969	Estimated—	
		Fiscal year 1970	Fiscal year 1971
Applications for complaint:			
Pending beginning of year.....	589	2,184	1,084
Received or reopened.....	110,152	12,500	16,250
Disposed of.....	18,557	13,600	15,500
Pending end of year.....	2,184	1,084	1,834
Formal investigations:			
Pending beginning of year.....	1,076	781	681
Initiated or reopened.....	203	500	1,300
Completed or closed.....	498	600	1,000
Pending end of year.....	781	681	981
Complaints issued:			
Pending beginning of year.....	23	37	37
Approved or reopened.....	84	95	150
Dispositions:			
Consent orders.....	54	75	100
Litigated.....	11	20	23
Other.....	5	0	0
Pending end of year.....	37	37	64
Litigated cases:			
Pending beginning of year.....	25	16	16
Complaints issued or reopened.....	12	25	35
Cases completed.....	21	25	30
Pending end of year.....	16	16	21
Assurances of voluntary compliance: Accepted.....	181	210	350
Compliance matters:			
Miscellaneous:			
Pending beginning of year.....	169	180	205
Received.....	848	925	1,025
Dispositions.....	837	900	1,000
Pending end of year.....	180	205	230
Penalty actions:			
Pending beginning of year.....	8	12	17
Certified.....	5	10	15
Dispositions.....	1	5	10
Pending end of year.....	12	17	22
Compliance reports:			
Pending beginning of year.....	146	181	81
Received.....	89	100	130
Accepted.....	54	200	170
Pending end of year.....	181	81	41

¹ In addition, 2,200 matters on automobile warranties were handled.

II. CURRENT PROGRAMS AND PLANS FOR 1971

Historically, the principal function of this Bureau has been case-by-case enforcement of the FTC Act. Its efforts and its personnel were directed to that end. This situation began to change in 1967, when the Division of Special Projects was formed within the Bureau. While this Division at the outset expended most of its effort in the enforcement field by handling casework of the D.C. Consumer Protection Program, it has now departed completely from that role and is engaged solely in programs having an industry or nationwide application. If a need for a case-by-case approach is discovered within one of its programs, the program is shifted to one of the other divisions. Examples of the types of matters assigned to this group are a nationwide study of automobile warranties, a study and report of national consumer problems and a continuing testing and investigation of cigarettes. Understandably, subsequent events beyond our control, or not now foreseen, may reorder priorities and resources. However, it is assumed that the Bureau will continue to be assigned consumer protection programs having application throughout the industry or the nation and will carry through programs presently underway.

The rise of "consumerism" has forced the Bureau to devote an everincreasing amount of effort to anticipating and responding to the demands of the highly vocal and visible spokesmen of this phenomenon. While the Bureau has received a minuscule increase in personnel over the years, it can in no way compare with the increased demands and new functions assigned. The result has been that the number of attorneys now engaged in case work enforcement is twenty percent smaller than the number engaged in that work in 1964. We now have about forty-two men ostensibly engaged in enforcement, whereas in 1964, we had fifty-two engaged in this pursuit.

Turning now from the general to the specific, the following is a seriatim presentation of the Bureau's major programs, their aims and their needs.

The Input Programs:

These are the programs which supply the information needed to plan and conduct campaigns in consumer protection. The programs include, not only the consumer mail input where information is thrust upon the Commission, but also encompass the affirmative efforts to acquire information, such as monitoring, and liaison contacts with groups and individuals who possess needed information. All of these programs are now grossly understaffed, with the result that necessary information is either not being gathered or when gathered can not be properly analyzed and utilized in developing programs.

Consumer Complaints.—The processing, answering and analyzing of written complaints and inquiries from the public, other government agencies and the like, is being handled by four experienced attorneys and three recent law school graduates. The current practice is to break in new attorneys on such duties for a period of three to six months after which they are transferred to other divisions and newly hired law school graduates take their place.

It should not be thought that this small force is up to the task of responding to all complaint and inquiry letters received by the Bureau. A substantial volume must be referred to attorneys assigned to other divisions because the nature of some complaints demands the unique expertise or experience of a particular attorney, and in addition, many communications concern investigations or studies in progress.

The mail volume is growing markedly. In FY 1968, the Bureau received 7215 applications for complaint. In FY 1969, this figure rose to 12,352 (including 2200 automobile warranty complaints). In FY 1968, the Bureau received 944 inquiry letters. This figure increased to 2004 for FY 1969. Due to the absence of adequate manpower, the Bureau can do little more than merely handle this torrent of mail; it can not be properly analyzed for trends or implications. Only the most pressing and serious allegations are docketed for investigation. During FY 1971, the passive input, that is the sum total of all unsolicited applications for complaint, referrals, and inquiries received from all sources will reach, utilizing a simple, straight-line projection, a minimum of 16,250 complaint applications. Inquiries will total a minimum of 2400.

Contingent upon additional funds, 1971 plans entail a new approach to this avalanche of mail. A first step will be to change the type of personnel utilized in this endeavor by employing and training a nonlegal staff of consumer specialists to handle the routine correspondence. This staff will operate under the super-

vision of one or more seasoned trade-regulation attorneys. Handling the mail in this fashion will free professional personnel for other duties. Additionally such personnel can be expected to be more permanent than new attorneys who are anxious to move on to purely legal positions.

Presently, seven attorneys and law graduates and four clerk typists are engaged in this function on a full time basis. During 1971, the use of two attorneys, eight nonprofessional consumer communication specialists and five clerk typists is contemplated.

The Advertising Monitoring Program.—The Monitoring Program as presently conducted has serious deficiencies. The monitors, three part-time law students, perform a purely clerical function. Attorneys throughout the Commission submit requests for advertising of products in which they are interested. Material received from various sources is examined and pertinent advertisements referred. Only network radio and television advertising is subjected to searching scrutiny by lawyers and other professionals to discover law violations. Personnel is not available to monitor regional television and radio, national print media, and newspapers. Plans for 1971 involve an effective wide ranging monitoring program conducted by a staff of six nonlegal full-time employees. The actual study of advertising to discover law violations will also be expanded in the enforcement divisions.

Consumer Information and Education.—Funds to set up a Consumer Information program are included in the Commission's 1970 appropriation now pending in Congress. This function will be staffed by 7 consumer information and editorial specialists and 3 supporting clerical employees for a total of 10.

This is planned as a dynamic new consumer information program to provide, through all possible media, opportunity for the consumer to become knowledgeable regarding misleading advertising, unfair credit practices and other dishonest sales practices that tend to exploit them, and how to protect themselves.

Under this program, emphasis will be directed toward the information of consumers through various media including pamphlets, TV, radio, newspapers, etc., after determination as to the most efficient ways to reach various categories of consumers. One of the very definite programs to be undertaken will be the preparation of spot-television productions directed toward low-income consumers together with spot public service announcements on specific radio stations. Staff will negotiate with various media for presentation of programs once developed.

Although the staff provided for this program is small in comparison to the projected gains to be achieved, no increases are requested in 1971.

The Enforcement Program:

The "Enforcement Program" denotes that activity which is devoted to the enforcement of the Federal Trade Commission Act via the traditional investigation and case-by-case approach. In this Bureau, this program is the responsibility of the Divisions of General Practices and Food & Drug Advertising. During fiscal 1969, only forty-two attorneys were attempting to handle the entire enforcement caseload of the Bureau. The forty-two attorneys includes two division chiefs, and three senior grade attorneys who assist them and who handle practically no cases themselves. The number of effective case producers shrinks even more when necessary details to other duties in the FTC are considered.

Recognizing the acute shortage of manpower and the futility of opening new cases that could not possibly be handled, the two enforcement divisions reduced their caseload (from 1076 investigations at the beginning of the fiscal year to 781 on June 30, 1969), but the procedure by which this was accomplished was definitely not in the public interest. Simply stated, the Bureau has been opening very few new cases. In FY 1967, 666 investigations were opened. In FY 1968, the number dropped to 388. In FY 1969 only 192 seven-digit investigations were opened. This means that more than 12,000 written pleas for action or assistance were turned down.

The case-producing attorneys labored assiduously during 1969, and have compiled quite a record. They completed about 500 new and auxiliary investigations, secured the approval of 84 complaints and the issuance of 68 final orders to cease and desist. We can only hope that production at this rate will continue in fiscal year 1970, since the enforcement divisions have lost by resignation, transfer and illness, ten of their most effective, case-producing attorneys, and replacements, no matter how talented, require at least a year to swing into full production.

This budget presentation departs from the approach historically used in justification for an Enforcement Program. In the past, the enforcement divisions' jus-

tification has consisted of a list of proposed casework, segregated into neat categories such as analgesics, weight-reducing plans, cigars, automobile tires, and the like. While some description of the subject matter to be pursued is no doubt necessary, complete dependence upon this system of budget justification has been abandoned this year.

This budget presentation is based upon the premise that FTC Act enforcement is a bottomless pit possessing an ability to soak up and utilize an infinite amount of manpower. With very little additional efforts in the Input Program, the Bureau could open ten thousand investigation files. The economy is expanding at a fantastic rate, and in all probability the number of actionable deceptive practices grows at approximately the same rate as the GNP. Since actions against *all* violators cannot be realized, the question arises "How much enforcement does the situation require?" There is no exact formula or methodology in existence which will give a dependable answer. The only statistical indicator which we have as to the prevalence of deceptive practices is the number of applications for complaint received. While it admittedly has imperfections it is the only empirical yardstick available.

Of course, there are a myriad of ways in which the number of applications for complaint received can be employed to arrive at a figure representative of the number of enforcement actions (i.e., seven-digit investigations) which constitutes an adequate enforcement job. Perhaps an ADP analysis of this input will help when it becomes available. For now, however, the best approach is to examine the ratio between seven-digit cases opened and applications for complaint filed over a period of years. This procedure assumes that all case openings during the base period stemmed from complaints received and assumes further that only meritorious matters were opened. Of course, neither of these assumptions is one hundred percent true.

As a statistical-base period, the five fiscal years, 1964 through 1968 were selected. The most recent year 1969, was rejected as not typical since the Bureau has drastically curtailed case openings since the close of fiscal 1968. There was no particular reason for not going back beyond 1964 and perhaps a longer base period will produce a result with greater statistical validity. Be that as it may, analysis of the five years actually utilized reveals that during the period, 26,621 applications for complaint were received, and 2619 seven-digit investigations were initiated. The cases-opened figure is just under ten percent of the total applications received.

Doubtless, many of the matters deemed worthy of opening during the base period would not be opened under present criteria. For example, complaints of failure to disclose foreign origin and fictitious price preticketing are seldom docketed for investigation today, whereas they comprised some part of the total docket in past years. Allowing then for the shift to a more selective docketing policy we believe that at least eight percent of the total applications for complaint merit some further inquiry, i.e., being docketed for investigation.

It is estimated on the basis of a straight-line projection, that fiscal year 1971 will produce 16,250 applications for complaint. Eight percent of these complaints, or 1300 cases should be investigated during fiscal year 1971 in order to prevent an enforcement gap and be properly responsive to the pleas of consumers for government assistance.

To calculate the attorney-workforce which will be required to carry on an enforcement program of this magnitude, the statistical approach is again used. The base-period utilized is fiscal year 1968 and 1969. Over this period of time, an average of forty-two enforcement attorneys produced an average of 510 completed investigations per year. Thus, it is seen the average enforcement attorney can produce about 12 completed investigations per year.

Simple division shows that we would need one hundred and nine attorneys to handle a docket turnover of 1300 cases per year. This is an increase of forty-seven attorney positions over the 1970 authorization of sixty-two.

A one hundred and nine man attorney-force will require a clerical force of about thirty-three, an increase of twelve over FY 1970 strength.

At the close of fiscal year 1969, the enforcement divisions had on hand a total of 781 investigations, equal to 18 cases per attorney. More than ten percent of these matters contain a recommendation for formal complaint by the investigating attorney. Thus, it can be seen that a policy of curtailing the number of seven-digit numbers opened must be continued through fiscal year 1970 and perhaps into part of fiscal year 1971, depending on future manpower authorizations. Assuming that seven-digit investigations opened should be equal

to eight percent of total applications for complaint filed, about 900 investigations should have been opened in fiscal year 1969. Actually, only 192 were opened. The difference of about 700 cases represents an enforcement gap. This is not to argue that *all* of the unopened matters would have revealed an actionable wrong. What is urged, however, is acceptance of the view that you really can't tell from the application alone and must investigate to find out.

The truth-in-lending program:

The Truth-in-Lending Program is a developing operation at present conducted by seven attorneys in Washington with the temporary, full-time assistance of two attorneys in each field office. This small force has performed yeoman service in fiscal year 1969. It has mailed out three quarters of a million copies of Regulation Z by utilizing a private distribution source. The force has distributed more than fifty thousand copies of the booklet itself by direct mail from Washington and by utilization of the eleven field offices. The mail for this group, consisting for the most part of inquiries, has now reached an average of approximately fifty letters a day. The field office personnel are at present entirely engaged in an educational effort aimed at informing lenders and creditors how to comply with the statute. The field men have spoken to about fifteen thousand businessmen during the past four months.

The present plans for fiscal 1970 call for an increase in the manpower for this program to the fully authorized complement of one hundred and fifty. Present plans envision the placement of one hundred and eighteen of the total personnel in the field offices and budget requirements for this field staff are made in the Bureau of Field Operations section of this justification.

The Washington staff, named the Division of Consumer Credit, will consist of three supervisors, seventeen staff attorneys, four professionals with nonlegal discipline, and a clerical staff of eight for a total of thirty-two.

Much of 1970 will be devoted to recruiting, organizing, and training for an Enforcement Program, as well as continuing present educational efforts.

Before the close of fiscal 1970, it is planned that this program will have the full authorized complement of one hundred fifty employees on board and trained. During the latter part of 1970 and by 1971 the program will shift emphasis from educational efforts to enforcement. The goal is to achieve across-the-board compliance by all lenders.

The Bureau is not requesting an increase in the thirty-two positions, Washington headquarter's allotment for this program for fiscal 1971.

The scientific advice and assistance program:

This program is conducted entirely by our Division of Scientific Opinions. The Division has suffered key retirements during fiscal 1969 and is currently recruiting replacements. The FTC is dependent upon the scientists in this Division for expert advice in drug and medical cases. Moreover, the personnel of this Division are expected to act as the scientific eyes and ears of the Commission and to bring to its attention any detected need for action by the Commission in the scientific field. Scientists in the Division are currently reviewing all food, drug and cosmetic advertisements secured through the national television Monitoring Program. A substantial portion of the almost 3,000 television scripts and storyboards which this program produces each month involve these products.

The Division of Scientific Opinions provides scientific advice and assistance in scientific matters to the entire Commission staff. Since this Division is technically not an operating division but serves more in an advisory capacity, the subject matter and volume of work performed by it depends upon the demands for advice and assistance made by the Commission and the various operating divisions. This makes it difficult to project unilaterally a program of future activities for the Division of Scientific Opinions. This Division does, of course, actively participate in project and program planning with respect to Section 15 and other commodities for which health or other scientific claims are made in advertising.

The Division's present workload is becoming unmanageable and without additional manpower in addition to filling existing vacancies, adequate coverage cannot be given to projects currently underway much less planning or taking on a variety of new ones. The unrelenting pressures of Commission requests and the day-to-day operational demands preclude this Division's assuming any further responsibilities and probably will necessitate curtailing or stopping significant programs now underway. A physical limit was reached some time ago

as to what its scientists can handle no matter how selective the program planning or the priority ratings. It is not an exaggeration to state that the mounting volume of work and pressures have left the staff near the point of exhaustion and complete frustration.

The present situation leaves virtually no time for the reflective thinking or meaningful planning exhorted by the Commission of the staff. There is likewise little time for planning for more effective operational relationships with other divisions with whom we are involved in joint project operations or from whom requests for assistance are received on an ever-increasing scale.

There is a definite need for additional scientific disciplines within this program. Needed are a pharmacologist, and experts in the fields of mechanics and electricity. To fulfill these needs, and the need for additional medical personnel, the Division must be strengthened in 1971 by an additional six professionals and four supporting clerical positions, as follows: three GS-15, two GS-14, one GS-13, two GS-5 and two GS-4.

The FDA drug evaluation program

This involves the review and enforced revision, when necessary, of the advertising claims of at least 2000 and perhaps as many as 4000 individual drug products in light of labeling requirements being promulgated by the Food & Drug Administration.

It was originally estimated that this project would commence in the early part of fiscal 1969 and carry through fiscal years 1970 and 1971. However, due to delays within FDA, FTC participation was slowed, and demands upon manpower will reach a peak in fiscal 1971 and extend into 1972.

In January, 1969, the Commission requested a supplemental appropriation for fiscal 1969 in the amount of \$150,000 for twenty-two positions to start this program. The fiscal 1970 budget request included funds of \$250,000 for a full year basis for the same twenty-two positions with one additional clerk-typist for a total of twenty-three positions. Recruitment for this program is still underway. Obviously, the progress of this program in 1970 depends upon the recruitment of legal and medical personnel for the two responsible divisions, Scientific Opinions and Food and Drug Advertising.

No increase is requested in F.Y. 1971.

The compliance program:

The eleven attorneys in the Division of Compliance are unable to keep up with the workload. A glance at the statistics shows the situation. During FY 1969, the Division handled 752 complaints of order violation, but ended up the year with a backlog of 169 matters, six more than they had at the start of the fiscal year. The same situation exists with respect to reports of compliance. They had 146 on hand at the beginning of the fiscal year and ended the year with 168 on hand. They began the year with 164 compliance investigations in progress and ended the year with 181.

Five matters were certified to the Department of Justice for penalty proceedings during FY 1969, but this figure will be substantially increased in 1970. However, penalty certifications are a reflection of the compliance investigations instituted. FY 1970 will see a reduction in the number of investigations commenced, for a crash effort will be made to reduce the number of reports of compliance awaiting processing. Since only 54 were accepted by the Commission during the FY 1969, the backlog of 181 is formidable.

Three additional attorneys are requested in 1971 which will merely keep abreast of the daily routine work flow and eliminate the delays which are now the rule.

One of the prime duties of the Division is to maintain surveillance over more than 5000 orders involving deceptive practices. Currently, because of lack of manpower, there is no systematic program to check compliance with orders issued by the Commission over the years where initial and supplemental compliance reports have been approved. Presently, for the most part, noncompliance information comes from complaints from the public, competitors, Better Business Bureaus and the Commission's advertising survey.

A compliance survey is required of outstanding orders. Such a survey has not been made for more than fifteen years. A planned survey in F.Y. 1971 will be highly selective and be conducted in close cooperation with the operating divisions in the Bureau of Deceptive Practices and the Bureau of Industry Guidance. For example, a project is established involving hearing aid devices, the Division

of Compliance should survey all orders in this field. The outstanding orders could then be evaluated in the light of present-day practices and, where appropriate, recommendation could be made for the modification of these orders to reflect the current Commission position. This would be consistent with the often expressed view that insofar as possible, competitors should receive equality of treatment. In those cases where violations of old orders are found and the Commission has not altered its position with respect to the proscribed practices, penalty proceedings would be initiated or voluntary compliance achieved by way of supplemental compliance reports. This survey procedure should also be followed when new trade regulation rules are promulgated.

In order to institute a survey program, a minimum of two additional attorneys would be required. During FY 1971, approximately 150 orders could be surveyed. The survey conducted fifteen years ago justifies the estimate that twenty-five percent of the cases surveyed would result in penalty investigations and that approximately fifty percent of those investigations would result in civil penalty proceedings. The remaining cases would involve the processing of additional, supplemental reports of compliance or the review of reports of compliance investigations.

In summary, an increase of five attorneys is requested: one GS-15, two GS-14 and two GS-13. Three additional clerical positions are also needed: two GS-5 and one GS-4.

The packaging program:

Presently five professionals are assigned full-time on packaging. A steady input of requests for information and technical interpretation has occupied the main efforts of two members of the staff. Telephone requests have averaged 150 calls per month for one of these members. Since the initial publication of the first interpretative bulletin in March, the mail-list has risen to 1500 by individually submitted requests. Requests for written, technical interpretations have numbered 200 in the past eight months and conferences with visiting attorneys and businessmen average at least two per day. One member of the staff is required fulltime in screening and responding to complaints concerning packaging and labeling matters. In the past eight months, 125 complaints have been answered. Industry has been contacted in at least one-third of these cases, with encouraging response to corrections suggested.

During FY 1970, the first public hearing under the regulatory procedure is scheduled. This is an uncharted course and will be time consuming. In addition, the staff has been directed to undertake an investigation of nonfunctional, slack-fill in the toy industry, investigate the necessity of proper naming and ingredient-listing in the charcoal industry, and to complete the issuance of "cents-off" regulations. These duties will be the maximum possible with the staff of five professionals as now planned. Primary enforcement efforts must be devoted to additional liaison and schooling assistance to field offices, state agencies and Customs' officials. Complaints are anticipated to sharply increase with timely screening and answering becoming a major concern. An involved study of state integration and uniformity; surveys and market studies for effectiveness of the Act desired by Congress; enforcement; and industry and consumer aids to the total understanding of this Act, must await appropriate staffing. Interpretations are anticipated to continue in high demand for at least the next six months after which, it is hoped, a limited amount of effort may be turned to industry survey followed by possible voluntary compliance where mistakes are discovered. Since new compliance actions are not available for this year and enforcement will be meager, some apathy is anticipated which will be a severe burden for future years. Industry has already shown the desire for these basic regulations and will perform a great deal of self-policing. But, if these reports are not aggressively followed-up, the entire thrust of the Bureau's efforts will wane to ineffectiveness at this beginning stage.

In view of recent developments, proposals to amend the statute, substantial issues involving interpretations, definitions, and procedures it now appears that resolution of these matters will peak in 1971. Since the staff, working overtime cannot keep up with the present workload, it is estimated that eleven professionals and five clerical employees will be needed in 1971. This is an increase of eight positions, six professional and two clerical.

Enforcement activities to bring packagers in compliance with the statute will place an additional workload upon the field offices and upon the enforcement

attorneys in this Bureau. Presently, there is no experience upon which to base a prediction as to the size of the truth-in-packaging caseload. Therefore, we hope to be able to handle it with the current staff plus the increase requested for 1971.

Special continuing projects:

Cigarettes.—The continued surveillance of the industry and work associated with the laboratory will continue to demand the services of at least two attorneys, two chemists, and the full-time services of a doctor. No increase is asked for this program.

Automobile Warranties.—The Bureau will be engaged in a continuing effort to insure that manufacturers and dealers fully comply with the constructive obligations created by the manufacturers' new car warranties. This effort will require two attorneys full-time in fiscal 1971. Such surveillance will involve: (1) the accumulation of data through a scientifically selected sampling of the owners of cars of model years 1967-1969; (2) FTC follow-up on a percentage of consumer complaints; (3) monitoring and evaluation of advertisements, commercials, display posters and materials including the warranty; (4) study and evaluation of industry actions taken effecting the warranty; (5) an expected requirement to prepare and submit to Congress annual reports; and (6) possible litigation on a case-by-case basis.

Some idea of the public interest in this program can be gotten from the fact that the Bureau received 2200 written complaints from irate new car owners in fiscal 1969.

We are using only one attorney and one clerk-typist on this project, but must assign one more lawyer to the job in 1971 or see it hopelessly bog down.

Magazines and encyclopedias.—The door-to-door sale of magazines and encyclopedias continues to be a source of trouble. A comparatively large number of consumer complaints to us and to Congress indicate that deceptive practices are still prevalent. Recently, a member of Congress has been pressing the Commission to increase its efforts in this field and to re-examine the temporary approval given to the Paid-During-Service industry group to attempt self-regulation.

The PDS code trial period will end in fiscal 1971, making necessary a report and recommendations. A review of all past and current encyclopedia investigations is underway with the prospects of a concentrated enforcement program in the near future. We must plan to utilize at least one additional attorney on this program in 1971.

New projects and programs

Affirmative disclosure.—The principal of affirmative disclosure in a statutory sense was set in motion by the enactment of "Truth-in-Lending." It seems reasonable to anticipate that if there is to be full disclosure as to the cost of credit, there will also be demands for full disclosure (product information) as to the characteristics of the product to be financed. The continuing drive for equality between buyer and seller in the marketplace will mean an important, new program area for the Federal Trade Commission on the general subject of affirmative disclosure.

A minimum of three attorneys can be utilized in this program area during fiscal 1971.

Consumer products standards.—Product standards, including safety standards, is one of the most important frontiers yet to be defined in the area of consumer protection, clearly within the Federal Trade Commission's charter and closely akin to affirmative disclosure. Consumer groups have been insisting in increasingly strident tones since 1961 that standards be devised and made available to assist them in making intelligent choices in the marketplace. Moreover, there is strong Congressional interest in this area. Additionally, consumer groups are asking the Federal Government to disclose its standards for those products in common civilian use and for which government standards had been developed which could be restated in laymen's language for the private citizen. The justification for such disclosure on the part of the government is to be found in the view that the citizen taxpayer, in paying the cost of the government's testing activities, is entitled to be the beneficiary of such information as well.

The likelihood of the extension of the life of the National Commission on Product Safety and its anticipated findings that the Federal Government should

have more responsibility for the development of mandatory product safety standards, supports the assumption that there will be increased activity in this portfolio during fiscal 1971. The FTC is already on record with respect to the National Commission on Product Safety in expressing an interest in certain categories of household products that should be investigated.

The Bureau is planning to develop a study for Commission approval which will state the alternatives by which a product standardization program can be developed.

There is increasing consumer concern that fair marketing practices should also require full safety in the matter of radiation and that a manufacturing technology should be developed in the public interest which would have as its objective a "fail-safe" or "zero-defect" standard for those consumer products that may harm the person. In this area, in addition to color television, there are other potentially harmful products, i.e., products which utilize high-frequency sound, short-wave energy radiation, etc. Moreover, increasing attention must be paid to the problem of improper servicing of such consumer products which can result in insidious injuries.

Three attorneys and one clerical employee are required for fiscal 1971.

III. BUREAU MANAGEMENT AND ORGANIZATION

The programs which are administered by this Bureau are complex, extremely varied and wide in scope. As a result, the Bureau Director and Assistant Director find themselves stretched too thin. They find it impossible to be experts on packaging and truth-in-lending with the complicated rules, regulations and procedures associated with these programs and effectively and intelligently administer and supervise all of the enforcement activities, including compliance and the wide-ranging regulatory programs administered in the Division of Special Projects.

An additional GS-16 Assistant Director position is requested for fiscal year 1971. The two assistants will be given autonomy over the programs they manage. To relieve the Director of the routine matters and give him the time he requires for top administrative-policy considerations.

Moreover, the Commission rightfully expects that the top management personnel of this Bureau will fully perform the basic executive functions such as planning, personnel management, budgeting, program innovation, administrative, and the like. These functions are not being fully performed at this time because of the shortage of manpower, therefore an additional GS-15 attorney for planning is requested and a staff of one GS-9 management analyst and two GS-8 procedures analysts.

IV. BUREAU SUMMARY—INCREASES REQUESTED, 1971

In order to carry out the programs described in detail for this Bureau in 1971, an additional 111 new positions (75 professional and 36 administrative or clerical) are requested, together with supporting costs, or a total increase of \$1,506,000, as follows:

Office of the Director (14): 1 GS-16 assistant bureau director; 1 GS-15 attorney (for planning office); 1 GS-9 management and procedures analyst; 2 GS-8 procedures analysts; 1 GS-7 secretary; 1 GS-6 administrative assistant; 1 GS-6 Secretary; 3 GS-5 clerk-stenographers; 3 GS-4 clerical positions	\$127,000
Division of Consumer Credit	None
Division of Special Projects (20): 2 GS-15 attorneys; 4 GS-14 attorneys; 3 GS-13 attorneys; 3 GS-12 attorneys; 3 GS-11 attorneys; 1 GS-6 secretary; 3 GS-5 clerk-stenographers; 1 GS-4 clerk-stenographers	265,000
Division of Food and Drug Advertising (17): 2 GS-15 attorneys; 4 GS-14 attorneys; 3 GS-13 attorneys; 2 GS-12 attorneys; 2 GS-11 attorneys; 1 GS-6 secretary; 2 GS-5 clerk-stenographers; 1 GS-4 clerk-stenographer	239,000
Division of General Practices (42): 5 GS-15 attorneys; 9 GS-14 attorneys; 9 GS-13 attorneys; 6 GS-12 attorneys; 5 GS-11 attorneys; 1 GS-6 secretary; 3 GS-5 clerk-stenographers; 4 GS-4 clerk-stenographers	585,000

Division of Compliance (8) : 1 GS-15 attorneys; 2 GS-14 attorneys; 2 GS-13 attorneys; 2 GS-5 clerk-stenographers; 1 GS-4 clerk-stenographer -----	106,000
Division of Scientific Opinions (10) : 2 GS-15 medical officers; 1 GS-15 pharmacologist; 1 GS-14 medical officer; 1 GS-14 engineer; 1 GS-13 general physical scientists; 2 GS-5 clerk-stenographers; 2 GS-4 clerk-stenographers -----	138,000
Total Personnel Compensation (111 New Positions) -----	1,460,000
Travel -----	30,000
Other Expenses :	
Steno. Reporting -----	8,000
Exhibits and Testing -----	8,000
Total Increases Requested 1971 -----	1,506,000

BUREAU OF TEXTILES AND FURS

	Allotment, fiscal year 1970 Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount
Office of the Director -----	22	\$173,500	22	\$173,500
Division of Enforcement -----	24	370,000	24	370,000
Division of Regulation -----	122	1,312,500	122	1,312,500
Total personal services -----	168	1,856,000	168	1,856,000
Travel -----		107,000		122,000
Other expenses -----		16,000		28,000
Total -----	168	1,979,000	168	2,006,000

The Bureau of Textiles and Furs has responsibility for administering the Wool Products Labeling Act, the Textile Fiber Products Identification Act, the Fur Products Labeling Act and the Flammable Fabrics Act. In order to carry out these duties, the Bureau has been divided into the Office of the Director, the Division of Regulation and the Division of Enforcement.

The Commission's 1970 appropriation, now pending in Congress, includes an increase of approximately \$500,000 for expanded flammable fabrics enforcement under the amended act which became effective July 1, 1969. This will provide the necessary manpower to increase surveillance of potentially dangerous fabrics and garments.

The Division of Enforcement, in addition to handling all formal investigations made under the above Acts is responsible for the settlement or trial of each of such cases. Also, the trial attorneys in the Division of Enforcement are responsible for any injunctions brought under these statutes. The Bureau laboratory which is a part of this Division analyzes questionable fibrous stock, yarn and fabrics, conducts dye tests of fur products and makes flammability tests of fabrics that might be dangerously flammable. In addition, the Compliance Section of this Division polices Commission orders under the four enumerated Acts.

The Division of Regulation makes field inspections of manufacturers, wholesalers and retailers of textile products and fur products, monitors textile and fur advertising, prepares and makes recommendations relative to amendments to the regulations under these four Acts, issues registered identification numbers, is custodian of the continuing guaranty files, maintains the Bureau's correspondence files, and counsels and advises the textile and fur industries concerning their labeling, invoicing and advertising practices.

The work of the Bureau is to a large extent to guard or protect the public, and only when the efforts of the Bureau to obtain compliance with the assigned statutes through education, cooperation and voluntary compliance are unsuccessful is enforcement sought through complaint and cease and desist order, or, if warranted, by injunction or criminal penalties.

DIVISION OF ENFORCEMENT

The Division of Enforcement is responsible for the investigation and effective disposition of serious violations of the Wool, Textile, Fur and Flammable Fabrics Acts. The Division consists of a staff of trial attorneys who supervise the investigation and are responsible for the prosecution of violations considered to be serious enough to warrant issuance of a complaint. It also has a compliance section which polices the cease and desist orders issued under each of these Acts.

During the past year the Division of Enforcement continued to give fast attention to cases arising under the Flammable Fabrics Act. There were twelve cases under this Act which were concluded with Cease and Desist Orders.

The small staff of the Division of Enforcement processed 186 cases either by a recommendation for complaint or by a closing recommendation. Thus, each trial attorney concluded an average of approximately 24 cases during the year.

The Division also includes the Commission's testing laboratory which during FY 1969, made 498 fiber content analyses of fabrics and fibers, conducted 599 burn tests under the Flammable Fabrics Act (each of which consisted of 3-10 individual tests), and 327 tests of fur fibers to determine if dye, bleach or other artificial coloration had been added to the furs.

Of the 599 items tested for dangerous flammability, 111 products failed the tests and were removed from public sale as wearing apparel. These products, which numbered in the tens of thousands of individual items, were in 6 different categories, as follows:

<i>Type of wearing apparel</i>	<i>Number of products failing burn tests</i>
Fabrics -----	6
Scarves -----	55
Sweat shirts -----	3
Garments -----	10
Non-woven fabrics and garments -----	3
Wood chips and flowers -----	34
Total -----	111

The 323 tests of fur products included, for example, samples of furs obtained from some 170 manufacturers some 75 of which the tests revealed were misbranding dyed fur skins as natural. Tracing the products and subsequent corrective action in thousands of individual garments resulted in a savings of many thousands of dollars by the consuming public.

As of July 1, 1969, the formal cases on the Docket of this Division were:

Wool -----	56
Fur -----	120
Textile -----	69
Flammable Fabrics -----	15
Total -----	260

It is considered desirable, *as an average*, to handle all cases in a period of one year. Although some cases will remain on the docket for longer periods and many may be disposed of in a shorter period, the target to be achieved in this plan is disposition of cases, on the average, in one year.

Compliance section

The Compliance Section of the Division of Enforcement obtains compliance with Commission cease and desist orders as they are issued under the four Acts administered by the Bureau, directs and analyzes investigations of suspected violations of orders, and refers through the Commission such violations as warrant proceedings for civil or criminal penalties in the Federal District Courts.

FY 1969 commenced with 105 active compliance cases. During the year new orders and reopened cases brought the total assignment to 264 cases of which 116 were closed, leaving 148 at the beginning of FY 1970.

A judgment in the amount of \$15,000 was filed during the year in a civil penalty suit. Seven other civil penalty suits were pending in various United States District Courts at the close of the year. This phase of the Compliance

Section's work is particularly exacting and time-consuming. It requires the preparation of all essential papers to be filed in court and for use in trial and cooperation with the United States Attorneys throughout the proceedings.

In instances where serious violations of orders are found, full enforcement necessitates proceedings for penalties, not only for the effect on the violating parties but also to operate as a deterrent against others who may be similarly involved. In FY 1969 only four cases were prepared for certification to the Attorney General as civil penalty suits. Some matters which might have resulted in penalty cases were by necessity handled administratively.

At the end of June 1969 the Compliance Section of the Division had approximately 1,650 Commission orders to supervise and police.

DIVISION OF ENFORCEMENT—OPERATIONS AND STATUS REPORT FOR YEAR ENDING JUNE 30, 1969,
INVESTIGATIONAL CASES

Workload statistics	Wool	Fur	Textile	Flamma- ble fabrics	Total	Percent change from 1968
Cases at the beginning of fiscal year 1969.....	51	60	80	16	207	+9
Investigations initiated.....	46	127	48	18	239	+61
Total number of docket cases considered.....	97	187	128	34	446	+31
Complaints recommended.....	21	48	20	6	95	-14
Complaints previously sent to Commission with recommendation for complaint.....	11	21	11	8	51	-----
Complaints approved for issuance.....	29	56	29	12	126	-----
Final orders issued by Commission.....	29	56	29	12	126	+95
Consent.....	29	56	28	12	125	-----
Docketed.....	-----	-----	1	-----	1	-----
Assurances of voluntary compliance received.....	11	4	25	7	47	+20
Cases closed for other reasons.....	4	9	6	-----	19	-34
Total cases disposed of during year.....	41	67	59	19	186	+42
Cases on hand at end of fiscal year 1969.....	56	120	69	15	260	+25

DIVISION OF ENFORCEMENT—DISTRIBUTION OF CASES ON JULY 1, 1969

	Wool	Fur	Textiles	Flammable fabrics	Total
Pending cases:					
Awaiting investigation.....	19	48	18	5	90
Awaiting analysis.....	11	11	17	-----	39
Total.....	-----	-----	-----	-----	129
Cases in which complaints or closings have been recommended but are in various processing stages:					
Affidavits.....	-----	1	7	-----	8
Sec. 2.14.....	21	43	18	8	90
Consent agreements.....	4	15	3	2	24
Closings.....	1	1	6	-----	8
Total.....	-----	-----	-----	-----	130
Cases in trial status.....	-----	1	-----	-----	1
Grand total.....	56	120	69	15	260

DIVISION OF REGULATION

The Division of Regulation is responsible for the inspection of textile and fur products in manufacturing establishments and distribution channels in order to protect manufacturers, distributors and consumers against misbranding or false and misleading advertising of these products, and to insure consumer safety against the hazard of flammable fabrics. In so doing, not only is the safety and welfare of consumers increased directly but also indirectly in that competition is made fairer by the elimination of certain unfair trade practices.

Consultation with industry members and their counsel is a continuing responsibility of the attorneys in the headquarters office. This may follow inspection trips by men in the field or prior correspondence with the industry member involved. From time to time representatives of large mills or fiber producers will have their production engineers and counsel check with us on proposed or changed tags, labels, tickets, etc., intended to be sent to the cutters who use these labels on the end products.

In addition to the general duties and responsibilities set out above, the Division has close contact with the Customs authorities as well as considerable activity with other governmental agencies. Substantial correspondence and many personal conferences are carried on with organizations such as Better Business Bureaus, Chambers of Commerce and Trade Associations which represent all phases of manufacture and distribution of textiles and furs. All of these activities require the expenditure of a considerable amount of time and are most important in obtaining voluntary compliance by business and industry.

The Bureau plans in FY 1971 to vigorously enforce the four statutes assigned to it for administration as far as its personnel and funds will allow. Priority will be given to inspections and investigations under the Flammable Fabrics Act and local and State fire officials will be contacted and educated as to the Federal requirements. The assistance of these officials will be solicited in enforcing the Flammable Fabrics Act in order to afford the greatest possible protection to the general public from injuries and death resulting from fabric and clothing fires.

In accordance with the overall planning of the Commission, the Bureau of Textiles and Furs does not request any increase in personnel for FY 1971.

The labeling, invoicing and advertising requirements of the Wool Act, the Textile Act and the Fur Act, together with the policing of the Flammable Fabrics Act, are administered primarily through the inspection of mills, manufacturers, importers, wholesalers and retailers of textile and fur products. The staff stationed throughout the country give priority to formal investigations of the Division of Enforcement looking toward possible Commission complaints and orders against the hard core violators. The balance of their time is spent on the inspection and education work of the Division.

The anticipated increase in 1970 for flammable fabrics enforcement will provide approximately 30 to 35 additional field investigators and through the General Services Administration, space is being made available in thirteen new locations throughout the country.

The Bureau personnel in the field offices and stations will also cooperate with State and local fire marshals and fire chiefs and to educate these officials as to the types of merchandise that might fail the flammable fabrics tests. In this manner the Bureau hopes to enlist the help and assistance of the State and local fire officials in locating and preventing the distribution of fabrics and products that might be in violation of the Flammable Fabrics Act.

The increase in field personnel will allow greater inspection coverage of mills, manufacturers, and distributors of fabrics and products that may be potentially dangerous. Further, with new specifications to be published by the Department of Commerce, large numbers of manufacturers and distributors not now subject to the statutes administered by the Bureau will be covered in our inspection work, i.e., manufacturers, wholesalers, and distributors of mattresses, box springs, upholstered furniture, etc. When specifications are issued by the Department of Commerce covering interior furnishings, it is expected that State and local fire officials will ask for the assistance of the Bureau's investigators whenever fires occur in which products subject to the Flammable Fabrics Act are involved and when there appear to be possible violations of the Federal law.

The Division's textile and fur investigators in the field perform inspections and counsel businessmen regarding the requirements of the four Acts and the rules and regulations. Administrative handling of minor deficiencies in labeling, advertising or invoicing (as the case may be with the particular Act involved) is performed. Immediate informal correction is often made by the person being interviewed and reported to the headquarters office by the investigator.

In the headquarters office, the staff engages in the several activities to achieve voluntary compliance, renders legal opinions and interpretations, maintains records of approximately 32,000 active continuing guaranties filed under the four Acts, issues registered identification numbers to be used in lieu of the manufacturer's or distributor's name under the Wool, Fur and Textile Acts, which currently approximates 45,000 active firms, and maintains inspection and other

records concerning the activities of the Bureau. Another important duty is the drafting of proposed rules and regulations for submission to the Commission for consideration and appropriate action.

Bureau increases requested 1971

The only increases requested for the Bureau in 1971 are \$15,000 for travel and \$12,000 for exhibits and testing.

DIVISION OF REGULATION—WORKLOAD STATISTICS, FISCAL YEAR 1969

Gross sales of firms inspected	\$16,625,675,000
Approximate inventory of firms inspected	\$1,744,168,000
Firms inspected revealing deficiencies (percent)	61

	Wool	Textile	Fur	Flammable fabrics	Other	Total
Number of establishments inspected ..	4,751	7,127	1,545	6,513	16	19,996
Number of products with labeling deficiencies	345,041	4,386,607	30,847		11,472	4,773,967
Dollar value of deficiency labeled products	\$7,532,000	\$41,521,000	\$2,817,060		\$120,000	\$51,990,000
Records deficiencies	227	527	197	2		953
Invoicing deficiencies		492	570	1	2	1,065
Advertising deficiencies found during inspections		548	120		6	674
Supplier deficiencies	1,468	7,348	508	4	8	9,336
Informal assurances obtained	1,072	3,262	786			5,120
Registered numbers issued	135	1,154	81			1,370
Continuing guaranties filed	119	420	44	860		1,443
Publications issued	3,013	18,253	3,423	1,179	335	27,203

BUREAU OF FIELD OPERATIONS

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director	6	\$93,500	6	\$93,500		
Field offices	385	4,228,500	520	5,758,500	135	\$1,530,000
Total personal services	391	4,322,000	526	5,852,000	135	1,530,000
Travel		247,000		397,000		150,000
Total	391	4,569,000	526	6,249,000	135	1,680,000

The Commission maintains field offices in eleven strategically located metropolitan areas of the Country. These field offices and a small headquarters group constitute the Bureau of Field Operations. This Bureau is the investigative arm of the Commission and its enforcement bureaus. Through the field offices it also serves as a liaison between the Commission and other enforcement agencies of the Federal, State, and local governments. The Bureau primarily discharges its responsibilities by conducting assigned investigations, negotiating settlements where appropriate by assurances of voluntary compliance or consent orders, and by performing such advisory, public relation, and educational activities as will enhance the effectiveness of the Commission's enforcement efforts. In fact, it is from the field staff that businessmen and the public generally form their impressions of the Commission since their contacts are limited largely to visits and communications with the field staff. Thus, although the investigative case load assigned to the field consumes a major portion of the Bureau's resources, these other related activities are of vital importance and require substantial amounts of staff efforts.

Although the Bureau experienced a heavy loss of qualified investigative personnel during 1969, it was still able to sustain a highly commendable record of performance throughout its varied operations. It began the fiscal year with 154 field attorneys and had the same number at year end. This represents a decrease in average employment of eight from 1968, primarily due to restrictions on employment. During the year the Bureau lost the services of 31 experienced attorneys. While the loss of several attorneys was related to death, retirement and transfer, the greater number resulted from resignations of attorneys desir-

ing to engage in private law practice. Even though the losses were eventually replaced with recent law graduates, the overall effectiveness of the staff was reduced because the inexperienced replacements do not attain full effectiveness until they have served for more than a year.

The workload of the field offices for 1969 follows:

Pending cases beginning of fiscal year-----	786
Referrals to field for investigation during fiscal year-----	779
Total cases in field during year-----	1,565
Cases completed-----	960
Pending July 1, 1969-----	605

While there was some reduction in the number of cases referred to the field offices for investigation, their complexity, as well as the attendant increases in the evidentiary requirements necessitated by Commission direction more than offset the decrease in numbers. Many of the cases involved industrywide considerations. In addition, the Commission directed the field offices to expedite many special projects and surveys which necessitated the diversion of large numbers of attorneys from casework investigations. At one time during 1969 there were approximately 85 attorneys assigned to special investigations and educational programs.

In connection with their casework assignments in 1969, the field offices negotiated or participated in the negotiation of over 400 consent settlements. These included 170 affidavits or letters of voluntary compliance and 239 consent orders. Of the consent orders 76 were in deceptive practice cases, 7 in restraint of trade matters and 3 in Industry Guidance cases. There were also consent orders in 153 textile and fur matters which were administratively handled by the field offices, although the actual negotiations were conducted largely by the textile and fur investigators who are under the supervision of the field offices.

The burden and length of investigations have been influenced by the increased necessity of resorting to subpoenas, processing motions to quash, and other delaying actions that often follow the issuance of subpoenas. During 1969 it was necessary to resort to subpoenas in 31 cases. This is a substantial increase over prior years and will continue to increase during 1970 and 1971.

The average number of cases completed per attorney was 6.23 cases, which represents a slight decrease from 6.97 cases per attorney for 1968. This slight decrease is readily understood by a review of the special activities required of the field staff. It is anticipated that the role of the field offices in informal matters and special assignments will continue at an accelerated rate during 1971.

There was an unprecedented increase in the number of special contacts with businessmen and the public, particularly during the last quarter of 1969 when the burden of educating creditors and others as to the requirements of the Truth-in-Lending Act which were promulgated in Regulation Z issued by the Federal Reserve Board. There were 33,635 special contacts with the public during 1969, compared with 13,214 in 1968. This includes speakers furnished on 827 occasions of which 608 involved audiences numbering from 25 to 1,000 businessmen, trade associations, chambers of commerce and other groups who were interested in the effects of Truth-in-Lending on their business practices. During the fourth quarter of 1969, 37 field attorneys were assigned to Truth-in-Lending activities substantially on a full time basis.

As the Federal-State Cooperative programs continue to grow, field offices are being called upon to expand their contribution to the administration of these programs. This is particularly so in the Truth-in-Lending Act educational and enforcement programs and the "little" FTC Acts which many of the states are enacting through the encouragement of the Commission. Many of the field offices have already developed valuable contacts, techniques, skills and leadership in these areas through such activities as attending regional and area meetings of businessmen, trade associations, etc. on interstate cooperation in consumer fraud and deception and interstate cooperation in antitrust; providing key state officials with information for adopting deceptive and unfair trade practice legislation; providing continuing assistance to legal aid and "poverty law" offices, Better Business Bureaus, and similar agencies; and holding consumer conferences in conjunction with other agencies comprising the federal executive boards.

The Commission has now placed all Truth-in-Lending activities in the field under the direction and supervision of the Bureau of Field Operations, with the overall responsibility for program planning and policy invested in the Division of Consumer Credit, Bureau of Deceptive Practices. The educational program initiated by the field offices to acquaint all affected parties and others with respect to disclosures and other requirements under the Truth-in-Lending Act and Regulation Z will continue to some extent throughout the year. Inspections and other enforcement activities are underway, and this phase of the work will be expanded substantially during the year as fast as new staffing permits. No additional funds are being requested in 1971 for field activities related to the Truth-in-Lending Act.

Based on the projections of the various enforcement bureaus and the investigative programs charted by the Commission for 1971, and the experience of the Bureau of Field Operations with its expanding investigative and compliance activities, an additional 100 field attorneys and 35 clerical-stenographic personnel are required together with supporting costs totaling \$1,680,000 for 1971 as follows:

INCREASES REQUESTED F.Y. 1971

Personnel

Attorney:

GS-15 (headquarters) -----	1
GS-14 -----	11
GS-13 -----	18
GS-12 -----	30
GS-11 -----	40
	<hr/> 100

Clerk-Stenographers

GS-5 -----	15
GS-4 -----	20
	<hr/> 35

Total ----- 135

Personnel Compensation ----- \$1, 530, 000

Travel (Est. minimum 35 days per man) ----- 150, 000

Total ----- 1, 680, 000

BUREAU OF INDUSTRY GUIDANCE

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director -----	17	\$166, 000	18	\$171, 000	1	\$5, 000
Division of Industry Guides -----	23	379, 500	25	401, 500	2	22, 000
Division of Advisory Opinions -----	7	158, 500	7	158, 500		
Division of Trade Regulation Rules -----	12	161, 000	15	191, 000	3	30, 000
Total personal services -----	59	865, 000	65	922, 000	6	57, 000
Travel -----		2, 000		2, 000		
Total -----	59	867, 000	65	924, 000	6	57, 000

Through the Bureau of Industry Guidance, the Commission endeavors to obtain industrywide voluntary compliance with statutes it administers by informing and guiding businessmen as to the requirements of such statutes. The Bureau is comprised of three Divisions, each using a different technique to accomplish this vitally important phase of the Commission's work. In carrying out its objectives, the Bureau not only counsels, guides, and advises businessmen as to legal requirements applicable to various business practices, but also affords the

business community the opportunity to discontinue, voluntarily, unlawful practices and thereby avoid the expense and delay of litigation.

The procedures utilized by the Bureau call for (1) the issuance and administration of industry guides which interpret statutory provisions as applicable to practices of particular industries or practices common to many industries, (2) promulgation of trade regulation rules defining specific practices considered to be unlawful and upon which the Commission may rely in litigated cases, (3) the preparation of advisory opinions concerning proposed courses of action, which are binding upon the Commission. These procedures are utilized, respectively, by the Division of Industry Guides, the Division of Advisory Opinions and the Division of Trade Regulations Rules.

During its history of almost fifty years, the concept of industrywide voluntary compliance has repeatedly proved its effectiveness. The program was significantly enhanced in 1962 with the addition of the trade regulation rule and the advisory opinion. As presently constituted, the program provides businessmen an extraordinary opportunity to assess the legality of business programs from their very inception and to make such corrections as may be necessary to assure that Commission administered laws are observed. When the industrywide voluntary compliance concept is utilized to its fullest extent, not only the business community but consumers and the national economy itself benefit. Fair and equitable competitive conditions prevail in the marketplace and assist to promote and maintain a prosperous business climate. Consumers are afforded the opportunity to make informed purchases, pick out the best buy and avail themselves of legitimate savings, secure in the knowledge that manufacturers and sellers intend to stand behind guaranteed merchandise to the limit of what they have promised.

In fiscal year 1969, the industry guidance program continued to place heavy emphasis on consumer protection programs. An increased number of rules and guides were adopted by the Commission and, at the close of the year, the Commission was giving active consideration to several other sets of rules and guides upon which work had been completed by the staff. In addition, the number of staff level interpretations as to the application of guide and rule provisions, given in response to requests from the business community, had increased by more than fifty percent over the previous year.

Because of the demonstrated need for continued efforts by the Commission to develop new consumer protection programs, added emphasis will be placed on the formulation and implementation of such new programs. This objective will be accomplished not only through the issuance of new rules and guides, but also through preparation of consumer pamphlets in important problem areas wherein the Commission wishes to place the general public, as well as a particular industry, on notice of the need for corrective action.

The program for FY 1971 does not, however, ignore the problems of maintaining competition. A continuing program to evaluate the effectiveness of the recently promulgated *Guides for Advertising Allowances and Other Merchandising Payments and Services* will be carried forward. In addition, new rules and guides dealing with problem areas particular to certain industries will be developed.

OFFICE OF THE DIRECTOR

The Office of the Director has general supervision over the work of the Bureau's three Divisions. It also supervises the work of the Bureau's central record room and stenographic pool.

The increase in workload occasioned by the many new programs which will be developed in the three Divisions will require an additional \$5,000 to provide one additional GS-4 Clerk-Steno to serve the expanded legal staff requested for the Bureau.

DIVISION OF INDUSTRY GUIDES

This Division is responsible for administering the Commission's Industry Guides program, the primary objective of which is to obtain expeditious industrywide voluntary compliance with laws administered by the Commission. Its work falls in four main categories: (1) the establishment of Guides, (2) furnishing advice and guidance concerning the provisions and applicability of Guides, (3) obtaining through continuous administration of the Guides the greatest possible degree of voluntary compliance with the provisions thereof, and (4) special projects.

Accomplishments—Fiscal 1969

Establishment of Guides—The most significant contribution toward maintaining competition was the development of the *Guides for Advertising Allowances and Other Merchandising Payments and Services*, which provide extensive and comprehensive advice and guidance on how industry can meet the legal requirements of Sections 2(d) and (e) of the amended Clayton Act.

The Commission promulgated Guides for the *Beauty and Barber Equipment and Supplies Industry* offering guidance to avoid discriminatory or anti-competitive practices as well as dealing with problems of consumer deception.

Comprehensive Guides were also issued in the *Greeting Card Industry*, to assist in avoiding discriminatory practices and to maintain competition.

Guides for the *Dog and Cat Food Industry* were adopted to deal with misrepresentations of the content of such food, as well as misrepresentations concerning nutrient requirements and medicinal and therapeutic benefits to be derived through the use of such food.

Guides for the *Ladies' Handbag Industry* were also adopted in final form and deal with problems of deception due to the misrepresentation of material composition, finish, embossing, and processing, as well as other industry problems including deceptive pricing and anti-competitive practices.

Three new sets of Guides, as well as an amendment to an existing set of Guides, were released in proposed form for the purpose of soliciting public comment. The three sets of proposed Guides for the *Over-The-Counter Drug Industry*, *Decorative Wall Panel Industry* and dealing with *Use of the Word "Free" and Similar Representations* are intended to cope with various forms of deceptive or misleading practices. Likewise, a proposed amendment to the existing Guides for the Household Furniture Industry seeks to clarify problems with respect to misleading practices.

Staff work on proposed Guides for the *Wig Industry* had been completed and the Guides were being considered by the Commission at the close of the year.

Special Projects and Assignments—The Commission issued an enforcement statement challenging misleading speed and safety representations in automobile tire advertising which was prepared by the Division.

Compliance—Three hundred and seventy-eight alleged violations of Commission administered laws were given attention to and disposed of by the Division. Of this total, 263 matters were disposed of on the basis that the practices in question had been discontinued and would not be resumed.

In addition, particular attention was being paid to guarantee problems arising in connection with the sale of various major home appliances, as well as problems involving debt collection deception.

At the close of the fiscal year, 378 matters were pending for disposition.

Work programs—Fiscal 1971

The program of the Division for 1971 seeks to deal with new problems, especially in the field of consumer protection, while insuring the continuing effectiveness of those programs which will be put into operation during FY 1970. Likewise, efforts will be continued to strike a balance between efforts expended to develop new guides and time spent in obtaining compliances with those guides which have been promulgated.

Product Information—This program will be developed to obtain disclosure in advertising and/or by labeling of important product information for various consumer products. Many products on the market today are sold with either minimal or no information being provided the purchaser as to performance, content, care, durability or safety characteristics. As a consequence, consumers have little or no basis for making comparative evaluations of competing lines of merchandise prior to buying an item. Annually, after comparative testing, many consumer organizations release data to demonstrate that certain products are safer, more dependable, more easily cared for, etc., than are competing products.

Subsequent to the completion of studies involving application of the Commission's organic act to the problem of product information and the identification of important product lines requiring disclosure of one or more types of information, Industry Guidance proceedings will be initiated to determine the types of disclosures necessary for given products as well as the means by which such disclosures should be made to carry out the Commission's objectives.

Deceptive Franchise Agreements.—Following development, in FY 1970, of a consumer pamphlet on franchise agreements, Industry Guides will be formulated in fiscal year 1971. The problems involved fall both in the area of deceptive practices and restraint of trade. In essence, substantial deception occurs through misleading promises of lavish earnings, exclusive territories, training, franchisor assistance, and others. In addition to covering these practices, the Guides will deal with such anti-competitive practices as exclusive buying arrangements, the "cutting off" or termination of franchise agreements by franchisors, and others.

Currently cities, private organizations and government agencies, in an effort to persuade and assist minority groups to participate in the ownership and operation of small business in the inner city, have determined that franchising is an exceptionally well suited means to accomplish their objectives. Franchisees derive the benefit of proven know-how developed and tested by franchisors and enjoy the benefits of product identification.

Lawn & Garden Power Equipment Industry.—This industry has burgeoned during the past twenty years to reach its current size of 175 manufacturers with annual sales approaching \$350 million.

Preliminary information indicates that there is a growing tendency toward deceptive misrepresentation in the advertising of industry products, particularly in connection with representations as to quality, capability and performance of products, conformance of products' design to recognized standards, as well as use of deceptive guarantees or the failure to set forth the material terms and conditions of such guarantees, fictitious pricing claims and misrepresentations as to savings.

During fiscal year 1971, Industry Guides will be developed to deal specifically with the practices of this industry.

Handbook for Advertising Copywriters.—Much of the unintentionally misleading or deceptive advertising is due, in no small part, to a lack of knowledge on the part of advertising copywriters as to what claims for a product are legally permissible. In order to assist copywriters in the preparation of advertising material, a handbook of "do's and don'ts" will be prepared, bringing together in one volume of reference general information on such diverse questions as the advertising of prices and guarantees, general rules of thumb to be considered in preparing advertising formats, in order to avoid misleading or deceiving consumers, and other information.

Special Compliance—Household Furniture Industry.—During FY 1970, the existing Guides for this industry will be amended to provide additional advice to industry members concerning the labeling and advertising of their products, especially with respect to the type and method of disclosing wood names, identity of woods, stuffing, and origin and style of furniture. Subsequently an accelerated compliance program will be instituted in this large (4,000 manufacturers, \$4 billion in sales) industry.

Guarantees and Warranties of Major Home Appliances.—This project, inaugurated during FY 1969, is being conducted in conjunction with efforts in the same area on the part of the President's Advisor on Consumer Affairs, the Department of Commerce and the Department of Labor. The purpose of the project is to prepare guidelines which will specify the methods of disclosing guarantee provisions as well as to seek ways to improve repair work and servicing. Subsequent to issuance of such guidelines, a comprehensive compliance program is anticipated in this large industry (80 manufacturers with \$4.7 billion in sales).

Over-The-Counter Drugs.—Guides for this industry will become effective during FY 1970, having as their purpose the elimination of false advertising claims made in connection with the sale of proprietary drugs. Essentially, the guides will limit claims in advertising to those which are permissible in labeling under regulations administered by the Food and Drug Administration. Due to the large number of affected products on the market and the substantial amount of advertising done by manufacturers of such products, the necessary compliance work, which will be extensive, will continue throughout FY 1971.

General Compliance Program.—Guides for the *Household Metal Cookware Industry*, and *Simulated Stone, Marble and Related Products Industry*, as well as *Guides Against Deception in Referral Selling*, will be adopted during FY 1970, necessitating carry-forward compliance activity during the program year. In addition, compliance activity along product lines will be continued in connection with the *Guides Against Deceptive Advertising of Guarantees*.

PROGRAMS FOR FISCAL YEARS 1970-72

Projects	Type of action	Estimated man-years		
		1970	1971	1972
Deceptive franchise agreement negotiations..	Guide and consumer pamphlet promulgation..	1.0	1.0	0.5
Deception on referral selling.....	Promulgation of guides and compliance.....	.5	.5	.5
Pet food industry.....	Compliance.....	.5	.5	.5
Ladies' handbag manufacturing industry.....	do.....	.5	.5	
Free film industry.....	do.....	.5		
Decorative wall panel industry.....	Guide promulgation and compliance.....	.5	.5	
Household furniture industry.....	Guide revision and compliance.....	2.0	2.0	2.0
Toy manufacturing and wholesale distributing Industry.....	Guide promulgation and compliance.....	.5	.5	
Athletic goods industry.....	do.....	.5	.5	
Earn money at home offers.....	do.....	1.5	.5	.5
Cut carpet sizes.....	do.....	.5	.5	.5
Household metal cookware.....	do.....	.5	.5	.5
Simulated stone, marble and related products industry.....	do.....	.5	.5	
"Do's and Dont's" for advertising copywriters.....	Preparation of handbook.....		.5	
Guarantees and warranties for major home appliances.....	Preparation of guidelines and compliance.....	2.0	2.0	2.0
Lawn and garden power equipment industry.....	Guide promulgation and compliance.....		.5	.5
Tobacco auction markets.....	do.....	.5	.5	
Broadloom carpet industry.....	do.....	.5	.5	
Use of the word "Free".....	do.....	.5	.5	
Feather and down industry.....	Guide revision and compliance.....	.5	.5	.5
Wig industry.....	Guide promulgation and compliance.....	.5	.5	.5
Over-the-counter drug industry.....	do.....	.5	1.5	1.0
Product information.....	Study and I.G. proceedings.....		1.0	1.0
Revision of industry guides: A. Private home study schools, B. Watch industry.....	Revision and compliance.....	1.0		
Day-to-day compliance activity, special projects and assignments, interpretive work under guides.....		6.0	6.5	
Total man-years.....		21.0	23.0	
Total man-years presently authorized.....		21.0		

Increases requested 1971

The programs planned for fiscal year 1971 will require an increase in funds of \$22,000 to provide two additional GS-11 attorneys.

DIVISION OF ADVISORY OPINIONS

The Division of Advisory Opinions prepares, for the Commission's consideration, proposed advisory opinions in response to the request of individuals, partnerships and corporations. These opinions discuss the legality of proposed courses of action and, when finally rendered, are binding upon the Commission. The Agency retains a right to rescind any opinion, however, should subsequent developments indicate a necessity for so doing. The advisory opinion procedure is offered to businessmen to assist them in avoiding use of practices which may be contrary to laws administered by the Commission.

Accomplishments—fiscal 1969

During the fiscal year, the Division processed and transmitted to the Commission 174 requests for advisory opinions. This compares with 173 requests during the previous fiscal year. The Commission acted on 173 advisory opinion requests and issued 127 opinions.

Nearly all the advisory opinions issued affect the consumer either directly or indirectly through their effect on the national economy, or through protection of competition throughout the United States.

Twenty-eight opinions were issued interpreting Section 5 of the FTC Act in the area of general trade restraints, dealing with such problems as employment of a competitor's personnel, the propriety of proposed exclusive-dealing contracts, the use of uniform warranties, the various problems of franchising so vital to small business, the right to limit trade association memberships to non-competitors, and the legality of statistical reporting through industry and trade associations.

Another 29 opinions were issued in response to requests for interpretations of the Robinson-Patman amendment to the Clayton Act. Many of these requests involved the legality of proposed tripartite promotional assistance plans. While

varying greatly in detail, these plans essentially dealt with the question of using a third party intermediary through whom a supplier or manufacturer offers promotional assistance to his competing customers. Most of the plans are used in the distribution and merchandising of foodstuffs. Through advisory opinions in this area, the Commission has done much to preserve fair competition between the large chains and small independents, many of whom would not be able to stay in business, except for Commission action.

The Commission issued three opinions dealing with cooperatives, one under Sec. 6 of the Clayton Act and two involving the Capper-Volstead Act.

Fifteen requests for merger and acquisition clearances were processed under Section 7 of the Clayton Act. Of these 15 requests, only 5 clearances were granted by the Commission, 2 involving agricultural cooperatives, 2 involving small independent dairies having a difficult time financially and one merger of two small grocery chains in the interest of increasing competition in an area dominated by large chains. Clearance was denied in the 10 remaining matters and the economy was protected from further economic concentration in the areas involved.

The Commission issued 64 opinions concerning deceptive practices under Section 5 of the FTC Act. Five Food, Drug and Cosmetic opinions, four under Section 12 of the FTC Act and one under Section 15 were also issued. Twenty-five opinions were issued outlining the marking requirements of imported products, thereby informing consumers of a material fact bearing on their selection.

Two of the most difficult problems have been in the field of computerized credit services and the franchising field. Both of these areas have deep bearing on the future of the economy and the technological operation of businessmen in a modern world and the protection of small business men and consumers from the trade restraints and easy deceptions latent in franchising operations.

Program for fiscal 1971

The workload of this Division is dependent upon the number of requests received and it is reasonable to assume that this number will continue to exceed two hundred requests for the program year, as it has for the past several years. However, in view of the continuing publicity given to the program through the publication Advisory Opinion Digests which, for the first time in FY 1969, were indexed and published in volume form, the number of requests may increase as more businessmen become aware of the availability of the Advisory Opinion procedure.

A portion of the Commission's available manpower will continue to be devoted to the preparation and indexing of the advisory opinion digests, so as to prepare these valuable tools for further publication in additional volumes.

No increase is requested for this Division in 1971.

DIVISION OF TRADE REGULATION RULES

This Division deals with the newest of the Commission's industry guidance procedures, the Trade Regulation Rule, which was designed to eliminate and prevent unlawful practices on a broad, industry-wide basis without the expense of costly litigation. Such Rules express the judgment of the Commission concerning the substantive requirements of the statutes it administers and, as such, it is expected that they will be observed by all persons to whom they apply. If litigation is necessary as to a recalcitrant industry member, the Commission may rely upon a Trade Regulation Rule to resolve any relevant issue therein, provided that the respondent shall have been given a fair hearing on the applicability of the Rule to the particular case.

Accomplishments—Fiscal 1969

During the fiscal year the Division was actively engaged in, or giving study to, six separate rulemaking proceedings, which culminated, by the close of the year, in the issuance of two new Trade Regulation Rules.

The Commission promulgated a Rule covering *Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses*. This proceeding had as its purpose the protection of consumers from hazards resulting from use of a common household product. The proceeding was undertaken following receipt of evidence that inhalation of the concentrated vapors from these spray products is extremely dangerous and may cause death due to asphyxiation or freezing of the larynx. The Rule requires that the product be labeled with a clear and conspicuous warning.

Another Rule promulgated by the Commission deals with the *Deceptive Advertising and Labeling as to Length of Extension Ladders*. This Rule requires disclosure in advertising and labeling of the maximum length of ladders when fully extended for use, since substantial footage is lost due to necessary overlapping of two sections when full extended.

In connection with proceedings to which considerable activity was devoted during the year, but which were not finalized, a Notice of Public Hearing was published in a proceeding directed toward *Automobile Price Advertising*. In this matter, during FY 1970, consideration will be given to various pricing practices employed in the sale of automobiles, including the validity under law of the manufacturer's suggested list price affixed to automobiles pursuant to the Automobile Information Disclosure Act of 1958.

In response to a rising consumer demand for action, a proceeding was initiated related to the *Mailing of Unsolicited Credit Cards*. The proposed Rule, which was released for public comment, would prohibit the mailing of credit cards by those subject to Commission jurisdiction to any party without first receiving an express written request or consent therefor.

Staff consideration of the proposed Rule for *Non-prescription Systemic Analgesic Drugs* continued, pending outcome of an appeal in the Court of Appeals for the District of Columbia on the ruling of a lower court, dismissing a complaint filed by an industry member seeking to enjoin the proceeding. The staff will be in a position, as the result of its effort during FY 1970, to make final recommendations to the Commission following a favorable opinion by the Court.

A public hearing was held during the year on a proposed Rule relating to the advertising of *Economic Poisons*. Approximately 4,500 producers make up this industry and the advertising claims with respect to their products may represent a serious public health problem. At the close of the year, the staff was in the process of preparing recommendations for the Commission's consideration.

Of major interest was the public hearing involving *Games of Chance*, which has culminated in the issuance of a Rule in fiscal year 1970. The public hearing was primarily concerned with the need for regulating the future conduct of these games in the gasoline and food retailing fields.

Work programs—Fiscal 1971

Special Care Project—A survey and study will be initiated to locate and identify products which, because of their nature, may require special care and handling. The study will have as one of its objectives the determination of whether the Commission not only can, but should, attempt to make further entry into this area beyond the proceeding in the textile industry, which is presently pending in the Division. Should it be determined that further Commission action is warranted in this area, one or more industry guidance proceedings will be initiated. However, until such time as the initial study phase of the program is completed, it cannot be determined whether Commission action may be directed toward entire product lines or restricted to a product-by-product undertaking.

Automobile Lubricants & Crankcase Additives—This proceeding involves possible false and deceptive advertising as to the efficacy of various chemical preparations which are added to lubricating oil in the crankcase of automobiles. While some of the industry products are said to be harmless, although ineffectual to accomplish the purpose for which they are advertised, others may in fact be harmful to automobile engines. This industry is composed of approximately 121 producers having annual sales at the manufacturing level of \$150 million.

Electrical Home Appliances—The problem presented in this large industry is one of across the board compliance with Sections 2 (d) and (e) of the Amended Clayton Act. Study will be given to the promulgation of a Rule which creates a presumption that the granting or receiving of advertising or promotional allowances would be presumed *not* to have been made available on proportionally equal terms unless made available in accord with all the terms of a written plan to all competing customers.

Dry Bakery Products & Vend Pak—Problems of price and promotional allowance discriminations arising under Sections 2 (a) and (d) of the amended Clayton Act continue in this industry. The Commission has conducted many investigations in this highly competitive industry which have illuminated the problems that exist. A staff study will be initiated to determine whether the Trade Regulation Rule procedure can be brought to bear on the problems with any degree of effectiveness.

Newspaper Advertising Rates—Preliminary information indicates that newspapers may be engaging in discrimination between national and local advertisers through a disparity of advertising rates charged by such newspapers to the two different classes of advertisers.

Work will be commenced looking toward a Trade Regulation Rule Proceeding, in the event that the practice is determined to be industry-wide in nature, to correct discriminatory rate structures and advertising rate charges in this industry. This project is significant due to the size of total advertising budgets for national and local advertisers, which has important economic significance within the advertising industry.

Special Project—Compliance Activity—During FY 1970, the Commission will issue two important Rules involving *Games of Chance* used as promotional devices in service stations and grocery stores, and *Sweepstakes*, generally conducted by mail. It is anticipated that in 1971 a major effort will be required to obtain compliance with the Rules, thereby insuring their effectiveness. In addition, issuance of one or more Rules affecting *Automotive Pricing*, in 1970, will necessitate a substantial program of planned compliance activity in 1971.

Compliance activity will also be required on previously issued Rules since, in many instances, a period of between six to twelve months may intervene between adoption of a Rule and its effective date. After the initial round of compliance activity, some follow-up work, usually in the form of a limited advertising monitoring program and periodic spot checks with industry members is needed.

PROGRAMS FOR FISCAL YEARS 1970-72

Projects	Type of action	Estimated man-years		
		1970	1971	1972
Games of chance	Rulemaking and compliance	1.0	1.0	0.5
Paperback reprint agreements	do.	.5		
Unsolicited credit cards	do.	.5	.5	
Gloves and leather products	do.	.5	.5	.5
Automobile pricing	Investigation, Rulemaking and compliance	2.0	1.0	.5
Light bulbs	Rulemaking and compliance	1.0	.5	
Analgesics	do.	1.0	.5	
Economic poisons	do.	1.0	.5	.5
Home entertainment equipment (wattage)	do.	.5	.5	
Dry bakery products and Vend Pak	do.	1.0	1.0	
Automobile lubricants and crankcase additives	do.		.5	.5
Electrical home appliances	do.		1.0	.5
Sweepstakes	do.	1.0	1.0	.5
Newspaper advertising rates	do.		1.0	.5
Special care project	Study and possible I.G. proceedings		.5	
Day-to-day compliance activity, special projects and assignments, interpretive work under rules		2.0	3.0	
Total man-years		11.0	13.0	
Total man-years presently authorized		11.0		

In order that the projected programs for fiscal year 1971 may be effectively carried out, an increase of \$30,000 is requested for two additional staff attorneys (one GS-11 and one GS-12), and one GS-4 Clerk-Typist.

BUREAU OF ECONOMICS

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director	38	\$325,000	50	\$385,000	12	\$60,000
Division of Economic Evidence	27	349,000	47	598,000	20	249,000
Division of Industry Analysis	29	344,500	39	475,500	10	131,000
Division of Financial Statistics	37	349,500	57	529,500	20	180,000
Total, personal services	131	1,368,000	193	1,988,000	62	610,000
Travel		9,000		14,000		5,000
Other expenses		15,000		15,000		
Total	131	1,392,000	193	2,017,000	62	625,000

The principal responsibilities or objectives of the Bureau of Economics are (1) to review, study, analyze and make reports on economic developments affecting the structure, conduct and performance of the economy with the view to pinpointing actual or potential problems which may adversely affect competition, and to suggest appropriate corrective actions for such problems; and (2) to assist in the implementation of the Commission's law enforcement programs relating to antimonopoly and deceptive practices. In carrying out these responsibilities the Bureau's principal output is information and analyses which give direct support to the development and implementation of Commission actions associated with its efforts to maintain competition and protect the consumer.

OFFICE OF THE DIRECTOR

The primary function of the Office of the Director is to exercise general supervision over the operations of the Bureau.

The Statistical Services Section and the Stenographic Services Section, which provide statistical and stenographic services for the entire Bureau, are also in the Director's Office. In addition, five consultants working on the Automobile Insurance Report are attached to the Director's Office for administrative reasons only.

Due to the increase in the number of mergers, greater demands for more and various tabulations of merger statistics, and the increase in professional staff requested for fiscal year 1971, an increase of \$60,000 is requested to provide 12 additional employees for the Stenographic and Statistical Services Sections.

DIVISION OF INDUSTRY ANALYSIS

Personnel requirements with respect to the Division of Industry Analysis arise in the context of a research program designed to provide information and analysis associated with problems of policy planning and evaluation. These programs are designed first and foremost to assist the Commission in the implementation and development of competition and consumer protection programs. They are designed also to provide Congress and other interested government agencies with information suitable for consideration of legislative and administrative reforms with respect to government policy toward business.

Accomplishments, fiscal 1969:

Maintaining competition

Study of Conglomerate Mergers—The bulk of the division's staff was utilized to prepare the study of conglomerate mergers, almost all of which was completed in fiscal 1969. This study is an extensive review of merger trends, changes in concentration, and the sources and consequences of conglomerate mergers. It also includes a discussion of reciprocity. The policy conclusions recommend several legislative changes in the antitrust laws and several administrative changes in merger enforcement. Because this project is unusually broad in scope and because it was done in about 1 year, it required the attention of more than half the economists in the Division of Industry Analysis. Work on several other projects was reduced or postponed in order to complete this important study rapidly. This project constitutes an overall review and evaluation of merger activity. Several more detailed follow-up studies will be made in fiscal 1970, as described in the next section.

Trends in Merger Activity—The Commission's annual review of merger activity was prepared and published, continuing our series that has come to be regarded as the principal source for data concerning trends in merger activity. Two series of data are regularly presented in this report. One measures total merger activity. The other surveys large acquisitions (those with assets of \$10 million or more) involving mining and manufacturing firms. Both of these series reached new heights in fiscal 1969. This year each series was published separately, under the titles *Current Trends in Merger Activity, 1968*, and *Large Mergers in Manufacturing and Mining, 1948-1968*.

This statistical program is the key indicator in our merger enforcement program as well as a prime indicator of changing characteristics in the current merger movement which may require special economic analysis. The trend of recent years toward more conglomerate mergers was accelerated during fiscal 1969.

Consumer protection

Food Chain Selling Practices—The final draft of the *Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco* was completed and published. Additional store surveys were made during fiscal 1969 in connection with this revision. This study found that the distribution system performed less satisfactorily in low-income areas of the inner-city than in suburban areas.

Many food stores serving low-income, inner-city areas are small, less efficient, and have higher prices. Consumers in these areas are frequently sold lower quality merchandise and are provided fewer services than in other areas. Moreover, the retail facilities of low-income areas are often old and in a shabby state of upkeep. However, this report found no evidence that leading chain store operators in the District of Columbia and San Francisco have discriminatory policies designed to exploit low-income customers. Each of the largest food chain operators had an official policy of price and quality uniformity. To a significant degree, systematic departures from store-to-store price uniformity were discovered. However, for the most part, these involved responses to special competitive situations and could not be interpreted as reflecting an effort to discriminate against low-income customers, although that was generally the effect.

Analysis of Automobile Insurance—Work on this project was second only to the conglomerate study in terms of the number of economists involved. This study was undertaken at the request of the Department of Transportation, and is designed to develop and analyze information necessary for an evaluation of the automobile insurance industry. Our work will constitute a portion of the overall report which the Department of Transportation will submit to Congress. Our specific topics are the structure of the automobile insurance industry, and the high-risk market for automobile insurance. The former includes analysis of merger activity by the largest auto insurance companies, and an examination of trends in concentration. The high-risk project probes the effectiveness of high-risk plans, including an assessment of proposed plans designed to overcome deficiencies in existing high-risk programs.

Trading Stamps—Because of widespread public interest, the chapter on trading stamps in the *Economic Report on the Structure and Competitive Behavior of Food Retailing* was issued as a separate report. This was done to allow more widespread distribution of this chapter and to enable us to fulfill requests more readily for this portion of the study of food retailing. Some revisions in format were made so that the report could be issued independently of the rest of the study of food retailing.

Programs and staff requirements, fiscal 1971

The present staff of the Division of Industry Analysis is too small to perform its mission as the Commission's research and planning arm in the field of competition policy. A staff of 50 professional economists is needed to exploit fully the research and planning opportunities presently available.

A staff of this size would assure the maintenance of a continuing planned research program. As has been noted many times in the past, the need to perform special ad hoc projects with a comparatively small staff has meant that most planned research projects have either been delayed or cancelled.

Beyond the ability to maintain a persistent planned research program a larger staff would enable us to engage in a broader array of special projects relating to more rational policy planning toward competition both within the Commission and by other government agencies. Currently, most such projects in a given year are at the direction of the Commission or are initiated within the Bureau. Because of staffing limitations we have thus far been unable to give advice and assistance to other bureaus on a continuing basis. A recent example of our inability to provide assistance involves the Division of Special Projects (Bureau of Deceptive Practices) which asked for aid in evaluating and summarizing the recent consumer protection hearings. Additional staff is an absolute necessity to develop a program of continuing cooperation in assisting other bureaus and the Office of Program Review in planning and evaluating enforcement priorities. With present staffing levels we will continue to get involved in most such questions only after the fact if at all.

Still another area of demand for special assistance that we have had to generally ignore involves servicing requests for aid by other government agencies. Because the Bureau of Economics in this Commission is generally recognized

as a central sources of economic expertise on problems of industrial organization by economists in other government agencies, it receives many inquiries for assistance. In recent months the Small Business Administration, the Federal Communications Commission and the Interstate Commerce Commission have asked for aid in the development of special studies. Though we provided them very limited assistance we do not have the resources to give continuing support or direction to their efforts despite the fact that the problems involved are significant for antitrust policy and the competitive functioning of the economy. The SBA, for example, wanted assistance in examining the competitive consequences for the food industry of recent changes in meat inspection laws. The ICC requested aid in studying and evaluating the competitive consequences of the merger movement in the trucking industry. Many have argued that transportation is an area in which reliance on competition as a market regulator could be greatly expanded. Whether this will continue to be true as mergers restructure the transportation sector is doubtful.

From this it can be seen that recent work done for the Department of Justice in the preparation of their cases on the Northwest Industries—B. F. Goodrich merger and the work currently under way for the Department of Transportation involving automobile insurance represent only a small sample of the planning, coordinating and integrating role that could be played by an adequately staffed Bureau of Economics at the FTC.

Although some funds have in the past been obtained from other agencies for special studies and analyses on a contract basis, such funding does not provide a basis for a continuing program.

Adequate performance in each area of responsibility, long-term plan research, special projects for the Commission, planning and evaluating assistance for other bureaus and assistance to other government agencies can contribute significantly to the Commission's basic mission of maintaining competition and consumer protection. With present staff limitations, full exercise of responsibility has thus far not been possible.

Given adequate manpower as herein requested the project allocation for fiscal 1971 is summarized in the attached table and discussed below.

I. Maintaining competition

A. Effect of Conglomerate Mergers—This project is a follow-up of our research program studying trends and patterns of conglomerate merger activity. A major part of the Division's resources in fiscal 1970 is being devoted to carefully delineating the structural consequences of the current merger movement and various key financial and performance characteristics of merging firms, including an in-depth review of nine large acquirers. In fiscal 1971 a follow-up review will involve focusing on certain key industries whose overall level of concentration (at the S.I.C. 2-digit level) has increased as a result of mergers to determine what changes in performance characteristics might be associated with these structural modifications.

B. Studies of Major Concentrated Industries—Though a strong and well developed merger policy may be effective in preventing the emergence of inadequately competitive industries, it has relatively little impact on industries that are already highly concentrated. Such industries may represent instances of significant departures from competition but currently are only sporadically the object of active antitrust enforcement programs. It is therefore useful to determine in what way the balance of antitrust enforcement might be shifted to impinge more directly on persistent competitive trouble spots in the economy. A long-term research program is planned that would focus on a series of highly concentrated industries, long recognized to be ones in which competition is weak. The first industry to be examined in this program is the steel industry. Initial research would be undertaken in fiscal 1970 as soon as personnel can be shifted from the conglomerate study. The full program, however, cannot be implemented until fiscal 1971, at which time we plan to allocate four professional economists on a continuing basis.

C. Industrial Behavior and Market Structure—Recent research in the Bureau of Economics has indicated that there are divergent trends in concentration in the manufacturing sector of the economy. Most notable, consumer oriented industries have on the average experienced increased concentration while producer industries have experienced decreases. To better define our understanding of the relationship between industry structure and performance it is necessary to examine these two groups more carefully. A determination of what key variables operate to modify

industry structure and what their consequences for performance are, we can better plan the priority and method of implementation of antitrust policy designed to maintain competition.

D. Advertising and Promotion Practices—Preliminary studies mentioned in "C" above indicate that product differentiation is an important variable in effecting long-term changes in market structure. Similar conclusions are indicated on the basis of our experience in relation to litigated cases. It is appropriate therefore to analyze more carefully factors contributing to effective product differentiation. Of particular concern are current advertising and promotional practices employing television and other mass media to promote the products of the multiproduct diversified firm.

II. Consumer protection

A. Affirmative Disclosure—The Commission recently directed the Bureau of Economics, in cooperation with other bureaus, to implement a program of affirmative disclosure with respect to petroleum products. This is the first part of a program designed to encourage advertising and product promotion efforts which provide consumers with usable information on the quality and performance characteristics of products they purchase. This is a continuing program that will supplement our efforts to prevent deceptive advertising.

B. Truth-in-Lending—Still another aspect of affirmative disclosure is the requirement that borrowers be fully informed with respect to costs of borrowing. We anticipate a continuing role in assisting in the planning and implementation of our truth-in-lending program and stand ready to provide assistance in determining priorities.

A question has been raised regarding the adequacy of the rationale for studying truth-in-lending. It is our estimate that by 1971 the Commission's experience in enforcement in this area will be such that (1) adequate information will be available to evaluate program effectiveness, and (2) that ample statistical information (developed as a by-product of enforcement) will be available to prepare a special study of the consumer credit industry.

C. Home Improvement—In the past several years we have been involved in a variety of ad hoc studies focusing on trouble spots from the standpoint of consumer protection. Which trouble spots should receive attention is always a difficult question. New problems continually emerge, and the Commission's knowledge of these problems develops accordingly. One area of current concern is the home improvements industry. Home owners appear to suffer from flagrant deceptive selling practices, exorbitant loan fees, etc. This is an industry of considerable size and a recent Presidential report on consumer affairs indicated that social welfare losses due to unfair competitive practices were very large. We propose, therefore, to undertake to analyze this industry and to attempt to determine what steps could be taken to improve performance.

The Commission has questioned the timeliness of a home improvement study initially planned for fiscal 1971. We certainly agree it would be desirable to begin this study sooner. However, this cannot be undertaken with the present staff. In fiscal 1971 an increase of five economists is requested to undertake this study. The home improvement industry is so dispersed and questionable practices are so varied that any study will be complex and costly.

D. An Analysis of Problems in the Medical and Drug Industry—From the standpoint of inflationary pressures medical costs have presented a persistent problem. Prices have risen without interruption and the share of GNP going to health care has increased. These trends will continue in the future. Ways in which performance can be improved in this sector of economy are of great concern to the Government and to the public. Though the potential role of anti-trust may be quite limited, the public interest in this area is so great we believe a study is warranted, particularly in light of our experience with respect to patent practices in tetracycline and our current cooperative program with FDA. A full scale study in this area will require a staff of 5 to 10 economists.

III. Special and Statistical Reports

A. Trends in Mergers—For some years the FTC has been looked to as the principal reliable source for data on merger activity. These data were originally developed to determine our merger enforcement priorities. Commencing in 1962 the Bureau began developing a comprehensive merger series of "large" mergers,

those wherein the acquired corporation had assets of \$10 million or more. These data have become widely used by researchers and serve as the basis for special statistical reports published annually. It is planned to further expand our regular publication program to include analysis of recent developments in industrial organization, highlighting what appears to be important changes in industrial concentration, business practices, and the like. The purpose of this would be to stimulate and assist research in industrial organization by academic economists and to alert other government agencies to possible problems or opportunities their policy actions may have for competition. This modification in our publication format would require one additional economist.

B. Program Planning and Special Projects—Experience indicates that this area of the Division's operation regularly absorbs the largest portion of available manpower. Specific activities include: Special ad hoc projects at the direction of the Commission and at the request of other bureaus of the Commission involving the development and planning of enforcement programs; advisory assistance to the Chairman and individual Commissioners on special matters; analysis of economic implications of proposed legislation; preparation of testimony evaluating legislative proposals and evaluating information for such proposals.

As noted earlier, our special project involvement currently consists for the most part of a series of ad hoc assignments at the direction of the Commission. Examples of such assignments for fiscal year 1970 already include an analysis of anticompetitive practices in the department store industry, and an examination of structural and competitive changes in the apparel industry to determine the necessity and feasibility of issuing merger guidelines.

Based on past experience a wide variety of other activities will be undertaken. A brief sampling of projects for fiscal 1969 follows. Aside from the vastly expanded program of research on conglomerate mergers, examples of special projects last year include work on such topics as: pre-merger notification; automobile price increases; Gortons of Gloucester; discrimination in shopping center rental rates; textile mill products; cooperative tire advertising; affirmative disclosure; and testimony before the House Ways and Means Committee on mergers and taxation and before the House Banking Committee on one-bank holding companies. Most recently the Bureau assumed major responsibility for an investigation of pricing and availability practices of Washington supermarkets. Except for the study on conglomerate mergers none of the projects was included as planned programs for 1969.

This is not to imply lack of importance. On the contrary, some of the most important work done recently (for example, the Retail Credit Study) started out as special projects. Their recitation is designed rather to emphasize as forcefully as possible the fact that a major part of the Division's staff is regularly involved in special projects. We cannot anticipate the specifics of such assignments, but we do know that in any given year they absorb a major part of available manpower. We know further that the variety of special projects presently undertaken, particularly insofar as they involve forward planning assistance to other bureaus, the Program Review Office and other government agencies is greatly circumscribed by present staffing limitations.

An example of forward planning for fiscal 1970 and 1971 is the projected auto pricing study. At the present time we have no personnel assigned to this project. On its face it appears to be a project of considerable importance both from the public's and Commission's standpoint. It should be noted that the Commission has under way investigations of the auto parts industry, and automobile warranty practices, and it has approved a special study of the automobile industry in its concentrated industry program. This study will be designed to assist the Commission in integrating these various programs in order to maximize its enforcement impact.

PROJECTED MANPOWER REQUIREMENTS FOR DIVISION OF INDUSTRY ANALYSIS—FISCAL
YEAR 1971

I. Maintaining competition:

A. Effect of conglomerate mergers.....	3
B. Studies of major concentrated industries.....	4
C. Industrial behavior and market structure.....	2
D. Advertising and promotion practices.....	2

II. Consumer protection:

A. Affirmative disclosure.....	2
B. Truth-in-lending	1
C. Home improvements.....	5
D. An analysis of problems in the medical and drug industry.....	1

III. Special and statistical Reports:

A. Trends in mergers.....	4
B. Program planning and special projects.....	13
Total	37

DIVISION OF ECONOMIC EVIDENCE

This Division's primary function is to make economic analyses which will aid the Commission in enforcing the laws which it administers and to assist the legal bureaus in the implementation of enforcement programs designed to deal with designated problem areas, all of which are concerned with the principal goals of maintaining competition and protecting the consumer.

Accomplishments, fiscal 1969

Maintaining Competition.—Although practically all of this Division's work involves some aspect of maintaining competition, only those projects in which this aspect predominated are reviewed. In addition, the Division makes studies and reports where the complexity or obscurity of problems presented warrant extended research. Thus, the Division's work separates into analytical studies and case work. The Division's major projects in each of these categories are given below.

Economic Report on the Use of Games of Chance in Food and Gasoline Retailing.—An extensive study of the use of games of chance in retailing was finished by this Division and printed as a staff report in December 1968. Among other things, the study concluded that games were used by large grocery chains to increase or preserve their market positions. In the short run, games may raise a given chain's market share but as the use of games becomes widespread, market positions tend to revert to their pre-game status. Game costs either lower the user's profit or are paid by the consumer through higher grocery prices. As a result of this study, the Commission inaugurated a rule-making procedure covering the use of games of chance in retailing.

Enforcement Policy With Respect to Mergers in the Textile Mill Products Industry.—Studies by this Division formed the basis upon which these merger guidelines were predicated. Those studies showed that the structure of the textile mill products industry was changing due to numerous acquisitions particularly by the largest firms; to substantial increase in concentration in the industry and in specific product lines and to a trend to integration among the leading textile companies. These changes have raised entry barriers into an industry traditionally regarded as having a competitive structure. In order to arrest these marked trends away from a competitive structure, the Commission issued its guidelines respecting mergers in the textile mill products industry.

Other Staff Studies.—A staff report titled *An Economic Analysis of Structural Changes in the Fertilizer Industry and Their Competitive Consequences* was completed in fiscal 1969. A survey of the automotive parts industry was also completed and summarized. This survey was undertaken because of the large number of possible Section 7 violations in the auto parts business that are under investigation or have been the subject of formal complaints. A preliminary study of household consumer products is under way, but due to lack of staff it has not been given adequate attention. Many of the Division's staff have also worked on the Bureau's study of conglomerate mergers. That study will attempt to determine inter alia, the impact of such mergers upon competition and whether conglomerate firms tend to create industries that are not competitively structured.

Case Work.—This is the area where attempts are made to maintain competition in specific markets and among specific firms. Failure here is quite likely to be final. The Division was active on all fronts in this area in fiscal 1969.

The Division maintains a day-by-day surveillance of merger activity as publicly reported. Outstanding or significant mergers and acquisitions are quickly brought to the attention of the Division Chief and others who can initiate an

investigation. At the start of an investigation, the Division helps to prepare and/or reviews each letter of inquiry (about 61 in fiscal 1969) in Section 7 investigations and has participated in the collection of information in Section 5 investigations. Analyses of the data gathered during investigation were prepared by the Division for about 58 matters. The Division also participated actively in most of the Section 7 cases that were at the trial stage. Compliance work for previously issued orders as usual required substantial amounts of time. Such work always has a high priority, however, because it is at the compliance stage where restoration of competition, temporarily lost through merger, occurs.

Consumer Protection—The Commission's program for consumer protection was supported by the work of this Division in a number of ways in fiscal 1969. Hearings held as a result of the Division's report on games of chance resulted in the issuance of trade regulation rules respecting the use of such games. The Division is cooperating with the Division of General Trade Restraints in an investigation to determine if lower prices to the user for hearing aids and accessories can be achieved. The Division is working closely with other FTC staff groups to ascertain the effects of the use of extensive advertising programs by synthetic fiber firms. Such programs may have as one of their effects the artificial enhancement of fiber prices and so make apparel using those fibers more expensive to the consumer. The Division has under way a study of the marketing of household consumer products. This study may disclose the relative importance of non-price competition in the sale of such products and the cost to the consumer of such methods of competition.

Programs for fiscal 1970 and 1971:

Maintaining Competition: The more important activities planned by this Division for the future are listed below.

(1) *Pre-Merger Notification*—This project was begun in May 1969 in close cooperation with the Division of Mergers. The project will obtain data about the largest mergers and acquisitions directly from the parties concerned. Already about a half dozen investigations have been opened as a result of information received.

(2) *Study of Conglomerate Mergers*—It is expected that substantial time will be allocated by this Division to an in-depth study of the larger conglomerates and the effect of their acquisitions on industry structure.

(3) *Household Consumer Products*—Although severely hampered by the resignation of the senior economist supervising this study, it is anticipated that this study will be pursued. The study should yield valuable insights into the nature and causes of changes in industry structure in this field.

(4) *Study of Company Take-Over Attempts*—Begun as an adjunct to the study of conglomerate mergers, this investigation can result in valuable insights into the manner in which many mergers are planned and executed. Take-over attempts can weaken competitive aggressiveness because expensive management talent must spend time fighting off the corporate raider rather than attending to the firms' business.

Consumer protection

(1) *Automobile Pricing*—The Division is working closely with the Bureau of Industry Guidance in a study of prices charged customers by automobile dealers. The Commission has scheduled a hearing on a trade regulation rule respecting automobile pricing.

(2) *Department Store Industry*—The Division is likely to be asked to assist in, if not plan and conduct, a study of this industry in fiscal 1971.

Requested increase, fiscal 1971:

In order to evaluate the personnel needs of the Division of Economic Evidence in fiscal 1971, it is important to recognize the central role this Division should play in the Commission's enforcement program. This role must be meshed with the changing broad problems affecting our competitive economy with the view to establishing important priorities. A case in point is the allocation of resources as between two major problem areas, namely the escalating conglomerate merger movement, on the one hand, and the study of concentrated industries on the other. The staff is devoting a major portion of its resources to the first problem, while making plans for moving into the concentrated industry studies. A basic premise for future planning may be that some solution may be brought to bear

upon the wave of conglomerate mergers which would enable us to allocate a greater amount of resources to concentrated industry questions. This would not mean, of course, that merger problems would not continue. Rather it would mean that we should move to implement economic assistance to divisions other than the Division of Mergers, most notably General Trade Restraints and Discriminatory Practices as efforts are made to solve the problems posed by the concentrated industries.

In short, in planning manpower requirements it is essential that the operations of the Division of Economic Evidence be keyed in to broad developments involving potential enforcement questions so that the available manpower may be best deployed.

It is with this objective in view that we are submitting an estimate of manpower requirements for fiscal 1971, based upon the following data:

Office or bureau	Increase in legal personnel	Requested increase in professional staff of Division of Economic Evidence
Office of General Counsel.....	6	1
Restraint of trade:		
Division of Mergers.....	26	13
Division of Compliance.....	6	1
Bureau of Deceptive Practices.....	75	5
Bureau of Industry Guidance.....	4	
Total proposed increase.....	117	20

This allocation would permit flexibility in that where certain projects required more than one economist they could be drawn from the general pool of economists assigned to the Division's various projects. To illustrate the allocation of economists to projects in the various divisions, if 1 economist were to be assigned, say, to a project in the Division of General Trade Restraints, this would mean that while in reality perhaps 3 economists might be needed for the study of reciprocity, 2 of those could be considered as back-up economists for problems developing in an area which might not require full time economic help, for instance, hearing aids and razor blades. Similarly, projects in the Division of Discriminatory Practices involve many structural and behavioral aspects and require study in order to formulate the most effective program against discriminatory practices. For example, in the past Division of Economic Evidence has been called upon to assist in the evaluation of apparel and department store cases. An analysis of a proposed pilot study of the department store industry is a pending project in the Bureau and the Division is likely to become involved as well as the Division of Industry Analysis. In industries such as automotive replacement parts, drugs, and major appliances, there is much industry expertise which the Division of Economic Evidence has developed and which could be readily tapped in developing an effective antidiscrimination program in those industries. These are only examples, but examples based on past experience.

It should be emphasized that approximately 75 percent of this Division's manpower in recent years has been devoted to economic work in connection with the activities of the Division of Mergers. It is clear that emerging problems will require the deployment of more economists in this area. Mergers have increased by leaps and bounds and it is in this area that the greatest need for additional resources is likely to be found, and upon which most of the increase over our current allocation of some 27 employees, of which currently 18 are professional economists, is based.

But the above allocation does not mean that no resources would be allocated to rendering economic assistance to the Division of General Trade Restraints and to the Division of Discriminatory Practices. It only means that on the basis of present forecasts the merger problem in fiscal 1971 will have a claim on a greater share of the Division's resources than other problems pressing for resolution. Should the merger movement slow down, more resources would undoubtedly be applied to the problems likely to be considered violation of Section 5 of the Federal Trade Commission Act and of the Robinson-Patman Act.

DIVISION OF FINANCIAL STATISTICS

One of the important missions of this Division is to make available to the Commission and to the public more and better statistical information about the structure of American industrial corporations. A significant step toward achieving this mission would be to centralize in the Division of Financial Statistics the reporting program now divided between FTC and SEC. This is the Division's request for fiscal 1971.

There are 87 multi-billion-dollar manufacturing corporations, according to the most recent FTC-SEC quarterly report. These 87 own nearly half of the total assets of all corporate manufacturers. Of the 569 firms which now own nearly three-fourths of all corporate manufacturing assets, 524 report to SEC and 45 to FTC. While FTC obtains each quarter information as to the ownership, sales, product mix, profitability, and the like of all large privately-owned manufacturing corporations, it does not have similar data for large publicly-owned firms.

Approximately 8,300 firms now report to FTC in the FTC-SEC quarterly financial reporting program. If the 2,541 firms which report to SEC were to report instead to FTC, economic information not heretofore available to FTC could be developed for use on a continuing basis. Such centralization, which would be extremely valuable to the Commission in improving investigational planning and deploying its resources, can be accomplished at a cost not exceeding 20 man years, composed of 10 professional and 10 clerical employees. Because of the need for this information and the very high rate of return of essential data at relatively low cost, this project should be given high priority, in the Commission's budget for fiscal 1971.

Bureau summary—Increases requested, 1971

Office of the director (12) : 1 GS-5 clerk-stenographer ; 7 GS-4 clerks ; 4 GS-2 clerk-typists-----	\$60,000
Division of economic evidence : 2 GS-15 economists ; 1 GS-14 economist ; 2 GS-13 economists ; 4 GS-12 economists ; 5 GS-11 economists ; 3 GS-9 economists ; 3 GS-7 economists-----	249,000
Division of industry analysis : 1 GS-15 economist ; 1 GS-14 economist ; 1 GS-13 economist ; 2 GS-12 economists ; 3 GS-11 economists ; 1 GS-9 economist ; 1 GS-7 economist-----	131,000
Division of financial statistics : 1 GS-13 accountant ; 2 GS-12 account- ants ; 3 GS-11 accountants ; 5 GS-9 accountants ; 2 GS-7 accountants ; 3 GS-6 clerks ; 4 GS-5 clerks-----	180,000
Total personnel compensation (62 new positions)-----	620,000
Travel -----	5,000
Total -----	625,000

OTHER EXPENSES

The sum of \$4,485,000 is required for costs other than salaries for fiscal year 1971. These costs are itemized in the following table :

Item of expense	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increases, fiscal year 1971
Personnel benefits-----	\$1,362,000	\$1,722,000	\$360,000
Travel and transportation of persons-----	515,000	745,000	230,000
Transportation of things-----	11,000	17,000	6,000
Rent, communications, and utilities-----	594,000	879,000	285,000
Printing and reproduction-----	103,000	171,000	68,000
Other services-----	244,000	369,000	125,000
Supplies and materials-----	251,000	321,000	70,000
Equipment-----	220,000	261,000	41,000
Total-----	3,300,000	4,485,000	1,185,000

PERSONNEL BENEFITS

The sum of \$1,722,000 is required for personnel benefits as shown in the following table. These benefits are statutory and the cost reflects the Commission's pro rata share for these items.

[Amount in dollars]

	Fiscal years—		
	Allotment 1970	Requested 1971	Increases 1971
CSC retirement fund.....	\$1,170,500	\$1,480,000	\$309,500
CSC employee life insurance.....	63,000	79,500	16,500
Employee health benefits.....	112,000	141,500	29,500
Employers' shares FICA taxes.....	8,500	11,000	2,500
Incentive awards.....	2,500	3,000	500
Public health services.....	5,000	6,500	1,500
Allowances for uniforms.....	500	500	-----
Totals.....	1,362,000	1,722,000	360,000

TRAVEL AND TRANSPORTATION OF PERSONS

The amount of \$745,000 is required for travel expenses in 1971 which is an increase of \$230,000 over the allocation for 1970. This amount will provide for the payment of transportation expenses, rental of automobiles, subsistence, incidental expenses and mileage costs for the use of privately owned automobiles for official travel.

This increase of \$230,000 is explained and justified in the Bureau requests as follows: \$150,000 for Field Operations; \$30,000 for Deceptive Practices; \$20,000 for Restraint of Trade; \$15,000 for Textiles and Furs; \$10,000 for General Counsel; and \$5,000 for Economics. This increase is required to provide travel for 265 new professional employees. It is estimated that 150 of these will travel an average of 35 days per year. Also, 1970 per diem increase will bring minimum cost of all travel to an average of \$45 per day.

TRANSPORTATION OF THINGS

Funds in the amount of \$17,000 are requested for this item in 1971, which is an increase of \$6,000 over the allocation for 1970 which will be needed to defray the costs of moving household goods and increased allowances for field employees who are transferred during the year in accordance with P.L. 89-516 and Bureau of the Budget Circular A-56.

RENTS, COMMUNICATIONS AND UTILITIES

Rents and utilities

It is estimated that \$365,000 will be needed for payment to General Services Administration for additional space necessary for the new employees requested, which is an increase of \$175,000 over the allocation for space in 1970. Additional space will be required in the field offices as well as in Washington.

A data bank was established in 1969 and it will be necessary to include in this bank pertinent corporate and financial information concerning business corporations. \$25,000 is requested to provide two disc storage units and to annualize the cost of tape drives installed in 1970. (See Division of Data Processing for detailed justification.)

An increase of \$45,000 is requested for rental costs for additional Xerox and print shop equipment and also for increased use of existing equipment.

	Fiscal years—		
	Allotment 1970	Requested 1971	Increases 1971
Additional space rental (GSA).....	\$190,000	\$365,000	\$175,000
ADP equipment rental.....	43,000	68,000	25,000
Xerox and print shop equipment rental.....	90,000	135,000	45,000
Total.....	323,000	568,000	245,000

Communication services

Funds in the amount of \$311,000 are requested for communication services which represent an increase of \$40,000 over the allocation of \$271,000 for fiscal year 1970. This represents the additional cost of telephone, telegraph, and postal services which will be required in fiscal year 1971 and includes installation of substantial additional equipment as well as service charges.

PRINTING AND REPRODUCTION

Funds in the amount of \$171,000 are requested for printing of the Commission's volumes of Decisions, statutes, court briefs, and miscellaneous administrative printing. This represents an increase over 1970 of \$68,000 of which \$38,000 is for printing an extra volume of Commission Decisions and \$30,000 for miscellaneous printing of pamphlets, Guides, etc. for Truth-in-Lending, Flammable Fabrics, and Packaging.

OTHER SERVICES

This account includes all miscellaneous items not otherwise classified. The increases necessary because of higher costs are as follows:

	Fiscal year—		
	Allotment, 1970	Requested, 1971	Increases, 1971
Building alterations	\$65, 000	\$115, 000	\$50, 000
Repairs to equipment	30, 000	45, 000	15, 000
Stenographic reporting services	38, 000	53, 000	15, 000
Exhibits and testing	71, 000	91, 000	20, 000
Employee training	25, 000	45, 000	20, 000
Miscellaneous expenses		5, 000	5, 000
Special services—Government agencies:			
BOASI—Corporate statistics	6, 000	6, 000	-----
Internal revenue—Corporate statistics	9, 000	9, 000	-----
Total	244, 000	369, 000	125, 000

SUPPLIES AND MATERIALS

Funds in the amount of \$321,000 are requested for supplies and materials representing an increase of \$70,000 over the allocation for 1970. This increase is necessary because of the increased cost of supplies and materials.

Included in this request is the cost of the annual library order for subscriptions and publications amounting to approximately \$57,000.

EQUIPMENT

Funds in the amount of \$261,000 are requested for new equipment in fiscal year 1971, which represents an increase of \$41,000 over the allocation for 1970 to provide the following items:

Cigarette laboratory equipment	\$45, 000
Desks, chairs, typewriters, and so forth for new clerical employees	60, 000
Furniture for new professional employees	40, 000
Additional multilith machines	6, 000
Replacement of worn out, obsolete equipment consisting of typewriters, other office machines, furniture, and print shop equipment	90, 000
Purchase of duplicating equipment now on rental	20, 000
Total	261, 000

The above equipment estimates for furniture for 414 new employees are extremely conservative and are dependent on securing a large amount of excess property from other government sources.

FEDERAL TRADE COMMISSION,
Washington, D.C., November 20, 1969.

HON. ROBERT P. MAYO,
Director, Bureau of the Budget,
Washington, D.C.

DEAR MR. MAYO: The Commission has carefully reviewed and evaluated the 1971 budget authority recommended by the Bureau of the Budget for the Federal Trade Commission. Your recommendation of \$22,750,000 does not provide sufficient increased resources to attain our most significant program objectives and effectively cope with increasing workloads in the critical areas reflected in our stringent 1971 budget proposal. Although the Commission recognizes the importance of the Administration's overall policy of fiscal restraint, it is unanimously requested that you restore, as discussed below, the resources disallowed by the Bureau of the Budget. Also, we request that you reconsider the decision to eliminate 126 positions and \$1,500,000 from FTC's mandatory program responsibilities under the Wool Products Labeling Act, the Textile Fiber Products Identification Act, and the Fur Products Labeling Act. We strongly feel that this decision was based upon a misunderstanding of the ABA Study, and our mandatory responsibilities to the Congress under these statutes.

Since, in many instances, the Commission has received only minimal resources in its appropriations during the past several years for mandatory statutory responsibilities, the Commission requests that the Bureau of the Budget restore 182 positions and \$2,100,000 as highlighted in the justification which follows:

Bureau or office	1971 authorization from Budget Bureau		Commission request for restoration	
	Positions	Amount	Positions	Amount
Office of Program Review.....	1	\$18,000		
Office of Administration.....	8	45,000	+8	+\$61,000
Office of Secretary.....	7	45,000	+10	+45,000
Office of General Counsel.....	5	78,000	+4	+35,000
Bureau of Restraint of Trade.....	19	200,000	+11	+110,000
Bureau of Deceptive Practices.....	50	649,000		
Bureau of Textiles and Furs.....	-126	-1,500,000	+126	+1,500,000
Bureau of Field Operations.....	100	1,000,000		
Bureau of Industry Guidance.....			+6	+57,000
Bureau of Economics.....	25	250,000	+17	+190,000
General operating expenses.....		565,000		+102,000
Totals.....	89	1,350,000	+182	+2,100,000

Office of administration

The Bureau of the Budget is requested to restore eight positions and \$61,000 to the Office of Administration. When initially considering this request within the Commission, five positions were eliminated since it was believed that only 16 positions would be necessary to satisfactorily accomplish program requirements.

Only two of these positions are requested for the Division of Personnel: one to service the additional 1971 positions now approved by the Bureau of the Budget, in line with the ratio of one to 125 people, and the other to conduct extensive recruitment campaigns for positions in disciplines not presently utilized by FTC.

The other 14 positions are requested without regard to our overall request for additional resources for the Commission. Instead, they are directly related to specific programs currently underway. For example, five additional programmers and systems analysts are requested for the Division of Data Processing to provide an in-house facility for augmenting our data bank with specific information necessary to effectively carry out our operating activities. A study has been made of Commission information requirements and this minimum force is truly needed if we are to carry on efficiently and utilize to the fullest extent the increased computer capacity obtained this year by doubling the memory and adding four-tape drives.

Two positions are requested for the Management Staff since this area has been significantly under-manned in past years and organizational and procedural studies must be undertaken.

The Division of Administrative Services needs six additional positions to augment the currently under-staffed messenger force; to cope with increasing

workloads in the Print Shop now requiring excessive overtime costs to meet the Commission's requirements; and for telephone service.

One position in the Office of the Director is requested to provide an additional Management Intern. It is essential that this type of talent be recruited and trained if the administrative operations of the Federal Trade Commission are to effectively support substantive programs.

Office of the secretary

The Office of the Secretary is inadequately staffed to carry out its important responsibilities in an effective manner. Considerable overtime costs have been incurred during the past several years because of severe resource limitations.

In the first quarter of 1970 alone, increasing workloads were noted. For example, within the Division of Legal and Public Records, the Correspondence Section processed approximately 4,000 complaints and inquiries and over 600 follow-up letters. Many merger/divestiture matters were placed on the public record, some of which evinced widespread interest from the public. Considerable public interest was expressed also in the trade restraints hearings on automobile price advertising practices, incandescent light bulbs, unsolicited credit cards, and the merger notification program. Also, the Public Reference Section received over 150 visitors interested in matters of public record, and handled numerous inquiries as a certain Commission procedures, particularly in the field of issuance of voluntary compliance and consent orders. The Distribution Section processed over 9,000 requests from the general public for publications, which ranged from FTC consumer education literature suitable as teaching aids to the Commission's statements on merger enforcement policies.

In 1971, increased workloads are expected for the Office of the Secretary as a result of approved increases in other activities of the Commission, additional requests from the general public and others on matters of public record, and increased liaison activities with the Congress and other Government agencies. We also anticipate a significant increase in visitors attributed to continued public interests in the activities of the Commission, as well as increased distribution of consumer pamphlets relating to consumer protection activities. Accordingly, it is requested that the 1971 request for 10 additional positions and \$45,000 be restored in full.

Office of the General Counsel

The Commission requests that the Bureau of the Budget restore four positions and \$35,000 to carry out important functions within this Office. The disallowance of any portion of resources originally requested will seriously impair the Office's ability to handle its increased workload, and will hinder support of the Commission's planned drive against consumer deception and fraud.

The Division of Litigation, in addition to its normal duties of defending Commission decisions in court actions for review, has responsibility for backing up the Commission's enforcement bureaus in two critical areas, among others. These are (1) by vigorous enforcement of subpoenas through action in U.S. District Courts (in conjunction with the Department of Justice) where persons or firms have refused to produce information demanded by the Commission, and (2) by prompt defense against declaratory and injunctive actions seeking to interfere with Commission law enforcement efforts. Both types of court actions have increased substantially in 1970, and will continue to increase in 1971 as persons and corporations under investigation or challenged by the Commission attempt to delay or thwart Commission action. The additional attorney positions are crucial to enable the Division of Litigation to render speedy and competent support for the Commission's planned law enforcement program in 1971.

The Division of Legal Services cannot perform the functions for which it was recently established by the Commission unless the Bureau of the Budget restores the resources originally requested. In order to perform its policy-making and administrative duties efficiently the Commission must be provided with adequate, competent and speedy legal services of many kinds. The Division of Legal Services consists essentially of a pool of selected attorneys capable of solving problems, conducting legal research, preparing opinions, writing memorandums, and of performing similar work, frequently on an urgent basis, directly to assist the Commission or individual Commissioners. The Division of Legal Services has already contributed to the efficiency of the Commission by relieving it of work previously not delegated. In fact, the bulk of the assignments handled by the Division of Legal Services have never before been handled by the Officer of General

Counsel. The Division was established to relieve the Commission, and individual Commissioners, of many legal functions which previously burdened the Commission, and preempted effort and time which could be spent more profitably by the Commission in performing such fundamental functions as policy-making and program planning.

Additional resources are also needed for the Division of Legislation—Federal State Cooperation. An attorney is needed to assist in the field of cooperation between the Commission and state and local governmental agencies to implement concerted programs to combat consumer deception at the local level. Restoration of resources will enhance the Commission's efforts to fight victimization of the public through coordination of state and local efforts with those of the Commission.

Bureau of Restraint of Trade

It is requested that the resources approved by the Bureau of the Budget for 1971 be increased by 11 positions and \$110,000, principally to fund expanding program requirements within the Office of the Director and the Division of Compliance.

In the Office of the Director it is absolutely imperative that additional funds be granted to provide the expertise necessary to assure the most efficient and effective combination of resources necessary to achieve our program objectives for halting restraints of trade and discriminatory practices. In addition, clerk-stenographer positions are needed to expeditiously process the increasing and critical workloads generated by the operating divisions.

In the Division of Compliance adequate resources do not exist to effect compliance with restraint of trade orders, particularly those halting illegal mergers and requiring divestitures. Because of resource limitations over the past several years the division continues to be behind in servicing many aspects of these orders. Also to be processed are an increasing number of merger clearances under final orders requiring respondents to seek prior FTC approval before making an acquisition in any product line covered. By 1971, even with the most conservative estimate of increasing workloads in these areas, at least 14 man-years will be required on a continuing basis to handle Section 7 final orders alone.

Similar workload increases at the Compliance level are projected in both the Section 5 and Robinson-Patman Act activities. Also, since the Division of General Trade Restraints anticipates increased caseloads in price fixing, oligopolistic practices, producer goods in concentrated industries, food products, fuel, retail food industry, and office equipment, expanded compliance action must be undertaken. Likewise, estimates of increased activity by the Division of Discriminatory Practices in food distribution, dairy products, fresh fruits and vegetables, publishing, automotive parts, drugs, and other commodities necessitate that additional resources be requested for expanding compliance activities.

Bureau of Textiles and Furs

The Wool Products Labeling Act was passed by the 76th Congress and signed by President Roosevelt, the Fur Products Labeling Act was passed by the 82nd Congress and signed by President Truman. The Flammable Fabrics Act was passed by the 83rd Congress and signed by President Eisenhower and was amended and revised by the 90th Congress and signed by President Johnson. The Textile Fiber Products Identification Act was passed by the 85th Congress and signed by President Eisenhower. Each of these Acts was passed by Congress, after long and deliberate hearings, to correct abuses in the industries that they cover and each of the Acts specifically sets forth in its preamble that it is intended to protect the American consumer, and they do so in fact protect them.

These labeling laws are needed more today than when they were originally enacted. The development of new man-made fibers, new finishes for textiles, and new processing of furs makes it more necessary than ever that the American consumer be protected from predators. In fact, if these labeling laws are not enforced, there will be utter chaos in the marketplace. For example, a consumer may want to buy a wool coat but could well buy a coat made out of synthetic fiber which has all of the appearance of wool but would lack the qualities of that fiber.

In 1969, with an average of 39 field investigators, the Bureau of Textiles and Furs made some 19,996 inspections, under the Wool, Fur, Textile, and Flammable Fabrics Acts, of fabric and garment manufacturers importers, and retailers. In

addition these same field investigators completed 167 formal investigations. Over 95% of the formal investigations of the Bureau of Textiles and Furs resulted from information obtained in the course of the inspection work. These two activities are complementary to each other. In 1969 the Commission issued a total of 221 cease and desist orders, of which 126 orders were under the four Acts administered by the Bureau of Textiles and Furs.

All of the 126 cease and desist orders issued by the Commission in 1969 under the Wool, Fur, Textile, and Flammable Fabrics Acts restrained the respondents from actions declared by Congress to be false and deceptive under the Wool, Fur, and Textile Acts or restrained the respondents from manufacturing or disseminating dangerously flammable fabrics intended for use in wearing apparel or articles of wearing apparel under the Flammable Fabrics Act.

In addition, through its inspection work, the Bureau has kept a constant check on previous orders of the Commission under these Acts. The staff of the Compliance Section of the Bureau of Textiles and Furs during this period of time consisted of a supervisory attorney and four other attorneys who policed the orders issued by the Commission during 1969 by obtaining compliance reports. In addition, compliance investigations were initiated as the result of the inspection program against several violators of Commission orders. A settlement of one of the Bureau's civil penalty suits resulted in an injunction with a penalty of \$15,100 for distributing dangerously flammable articles of wearing apparel.

The budget of the Bureau of Textiles and Furs for 1970 has been passed by both the House of Representatives and the Senate. This budget substantially increases the personnel for enforcement of the Flammable Fabrics Act, covering both imported and domestic products, and for additional enforcement of the labeling requirements of imported wool and textile products. The favorable action by the House and the Senate on the 1970 budget of the Bureau of Textiles and Furs indicates that the Congress is still vitally interested in enforcing the labeling statutes and the Flammable Fabrics Act. Additionally, the President on several occasions has publicly stated his wholehearted support for consumer protection. In the hearings before the Senate Commerce Committee on November 19, 1969, Chairman-Designate Weinberger, was specifically asked if he intended that the Wool, Textile, and Fur Acts, along with the Flammable Fabrics Act, be vigorously enforced. Mr. Weinberger's reply was in the affirmative.

It seems somewhat ironic that while the Congress and the President have endorsed the present consumer legislation on the books and have proposed additional legislation of this type, the Bureau of the Budget would nullify three of the fundamental consumer-protection acts by deleting the funds for their enforcement. By its action, the Bureau of the Budget has allowed less than \$400,000 and 50 positions for the enforcement of the Flammable Fabrics Act during 1971. When considering the safety and lives of our Nation's consumers, it is unconscionable to expect those meager resources to adequately provide inspection of manufacturers, wholesalers, retailers and importers of potentially dangerous fabric and wearing apparel in 50 States of the Union, and, in addition, to make the required tests, investigations, preparations for trial, and try cases arising out of violations of the Flammable Fabrics Act, and at the same time to police the Commission's orders in such cases.

Under the present operation of the Bureau of Textiles and Furs, all of the field investigators are assigned responsibility in their inspection work to be on the alert for questionable dangerously flammable fabrics and wearing apparel. Such cases arising under the Flammable Fabrics Act are given priority by both the field men and the trial attorneys when violations of the statute are discovered. Under the proposed budget for the Bureau in 1971, there will be less than half the investigators to watch for questionable items in their inspections, and only a fraction of the trial attorneys presently available to try any violations. Such a reduction occurs at the very same time that the Department of Commerce is vigorously preparing to promulgate standards which will vastly increase the number and type of products to be policed under this statute. Such a reduction of force of the Bureau of Textiles and Furs would appear to be a striking example of false economy.

It would appear that the Bureau of the Budget by its proposed action which in effect nullifies the enforcement of the Wool, Fur, and Textile Labeling Acts, is, in effect, depriving the American consumer of vital information that he needs. Typical of this is a recent article by Mrs. Margaret Danna, a syndicated columnist and well-known consumer consultant, who is perhaps as close to the pulse of the consumer as any person, which article said in part:

The laws that concern fabrics, garments, furs, and the truthful, accurate labeling of these things are administered by the Federal Trade Commission as required by Congress. I have steadily watched the serious and concerned way in which this agency looks after the consumer interest in this field of honest claims. Millions of women know very well how important to them and their families fabrics are. I suspect all these women will resent vigorously the recent report of the American Bar Association, which downgrades this FTC work as "trivial", and chides the FTC for bothering about all this textile labeling. Any intelligent woman knows fabric honesty is not "trivial."

The Commission urgently requests that you restore in full the 126 positions and \$1,500,000 disallowed for enforcement of its statutory responsibilities under the Wool Products Labeling Act, the Textile Fiber Products Identification Act, and the Fur Products Labeling Act.

Bureau of industry guidance

The Bureau of the Budget is requested to restore in full the 1971 request for six additional positions and \$57,000 for this Bureau, principally to finance expanding program requirements within the area of industry guides and trades regulation rules.

For the Division of Industry Guides to better protect the widespread interests of consumers, two positions and \$22,000 are urgently requested. Particular attention must be directed towards eradicating such new problems as the false advertising claims made for proprietary drugs, as well as the false and misleading guarantees and warranties of major home appliances which plague virtually the entire consumer community. In addition, new programs and companion compliance efforts are needed to maintain competition in various industries such as toys, broadloom carpet, and tobacco auction markets. Planning will continue to strike a balance between efforts expended to develop new guides and time spent in obtaining compliance with those which have been promulgated.

In the Division of Trade Regulation Rules increased emphasis must be placed on matters of consumer protection in special fields, as well as the elimination of trade restraints, in the latter field, emphasis will continue to be placed on the promulgation of rules to correct practices involving discriminatory pricing and advertising allowances under Sections 2(a) and 2(d) of the amended Clayton Act. With respect to consumer protection, particular emphasis is centered on programs affecting health and safety for consumers and the curtailing of offensive deceptive practices.

Once a Trade Regulation Rule is issued, the work of the Division does not end. Normally a period of six to twelve months intervenes the adoption and effective date of a Rule. This is the period of counseling and interpreting during which the staff assists affected parties. Thereafter a compliance program is undertaken. The procedure usually followed is to write to affected parties approximately sixty days before the effective date of the Rule reminding them of the Rule requirements and offering our assistance if needed. On the effective date, a second letter follows requesting these parties to show the manner of their compliance with the Rule. This is usually followed by such activity as continued monitoring of advertising and periodic spot checks with industry members.

Accordingly, it is urged that you restore in full the additional resources requested in 1971 for increased activities in the area of trade regulation rules.

In the Office of the Director, a clerk stenographer is necessary to serve the expanded legal staff of the Bureau.

Bureau of Economics

The Commission requests restoration of 17 positions and \$190,000 for the Bureau. These resources will not be used in the financial reporting program for manufacturing corporations. Rather, as set out in detail in our 1971 budget justification and budget hearings, additional professional economists and clerical employees are critically needed to provide the Commission with timely economic information and competent analyses for evaluating business problems affecting competition and the consumer. Their availability is the key to more efficient planning, as well as the most effective use of staff and money. Such research also provides Congress and other government agencies with information needed to assess government problems.

Our present staff of professional economists for such work is too small to carry on continuing planned research in view of frequent interruptions to perform special ad hoc projects. As a result, most planned research projects have either had to be delayed or cancelled. In addition, the staff has been too small to give

adequate assistance to other Bureaus and the Office of Program Review. Also, manpower has been lacking to perform most of the requests received from other government agencies.

Additional resources are requested for our Industry Analysis Division, to provide the capacity in fiscal 1971 to: (1) conduct a follow-up of our research program studying trends and patterns of conglomerate merger activity; (2) determine in what way more antitrust enforcement could alleviate trouble spots in highly concentrated industries, such as the steel industry; (3) find out why consumer oriented industries have experienced increased concentration while producer industries have experienced decreases; (4) make a careful analysis of factors contributing to effective product differentiation. And, in the field of consumer protection, staff strengthening would assure a continuation of economic information needed to support FTC's efforts to encourage advertising and product promotion which inform consumers about the quality and performance of products. It also would make possible a special study of the consumer credit industry, an analysis of the home improvement industry, and a study of the potential role of antitrust in relation to high prices in the medical and drug industries.

It must be emphasized that special ad hoc projects regularly absorb the largest portion of available manpower in the Industry Analysis Division. Fiscal 1971 is likely to prove no exception.

Also, a major increase in resources is required for the Division of Economic Evidence inasmuch as its work plays a key role in FTC's entire law enforcement effort. This role must be meshed with the changing broad problems affecting our competitive economy with the view to establishing important priorities. A case in point is the allocation of resources as between two major problem areas, namely the escalating conglomerate merger movement, on the one hand, and the study of concentrated industries on the other. The staff is devoting a major portion of its resources to the first problem, while making plans for moving into the concentrated industry studies.

Additional resources are critically needed for studies of the concentrated industry. Should the merger movement slow down, additional resources would be applied to the problems likely to be considered violations of Section 5 of the Federal Trade Commission Act and of the Robinson-Patman Act.

It should be emphasized that in recent years, approximately 75 percent of the manpower of the Division of Economic Evidence has been devoted to economic work in connection with the activities of the Division of Mergers. It is clear that emerging problems will require the deployment of more economists in this area. Mergers have increased by leaps and bounds and it is in this area that the greatest need for additional resources is likely to be found, and upon which most of the increase over current allocation of some 27 employees, of which currently 18 are professional economists, is based.

Due to the increase in the number of mergers, greater demands for more and various tabulations of merger statistics and the increase in professional staff requested for fiscal 1971, an increase of \$60,000 is requested to provide 12 additional employees for the Stenographic and Statistical Services Sections, located within the Office of the Director.

General operating expenses

It is requested that an additional \$102,000 be restored to provide the general operating expenses related to the 182 positions appealed within this memorandum. These funds are principally necessary for personnel benefits; however, some funds are related to requirements for equipment, supplies and materials, rent, communications, etc.

By direction of the Commission. Commissioners Elman and Nicholson have attached a separate statement.

Sincerely yours,

PAUL RAND DIXON, *Chairman.*

SEPARATE STATEMENT OF COMMISSIONERS ELMAN AND NICHOLSON

We concur in the request for reconsideration of the budget requests, but not for the reasons stated in the Commission's letter. At this critical juncture in the Commission's history, when the President has stated that "the time has now come for the reactivation and revitalization of the FTC", and a new Chairman

has been appointed to provide the necessary leadership in the enormously difficult process of reconstruction, we do not think it wise to saddle him with the proposed decimation of the Bureau of Textiles and Furs. We would be the first to agree that, under able and imaginative leadership, that Bureau could produce far more, in terms of effective law enforcement, with far less money. There is absolutely no correlation in that Bureau—and it is not alone in that respect—between funds expended and results achieved. We believe, however, that it would be prudent to give the new Chairman sufficient opportunity to study the problems which plague the Commission, and to propose remedies for their solution, before making major revisions or reallocations in the Commission's budget.

FEDERAL TRADE COMMISSION,
Washington, D.C., December 1, 1969.

Mr. GREGG POTVIN,
General Council, Select Committee on Small Business,
House of Representatives,
Washington, D.C.

DEAR MR. POTVIN: This will acknowledge your letter of November 25, 1969, requesting the Federal Trade Commission to supply all correspondence with the Bureau of the Budget regarding the 1971 budget submission.

Your Committee has already received a copy of the budget submission to the Bureau of the Budget for 1971. The following information is forwarded to complete your records:

1. Letter from Director of the Bureau of the Budget, dated July 28, 1969.
2. Questions received from the Bureau of the Budget and answers provided by the Chairman at the Budget Hearing October 17, 1969.
3. Appeal letter of the Federal Trade Commission, dated November 20, 1969.

Sincerely,

PAUL RAND DIXON, *Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., July 28, 1969.

Hon. PAUL RAND DIXON,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: The inflationary outlook, combined with the budgetary momentum of prior commitments and existing laws, make it imperative that we adopt a very restrictive fiscal policy in the 1971 budget.

Federal spending plans for 1971 must conform to the President's declared intention to eliminate the income tax surcharge. The resulting loss in revenue will make a balanced budget impossible unless we apply a firm brake on the growth of expenditures. Since a balanced budget is essential in our efforts to cope effectively with continuing inflationary pressures, we must maintain a tight rein on budget outlays.

Accordingly, a stringent and frugal approach must characterize our 1971 budget proposals. Very few program expansions and new starts can be accommodated. Moreover, we must watch costs closely, move vigorously to improve efficiency, and obtain more for each dollar spent. Otherwise we shall not be able to initiate even the most urgent program improvements and innovations.

Your should therefore make a rigorous review of the budget estimates developed for your agency for fiscal year 1971. They should reflect the maximum savings possible through increased productivity, and through the reduction or elimination of lower priority and marginal programs.

Your 1971 estimates should represent the most efficient and effective combination of resources necessary to attain your program objectives. Your budget submission should give due recognition to the effect of the personnel and outlay limitations imposed in connection with the 1970 budget, about which I am writing to you separately. Generally speaking, Federal civilian employment needs to be strictly controlled; employment increases can be considered for only the very highest priority purposes.

Timely receipt of your budget estimates for the fiscal year 1971 is vital to the preparation of an aggregate budget which is oriented to the goals and priorities of this Administration.

Your budget estimates, due in the Bureau of the Budget by September 30, 1969, should be carefully prepared and fully reflect the Commission's decisions.

Sincerely,

ROBERT P. MAYO, *Director.*

1971 FEDERAL TRADE COMMISSION BUDGET BOB HEARING

OCTOBER 17, 1969

Questions

I. The American Bar Association Study:

- A. What are your views on the specific criticisms of the ABA study in the following areas?
 - (1) Delay in handling case workloads;
 - (2) Policy planning;
 - (3) Work outputs by bureau;
 - (4) Concern with "detection and deterrence of relatively technical instances of garment mislabeling" by the Bureau of Textiles and Furs;
 - (5) Commission does not establish priorities;
- B. What actions does FTC plan to take with regard to the ABA study?

II. Program Review Office:

- A. What specific resource allocation recommendations or priority determinations were produced by this office in the past fiscal year? What recommendations were put into effect?
- B. Do you feel merely meeting the standards suggested for this office by the Bureau of the Budget report of 1960 accurately reflects the attention that might be given to this office?
- C. Has any action been taken or is planned to be taken, on the memorandum of Commissioner Nicholson (as printed in the Committee Report of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee) which suggests several alternative methods of restructuring this office to redefine Commission priorities and standards?
- D. How much contact and interaction takes place between the Office of Program Review and the planning officers in each of the operating bureaus?

III. Bureau of Economics

- A. Why has the relationship between the number of professionals on the Commission staff and the number of economists on the staff remained relatively constant in the past few years, despite calls for increases in the number of economists?

	1969	1970	1971
Professionals (actual or proposed).....	810	970	1,254
Economists (actual or proposed).....	77	77	120
Economists of total professional staff.....	9.5	7.9	9.5

IV. Truth-in-Lending:

A. In addition to the mailing of over 750,000 copies of the Federal Reserve System publication on Regulation Z, what other specific formal or informal steps are being taken to assure compliance with the Truth-in-Lending law?

B. Has any formal enforcement strategy been developed to assure maximum exposure of FTC enforcement activities in this field?

C. What has been the public reaction to the implementation of the law?

V. Bureau of Textiles and Furs:

A. With respect to Rule 36, has any final decision been reached in the courts? If not, when do you expect a decision in the court and what is your estimate concerning that decision? How much is involved in the 1970 and 1971 budget for the administration of Rule 36?

B. Approximately how much is presently spent enforcing the provisions of the Flammable Fabrics Act? What has been accomplished by this program in the past year and what are your expectations for 1970 and 1971?

C. Why isn't this Bureau organized on program lines? How much of the 1970 and 1971 funds are devoted to each of the 4 programs? Why shouldn't the fur program be substantially reduced? What kinds of sampling techniques are employed to check on manufacturer's violations of the 4 acts administered by this bureau? If no such plan exists, do future bureau plans call for the development of one?

VI. Bureau of Field Operations:

A. How will the additional 100 professionals requested for this bureau be deployed? By location in the 11 field offices and by specific programs or bureaus?

B. Have you provided for any increase in Washington support personnel to administer the more than 33% increase in field personnel requested for this bureau?

C. How are cases referred to field personnel by the Washington staff? Directly through the other bureaus or through the Office of the Director, Bureau of Field Operations and then to the field personnel?

VII. Bureau of Deceptive Practices:

A. Would you explain the proposed reorganization in the Director's Office? Specifically, what programs will each Assistant Director be responsible for administering?

B. In which division is the newly staffed advertising monitoring program to be located? How much contact do these people have with the field personnel? Do field personnel mail them regional newspapers and other publications to be examined for deceptive advertising practices?

C. Why on p. 62 of the submission do you refer to Bureau staff acting as "consultants and supplying comments or assistance concerning consumer legislation and ordinances when so requested by the states, local governments or private groups?" Shouldn't the Bureau pursue a more active role in assisting or informing the public?

VIII. Bureau of Restraint of Trade:

A. With a relatively small workload increase projected for 1971 (e.g., complaint increase of 25, investigations completed increase of 20, complaints issued increase 1 to 4), what is the justification for a 30% increase in the clerical staff in the Director's office "to meet the increasing workload of the operating divisions"?

B. How do you explain the variance between the estimated investigations to be opened in 1969 (276) and the observed level of activity (189) for this Bureau?

IX. General

A. Please discuss criteria used in determining which programs should be increased and how magnitude of increase is determined.

B. Please rank increases by priority.

C. How do you determine which industry guides will be published?

D. Results of studies completed by Bureau of Economics.

FEDERAL TRADE COMMISSION

JUSTIFICATION OF ESTIMATES OF APPROPRIATION, FISCAL YEAR 1971

FEDERAL TRADE COMMISSION,
Washington, D.C., February 2, 1970.

HON. JOE L. EVINS,

Chairman, Subcommittee on Appropriations for Independent Offices, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Transmitted herewith is the budget request and justification of the Federal Trade Commission for the fiscal year 1971.

Respectfully submitted,

CASPAR W. WEINBERGER, *Chairman.*

CHAIRMAN'S STATEMENT ON 1971 BUDGET REQUEST OF THE FEDERAL TRADE
COMMISSION

The Federal Trade Commission is requesting \$21,375,000 for its work in fiscal 1971. This represents an increase of \$375,000 over the Commission's fiscal 1970 appropriation. I have been advised that \$195,000 of this increase is for additional personnel and related requirements; the balance, \$180,000, is necessary to annualize mandatory costs associated with the 1970 Pay Act.

The budget that this Commission is submitting today necessarily reflects decisions made by the Federal Trade Commission and recommendations of the Bureau of the Budget before my appointment. I wish to call to your attention that the Bureau of the Budget has recommended that our 1971 allocation of funds for the Bureau of Textiles and Furs be \$500,000 less than the level approved for fiscal 1970, but that our level of activity on Flammable Fabrics work not be reduced. I am advised that this final budget submission for fiscal 1971 reflects the instructions of the Bureau of the Budget to prorate the \$500,000 cut from the Bureau of Textiles and Furs among other Bureaus and Offices of the Commission. A majority of the then Commission (Commissioners Dixon, Elman, Jones and Nicholson) approving this proration, opposed and still opposes, the \$500,000 reduction.) Commissioner MacIntyre did not approve the ministerial action of the Commission making the proration and he did not concur in any of the proposals to reduce the funds to be made available for this work. A separate statement by Commissioner Dixon in which Commissioners Elman, MacIntyre and Jones concur is attached. We have not reduced our level of Flammable Fabrics work; however, we have not used the funds appropriated this fiscal year for enforcement of the new Flammable Fabrics Act because the Bureau of Standards of the Department of Commerce has issued only one proposed standard, which was published in the Federal Register in December, and will only become effective after decision by the Secretary of Commerce on review of comments as to possible changes. The Bureau of Standards is currently working on several other standards under the new Flammable Fabrics Act but we do not expect any of these to reach the point where the Federal Trade Commission will be enforcing them during fiscal 1971.

When I appeared before the Senate Committee on Interstate and Foreign Commerce for my confirmation hearing in November 1969, I was asked about my intentions concerning the work of our Bureau of Textiles and Furs. I advised the Committee that I intended to review this Bureau's activities, as well as the activities of all other Bureaus, to determine if more efficient and possibly more economical ways could be found to accomplish the Federal Trade Commission's missions under existing laws. This Committee will appreciate that the proposed reduction of \$500,000 in the Bureau of Textiles and Furs' funds for fiscal 1971 is not related to any review of activities I have made since assuming the Chairmanship on January 1, 1970, since there obviously has not yet been time for a properly thorough review.

If after my review, changes in the attached appear necessary in order to accomplish our consumer protection and antitrust missions in a more efficient, effective and economical manner, I will advance proposals for such changes to my fellow Commissioners within the next few months. If the Commission agrees to these proposals, and they significantly reprogram our appropriated funds, I will certainly advise this Committee.

I would be most happy to answer specific questions concerning our 1971 budget submission to the extent that my limited experience with the Commission permits. I am sure that my fellow Commissioners and our top staff can answer specific questions on which I do not readily have information.

SEPARATE STATEMENT OF COMMISSIONER DIXON

At the time the decision was made, I strongly opposed the reduction in funds in the amount of \$500,000 to be made available to the Commission's Bureau of Textiles and Furs for fiscal year 1971. I must repeat my opposition to that cut in funds.

Throughout my tenure in office, the Bureau of Textiles and Furs has been in the forefront in protecting the consumer. This is made readily apparent by citing one statistic. In 1969, the Commission issued a total of 221 cease and desist orders, of which 126 orders were under the acts administered by that Bureau. But this falls far short of telling the full story. In that same year, the Bureau's field inspectors made about 20,000 inspections and completed 167 formal investigations. Additionally, the Bureau constantly polices its outstanding cease and desist orders, of which there were about 1,650 at the end of June 1969.

The cut-back in funds will result in a reduction of 42 positions in the staff of the Bureau of Textiles and Furs. This reduction comes at a time when the activities of that Bureau can least afford to be slackened if the consumer is to obtain the protection intended by Congress in enacting the wool, fur and textile labeling laws. The development of new man-made fibers, new finishes for textiles, and new processing of furs makes it mandatory that that protection, at a minimum, be maintained.

The foregoing discussion, in reality, provides only a background justification for the funds which are being unconscionably withdrawn from the Bureau of Textiles and Furs. Congress, in enacting the laws administered by that Bureau, expressed its vital interest in protecting the consumer by correcting the abuses rampant in the industries coming within the purview of those laws. These statutes, with their broad jurisdictional provisions, more directly and personally affect the consumer than any other statute administered by the Commission. Thus, by reducing the funds available for that Bureau, the Commission is nullifying the enforcement of the laws which that Bureau administers, is disregarding the plain intent of Congress, and is thereby depriving the American consumer of vital information that he needs. Ironically, this comes at a time when the Congress and the President have strongly endorsed additional consumer legislation.

I cannot agree with a reduction in the funds of a Bureau which is so vitally and directly concerned with the interests of the consumer.

SUMMARY OF 1971 BUDGET REQUEST—FEDERAL TRADE COMMISSION

In 1971 the Federal Trade Commission requests an appropriation of \$21,375,000, which represents an increase of \$375,000 over the current fiscal year. Of the increase, \$195,000 is requested for additional personnel and related requirements; the balance, \$180,000, is requested to annualize mandatory costs associated with the 1970 Pay Act. Funds requested for the latter purpose are reflected in detail within the budget justification of each applicable organizational unit.

While it is true the FTC has received appropriation increases each year since 1962, the increases have been granted almost entirely for mandatory pay raises

or new enforcement responsibilities required by the passage of such new Acts as Truth in Lending, Fair Packaging and Labeling, and Flammable Fabrics. For its basic function to halt unfair methods of competition and unfair or deceptive acts or practices in commerce, the size of FTC's staff has lagged behind the growth rate of the economy in the past eight years and the consequent increase in law enforcement requirements.

Throughout the Commission's 55-year history, there has been an inclination to give only secondary attention to complaints from consumers. The comparatively few dollars lost by individuals duped by false advertising or devious salesmanship has seemed less important than the blatant or insidious curtailments of competition by business firms, particularly by large corporations. Understandably, the FTC devoted much more money and manpower to combat the tougher adversaries.

Fortunately, the situation is changing. The cumulative effect of being victimized by countless chicaneries in advertising and selling has overly tried the patience of the consumer, and his cause is being championed as never before, not only in the interest of a sound economy, but also to combat serious social unrest.

Resources, however, have been lacking for the FTC to halt "unfair or deceptive acts or practices in commerce." In the past seven years, staff for the Commission's basic responsibilities and ever-increasing program requirements in the consumer protection field has increased by only 25 positions; the number of attorneys now assigned for casework enforcement is 20 percent less than in 1964. As for applications for complaint about deceptive practices, 7,215 were received in 1968; 10,099 were received in 1969; and 16,250 are estimated for 1971. Experience has shown that about eight percent of such applications warrant investigation. Thus, about 1,300 deceptive practice cases should be investigated in 1971 in order to keep faith with consumers with apparently legitimate complaints within FTC's jurisdiction.

In addition to casework, our 1971 program requires a better assessment of consumer problems, more effective educational efforts, and the enlisting of help from other sources, public and private, capable of reducing our consumer protection workload.

In 1971, a new approach is planned for handling the avalanche of consumer complaints received by the Commission. A first step will be to change the type of personnel utilized in order to free professional personnel for more important assignments. To implement this changeover, four nonlegal personnel are requested at a cost of \$30,000.

We also need to strengthen our present program for scientific advice and assistance since the Commission depends heavily upon staff disciplines for expertise in drug and medical matters. Without additional resources, the present workload is becoming unmanageable and adequate consideration cannot be given projects requested by the Commission. Likewise, plans must be made for more effective operational relationships whenever joint projects are undertaken or requests for assistance are received from other divisions. Accordingly, funds totaling \$43,000 are requested for a pharmacologist, an expert in the fields of mechanics and electricity, and one clerical position.

The Bureau of Deceptive Practices also requires additional resources to cope with increasing workloads related to the compliance program, the packaging program and consumer products standards. These activities will require 7 additional personnel at a cost of \$73,000. Travel funds totaling \$21,000 are necessary for all the new positions requested by this Bureau.

Until recently, FTC's field offices were simply the investigative arm of the Commission. Now, however, their role has been enlarged. In addition to assigned investigations, they now have been empowered to negotiate settlements, where appropriate, by assurances of voluntary compliance or consent orders. They also perform advisory, public relations, and educational activities, as well as serving as liaison between FTC and state and local agencies working on related programs.

True, there was some reduction in the number of cases referred to the field for

investigation last year, but the complexity of the cases plus increased evidentiary requirements actually increased the workload. In addition, the field force was required to expedite many special projects and surveys. For example, at one time 85 attorneys had to be assigned to special investigations and educational programs.

Typical have been the burdens of educating creditors and others concerning requirements of the Truth in Lending Act, and of assisting state authorities in giving force to their recently enacted "little FTC Acts."

Based on the projections of FTC's enforcement bureaus, planned and expanding investigational activities, plus intensification of consumer protection efforts, our field forces need to be strengthened by 13 attorneys and eight clerk-stenographers. In 1971, funds totaling \$272,000 are requested for these positions and necessary supporting costs.

In the Commission's efforts to halt restraints of trade, the additionally requested resources will be used principally to reduce corporate mergers that are eliminating competition, particularly conglomerate mergers where economic power is being used to discourage the entry of new competitors and where opportunities for reciprocal dealing are being developed. Priority will be given to illegal merger and other trade restraint in the basic consumer industries, such as grocery products, automotive parts, lumber and building supplies and apparel.

Despite the alarming increase in corporate mergers, the legal staff of our Division of Mergers has not increased since 1963. Moreover, with the merger problem veering to conglomerate, investigations and analyses have become more difficult due to the diverse product lines involved. Additionally, manpower must be expended to examine and, if necessary, take action on reports submitted by certain large corporations in compliance with FTC's "pre-merger notification program." In 1971 we request two additional attorneys and \$35,000 for these vital activities. Also, \$16,000 is requested for a person to assist in Bureau Planning activities, and for a coding clerk to aid in processing practices, commodities and geographic areas involved in letters of complaint.

Our Bureau of Economics requests five additional economists and \$59,000 in 1971 for its Divisions of Economic Evidence and Industry Analysis.

It is imperative that the Commission be provided with information and competent analyses of economic facts to evaluate business problems affecting competition and the consumer. Their availability is the key to wise planning and the most effective use of staff and money. Such research also provides Congress and other government agencies with information needed to assess government-business problems.

In addition to the ad hoc projects that will be assigned to the Bureau's Division of Industry Analysis, the planned research projects scheduled for 1971 include: (1) a follow-up of the study of trends and patterns of conglomerate merger activity; (2) a study of whether and how more antitrust enforcement could alleviate trouble spots in highly concentrated industries, such as the steel industry; and (3) development of information needed to implement a program of affirmative disclosure requirements for the advertising and promotion of products offered consumers. This also would include an evaluation of FTC's experience in enforcing the Truth in Lending Act.

Increased productivity also will be required of the Division of Economic Evidence. The information and analyses it provides are vital to the prosecution of many of FTC's cases as well as to the development of enforcement policies.

In the Office of General Counsel, the Division of Legislation—Federal-State Cooperation expects a substantial increase in bills pertaining to consumer protection laws, mergers and other areas of Commission interest in 1971. There is every indication to believe that the consumer protection movement will accelerate in the immediate future. Moreover, two recent studies have called for a reexamination of the Robinson-Patman Act, one of the Commission's principal statutes. An additional attorney and \$22,000 are requested to accelerate the Commission's efforts in these areas.

For the Office of Program Review, an additional \$18,000 is requested to fund one attorney position. This additional position would provide the mix of attorneys and economists recommended in a Bureau of the Budget Staff Report for a Commission-level program review staff. In addition to devising ways and means for the Commission to improve strategic planning and focus its resources on the most significant problem areas in the economy, this well balanced staff will be able to provide policy guidance be evaluating competing proposals for project-type investigations, and recommend appropriate actions for accomplishing major missions.

In the Office of Administration, the Division of Data Processing has established a data bank covering complaints and other information that will pinpoint industries and products, geographic area, and practices on which to focus the attention of the Commission on emerging consumer protection problems. In 1971, it is planned to include in the data bank pertinent data on business corporations. Storage and accessibility of this vital data will require a capacity far in excess of our current ability. Two additional positions and \$11,000 are requested to help provide this service.

The Office of the Secretary is inadequately staffed to carry out its important responsibilities in an effective manner. In the past several years, increasing and uncontrollable workloads have required substantial overtime costs to be incurred for these activities. Two clerks are requested for legal and public record activities at a cost of \$11,000.

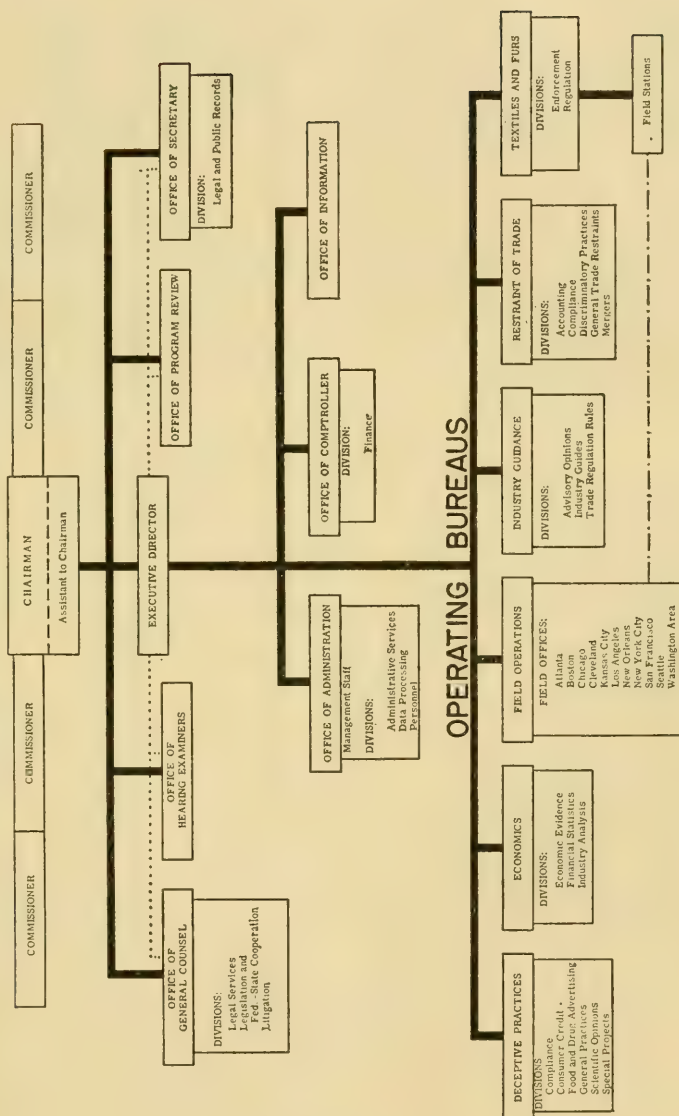
The Bureau of the Budget has recommended that the resources available for administering the Wool Products Labeling Act, the Textile Fiber Identification Act and the Fur Products Labeling Act be reduced by 42 positions and \$500,000 in 1971. We will utilize every means possible to police these Acts in the interests of safeguarding the public and fostering honest competition.

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Organization chart.
 FTC employees and salaries by bureaus as of December 31, 1969.
 Statutory authority and duties.
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 Bureau of Deceptive Practices.
 Bureau of Textiles and Furs.
 Bureau of Field Operations.
 Bureau of Industry Guidance.
 Bureau of Economics.
 Other expenses.

FEDERAL TRADE COMMISSION

1195



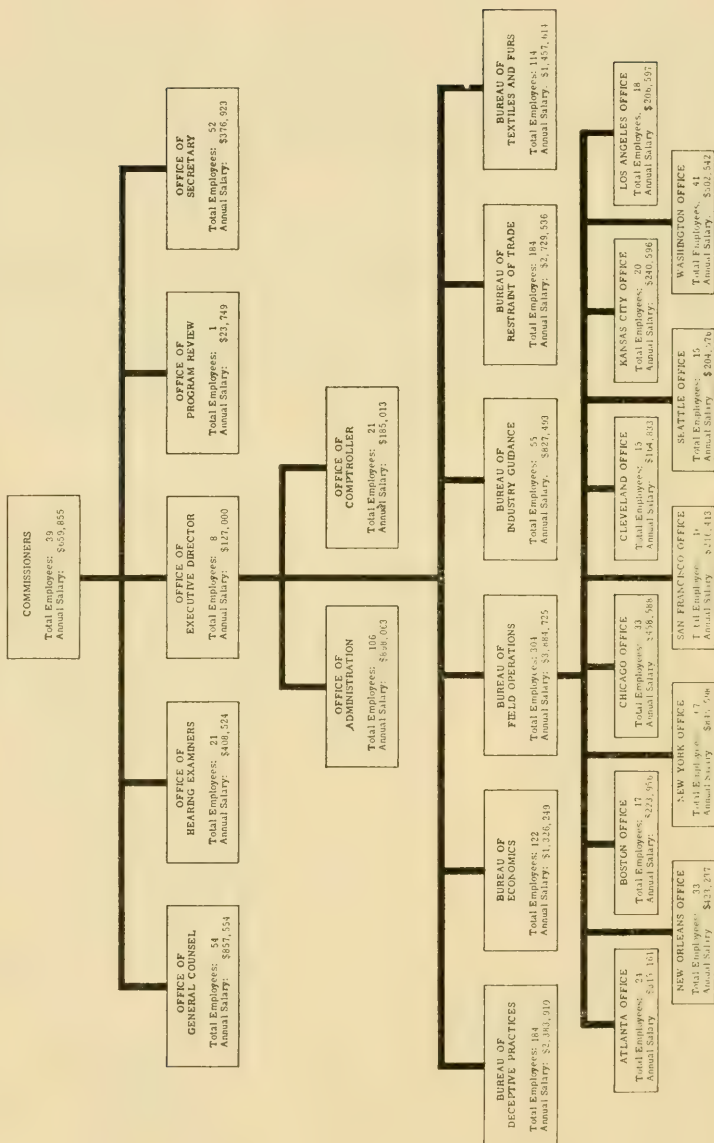
..... ADMINISTRATION ONLY.

----- ADMINISTRATIVE SERVICES AND
FORMAL INVESTIGATIVE MATTERS.

Approved: *Paul R. Simon*
Chairman

October 1969

As of December 31, 1969



Total Employees: 1,265 **Annual Salary:** \$16,146,208

STATUTORY AUTHORITY AND DUTIES OF THE FEDERAL TRADE COMMISSION

Statutory Authority—the Federal Trade Commission, an administrative agency, created by the Act of September 26, 1914, is charged with the enforcement of the Federal Trade Commission Act as amended by the Wheeler-Lea Act, approved March 21, 1938 (52 Stat. 111-117); Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526), and Sections 3, 7 as amended and 8 of the Clayton Act of October 15, 1914 (38 Stat. 730); the Export Trade Act, approved April 10, 1918 (40 Stat. 516); the Wool Products Labeling Act, approved October 14, 1940 (54 Stat. 1128); the Lanham Trade-Mark Act of 1946, approved July 5, 1946 (60 Stat. 427); the Fur Products Labeling Act, approved August 8, 1951 (65 Stat. 175); the Flammable Fabrics Act, approved June 30, 1953 (67 Stat. 111); amendment to the Packers and Stockyards Act, 1921, approved September 2, 1958 (72 Stat. 1749); and the Textile Fiber Products Identification Act, approved September 2, 1958 (72 Stat. 1717).

Duties—The principal duties of the Commission under the above-mentioned statutes are:

(1) *The Federal Trade Commission Act*—Under this Act, the Commission is charged with (a) the prevention of unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce; (b) the conduct of investigations relating to (1) alleged violations of the Antitrust Acts, (2) the manner in which decrees in Antitrust suits brought by the United States have been carried out, and (3) the organization, business, conduct, practices and management of corporations engaged in commerce (with certain statutory exemptions) and their relation to other enterprises; (c) the making of reports and recommendations to the Congress with respect to legislation; and (d) the conduct of trade conferences of industries for the elimination of unlawful and unethical business practices.

(2) *Clayton Act*—Under Sections 3, 7 and 8 of this Act the Commission is charged with the duty of preventing and eliminating unlawful tying contracts, corporate mergers and acquisitions and interlocking directorates. Under the Clayton Act, as amended by the Robinson-Patman Act, which greatly enlarged and increased the jurisdiction and duties of the Commission in respect to unlawful price discriminations, the Commission is charged with the prevention of certain specified practices, i.e., unlawful price and related discrimination.

(3) *Amendment to Packers and Stockyards Act*—The provisions of this amendment extend the Commission's jurisdiction to cover certain matters previously subject to the exclusive jurisdiction of the Secretary of Agriculture.

The amendment, in effect, grants the Commission jurisdiction over the activities of packers not related to livestock, meats, meat products, and the like. The Commission is granted additional power and jurisdiction over all transactions in commerce in margarine and oleomargarine and over retail sales of meat and related products. Other matters involving meat and related products are made subject to the Commission's jurisdiction where the Secretary requests the Commission to investigate and report or where, under certain circumstances, action by the Commission is necessary to exercise effectively its power or jurisdiction with respect to retail sales of meat and related products.

(4) *Export Trade Act*—The Commission is responsible for receiving and filing articles of association or incorporation of "associations" organized under the Export Trade Act; investigating their operations which may adversely affect competition within the United States; making recommendations to the associations for readjustments deemed necessary therein; and, where considered appropriate, making recommendations to the Attorney General for panel action.

(5) *Wool Products Labeling Act*—Under this statute the manufacture for introduction into commerce, or the introduction, sale transportation or distribution, in commerce, of misbranded wool products, is unlawful, and constitutes an unfair method of competition and an unfair and deceptive act and practice under the Federal Trade Commission Act. The Commission is authorized to make inspections, analyses, tests and examinations of all wool products subject to the Act and to make such rules and regulations as may be necessary and proper for the administration and enforcement of the Act. In addition, the Commission is also empowered under the statute to prevent the movement of misbranded wool products in commerce by injunction and to proceed by libel action in certain cases for condemnation of such products.

(6) *Lanham Trade-Mark Act of 1946*—Under this statute it is the duty of the Commission to make applications for the cancellation of registered trademarks under certain specified conditions. The Commission, as applicant, must secure the proper evidence on which the application for cancellation is based, prepare the application, stating the grounds relied upon, be represented at the hearing before a Patent Office examiner for the purpose of presenting such evidence and otherwise prosecute the matter to a conclusion.

(7) *Fur Products Labeling Act*—The Commission is charged with the administration and enforcement of this consumer legislation which requires the mandatory labeling of fur articles of wearing apparel, as well as truthful invoicing and advertising of furs and fur products to show, among other things, the true English name of the animal from which the fur was taken. The Commission is also charged with issuing a Fur Product Name Guide and is authorized and directed to cause compliance inspections, analyses, tests and examinations to be made of furs and fur products subject to the Act and to prescribe rule and regulations governing the manner and form of disclosing required information under the Act. In addition to administrative enforcement, injunctive and condemnation proceedings are also provided for.

(8) *Flammable Fabrics Act*.—This Act which became effective July 1, 1954 was amended and revised December 14, 1967. The original law set flammability standards for wearing apparel and fabric intended for use in wearing apparel only, whereas the amended law embraces all fabrics and related materials or products intended for use in or which can be reasonably expected to be used in homes, offices and other places of assembly or accommodation.

The amended Act delegates to the Secretary of Commerce the determination of which fabrics, related materials or products are dangerous, and commissions him to provide appropriate flammability standards for their control. The Federal Trade Commission is charged with the enforcement of the Flammable Fabrics Act, using the flammability standards provided for by the Department of Commerce, through the administrative procedures provided for under the Federal Trade Commission Act together with injunction, condemnation and criminal penalty proceedings in the Federal courts where such action is necessary to protect lives and property.

(9) *Textile Fiber Products Identification Act*—This additional "truth-in-fabrics" legislation takes up where the Wool Products Labeling Act leaves off. It became law September 2, 1958, and covers the broad field of mandatory content disclosure in labeling and advertising of textile fiber products. Under its terms, misbranding as well as false and deceptive advertising of textile fiber products is unlawful.

The Commission is authorized, under the Act, to make inspections, analyses, tests, and examinations of all textile fiber products subject to the statute, and further, to make such rules and regulations as may be necessary and proper for administration and enforcement of the Act. In addition, the Commission is directed to establish generic names for those man-made fibers which have not as yet attained one.

Its enforcement is to be carried out through administrative procedures provided for under the Federal Trade Commission Act, together with injunction and criminal proceedings in the U.S. District Courts.

(10) *Fair Packaging and Labeling Act*—This Act (P.L. 89-755) requires the Commission to issue regulations having the force of law respecting net contents disclosures, identity of commodity, and name and place of business of manufacturer, packer or distributor; and the Act authorizes additional regulations when necessary to prevent consumer deception or facilitate value comparisons in respect to declaration of ingredients, slack fill of packages, use of "cents-off" or lower price labeling, and characterization of package sizes. The act became effective July 1, 1967 and gives the Commission responsibility for consumer commodities other than food, drugs, therapeutic devices and cosmetics. Violations of regulations issued under the Act will be treated as violations of Section 5 of the Federal Trade Commission Act.

(11) *Truth in Lending Act*—This Act (Title I of the Consumer Credit Protection Act, P.L. 90-321) delegates to the Commission, effective July 1, 1969, enforcement responsibility as to business generally for compliance with this new consumer credit disclosure statute. The acts requires all consumer creditors to

make detailed written disclosures concerning all charges and related aspects of the transaction, including disclosure of finance charges expressed as a simple annual percentage rate, before consummation of the sale or loan, and before the account is opened and on every periodic statement in the case of open end or revolving creditors. The Act also contains specified requirements for any advertisement containing a credit representation, and it includes a three-day right of rescission in any transaction involving a security interest (except first mortgage) in the consumer's residence. The statute provides that a violation of the Act or of any implementing regulation shall be deemed a violation of the Federal Trade Commission Act, irrespective of whether the violator is engaged in commerce or meets any other jurisdictional test in the FTC Act.

OBLIGATIONS BY ACTIVITIES

	Actual, fiscal year 1969	Allotment, fiscal year 1970	Increase, fiscal year 1970	Requested, fiscal year 1971	Increase or decrease, fiscal year 1971
Antimonopoly:					
Investigation and litigation.....	\$6,054,000	\$6,985,000	\$931,000	\$7,184,000	\$199,000
Economic and financial reports.....	1,187,000	1,316,000	129,000	1,361,000	45,000
Trade regulation rules and industry guides.....	350,000	419,000	69,000	423,000	4,000
Deceptive practices:					
Investigation and litigation.....	4,907,000	6,121,000	1,214,000	6,472,000	351,000
Trade regulation rules and industry guides.....	704,000	840,000	136,000	844,000	4,000
Textile and fur enforcement.....	1,685,000	2,394,000	709,000	1,888,000	-506,000
Consumer credit enforcement.....	390,000	1,695,000	1,305,000	1,711,000	16,000
Executive direction and management.....	385,000	466,000	81,000	489,000	23,000
Administration.....	950,000	983,000	33,000	1,003,000	20,000
Total program costs.....	16,612,000	21,219,000		21,375,000	156,000
Unfunded adjustments.....	193,000	-219,000			219,000
Transfer to GSA for space rental.....	10,000				
Unobligated balance lapsing.....	85,000				
Appropriation.....	16,900,000	21,000,000		21,375,000	375,000

Includes proposed supplemental for Pay Act increases, \$1,500,000.

OBJECT CLASSIFICATION

	Actual fiscal year 1969	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increase or decrease
Personnel compensation:				
Permanent positions.....	\$14,017,000	\$17,513,500	\$17,766,500	\$253,000
Positions other than permanent.....	50,000	60,000	60,000	
Other personnel compensation.....	29,000	50,000	50,000	
Special personnel service payments.....	6,000	11,000	11,000	
Total personnel compensation.....	14,102,000	17,634,500	17,887,500	253,000
Personnel benefits.....	1,037,000	1,306,000	1,337,000	31,000
Travel and transportation of persons.....	377,000	697,500	727,500	30,000
Transportation of things.....	7,000	9,000	11,000	2,000
Rents, communications, and utility services:				
Rents.....	135,000	228,000	253,000	25,000
Communications.....	239,000	265,000	265,000	
Printing and reproduction.....	165,000	140,000	155,000	15,000
Other services.....	103,000	139,000	141,000	2,000
Services of other agencies.....	152,000	110,000	118,000	8,000
Supplies and materials.....	229,000	230,000	234,000	4,000
Equipment.....	259,000	241,000	246,000	5,000
Total obligations.....	16,805,000	21,000,000	21,375,000	375,000
Transferred to GSA for space rental.....	10,000			
Unobligated balance lapsing.....	85,000			
Total appropriation.....	16,900,000	21,000,000	21,375,000	375,000

COMPARATIVE SUMMARY—SALARIES AND EXPENSES, FISCAL YEAR 1970 WITH REQUESTED FUNDS, 1971

	Allotment, fiscal year 1970				Funds requested, fiscal year 1971				Increase requested, fiscal year 1971			
	Positions	Personal services	Travel and other	Total	Positions	Personal services	Travel and other	Total	Positions	Personal services	Travel and other	Total
Commissioners' offices.....	43	\$750,000	\$12,000	\$762,000	43	\$750,000	\$12,000	\$762,000	1	\$18,000		\$18,000
Office of Program Review.....	5	88,000		88,000	6	106,000		106,000				
Office of Executive Director.....	8	133,000	3,000	136,000	8	133,000	3,000	136,000				
Office of Administration.....	111	945,500	10,000	955,500	133	996,500	10,000	1,006,500	2	21,000		21,000
Office of Comptroller.....	25	233,000	500	233,500	25	236,500	500	237,000				
Office of Secretary.....	62	438,500	1,000	439,500	64	454,500	1,000	455,500	2	16,000		16,000
Office of General Counsel.....	60	890,000	10,000	900,000	61	917,000	15,000	932,000	1	27,000		27,000
Office of Hearing Examiners.....	24	448,000	11,000	459,000	24	452,000	11,000	463,000				
Bureau Restraint of Trade.....	205	2,931,000	110,000	3,041,000	209	3,009,000	116,000	3,125,000	4	78,000	6,000	84,000
Bureau Deceptive Practices.....	214	2,729,500	164,000	2,893,500	228	2,906,500	185,000	3,091,500	14	177,000	21,000	198,000
Bureau Textiles and Furs.....	146	1,693,500	148,000	1,841,500	104	1,248,000	93,000	1,341,000	-42	-445,000	-55,000	-500,000
Bureau Field Operations.....	376	4,139,000	329,000	4,468,000	397	4,412,000	374,000	4,786,000	21	273,000	45,000	318,000
Bureau Industry Guidance.....	59	854,000	3,000	857,000	59	864,000	3,000	867,000				
Bureau Economics.....	131	1,351,000	26,000	1,377,000	136	1,422,000	29,000	1,451,000	5	71,000	3,000	74,000
General operating expenses (not included above).....			2,549,000	2,549,000			2,646,000	2,646,000			97,000	97,000
Total.....	1,469	17,623,500	3,376,500	21,000,000	1,477	17,876,500	3,498,500	21,375,000	8	253,000	122,000	375,000

COMPLAINT ACTIONS FOR FISCAL YEARS 1966-69

[Legend: RT, restraint of trade; DP, deceptive practices; T. & F., textiles and furs; IG, industry guidance]

Fiscal year	Approved for complaint issuance or consent order negotiation	Other closings and withdrawals	Complaints and consent orders to cease and desist issued (C series)	Complaints docketed for litigation (D series)	Pending consent order negotiation, June 30	Complaints pending litigation, July 1	Orders to cease and desist ¹				Orders of dismissal	Other closings	Complaints pending litigation, June 30
							Reopened	Contest	Consent	Defaults and administrative answers			
1966:													
RT.....	34	11	80	14	17	40	2	11	3	---	7	1	34
DP.....	66	8	37	11	20	31	1	10	1	3	3	1	25
T. & F.....	47	4	49	3	5	2	---	2	---	---	---	---	3
Total.....	147	23	166	28	42	73	3	23	4	3	10	2	62
1967:													
RT.....	22	3	17	7	12	34	3	10	3	---	3	2	26
DP.....	108	1	68	40	19	25	1	14	8	5	3	2	34
T. & F.....	88	2	87	2	2	3	---	---	1	1	---	---	3
Total.....	218	6	172	49	33	62	4	24	12	6	6	4	63
1968:													
RT.....	30	2	10	6	24	26	4	9	4	---	1	2	20
DP.....	51	2	29	16	23	34	---	14	2	6	3	---	25
T. & F.....	99	---	61	1	39	3	---	1	---	---	---	2	1
Total.....	180	4	100	23	86	63	4	24	6	6	4	4	46
1969:													
RT.....	24	---	19	9	20	20	---	5	1	---	1	2	20
DP.....	84	5	54	11	37	25	1	7	2	5	4	3	16
T. & F.....	107	1	125	2	19	1	---	1	---	---	---	---	2
IG.....	1	---	---	---	1	---	---	---	---	---	---	---	---
Total.....	216	6	198	22	77	46	1	13	3	5	5	5	38

¹ Excludes orders partially disposing of cases.² 1 file resulted in 2 consent orders.

Note: Columns will not necessarily total because of multiple actions involving individual cases.

INVESTIGATION CASELOAD, FISCAL YEARS 1966 THROUGH 1969

	1966	1967	1968	1969
Pending first of year, total.....	2, 283	1, 978	2, 120	1, 990
Restraint of trade.....	930	689	725	747
Deceptive practices ¹	1, 353	1, 289	1, 395	1, 243
Initiated and reopened, total.....	1, 168	1, 200	754	628
Restraint of trade.....	251	357	218	186
Deceptive practices ¹	917	843	536	442
Completed, total ²	1, 473	1, 058	884	954
Restraint of trade.....	492	321	196	289
Deceptive practices ¹	981	737	688	665
Pending end of year, total.....	1, 978	2, 120	1, 990	1, 664
Restraint of trade.....	689	725	747	644
Deceptive practices ¹	1, 289	1, 395	1, 243	1, 020

¹ Includes textile and fur work.² Includes investigations approved for consent negotiation but pending consent action.

PETITIONS TO REVIEW FILED IN COURTS

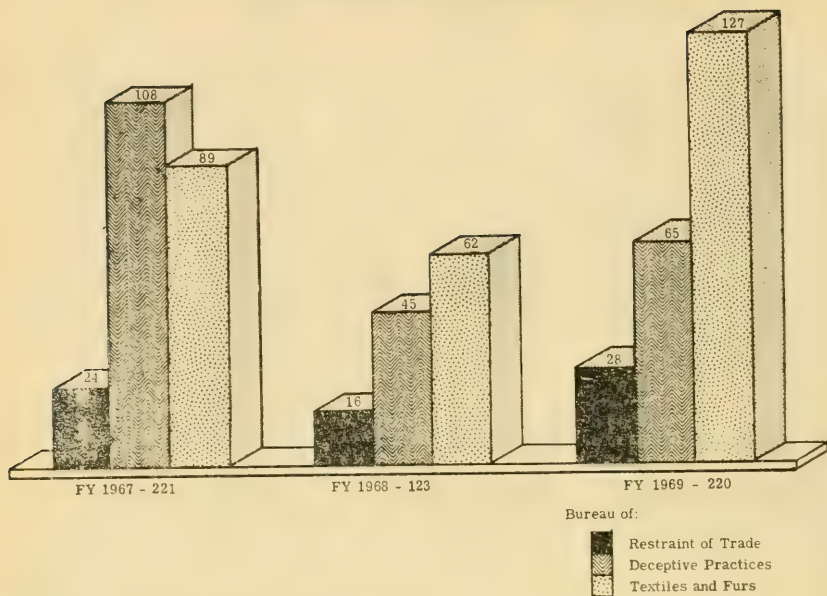
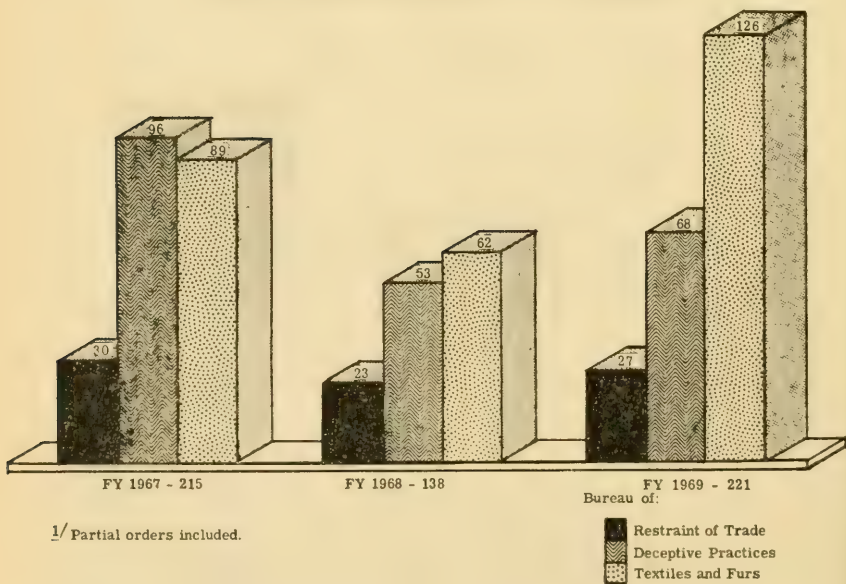
Fiscal year	Cases filed	Cases disposed of	Cases pending end of year
1964.....	51	31	80
1965.....	26	33	73
1966.....	20	32	61
1967.....	16	31	46
1968.....	32	27	61
1969.....	39	45	55

SELECTED MANPOWER AND CASEWORK STATISTICS, FISCAL YEAR 1969

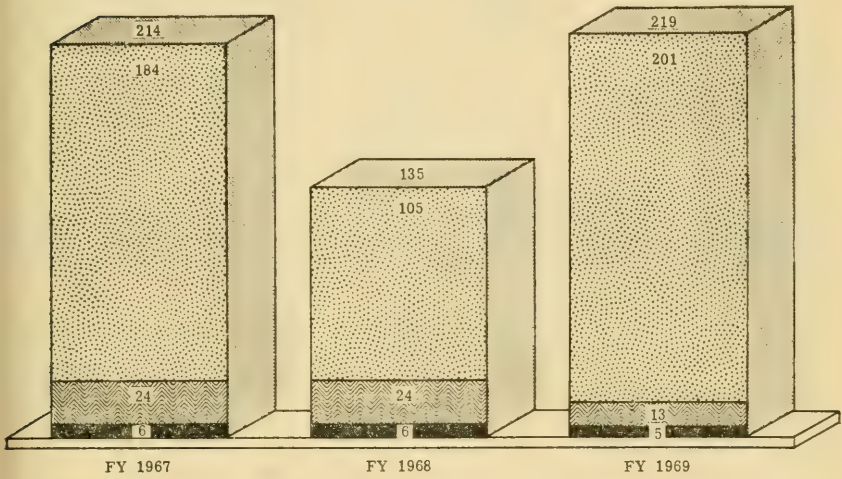
Bureaus and divisions	Average number of attorneys for period	7-digit investigations completed	Complaints issued		Orders to cease and desist ¹		Investigations pending June 30, 1969	Consent matters pending	Litigated ³ cases pending	Number of attorneys June 30, 1969	
			Contest	Consent	Contest	Consent					
Deceptive practices:											
Food and drug advertising	12.50	80		7	1	7	156	7	1	12	
General practices	29.36	386	11	42	4	44	575	30	15	31	
Special projects	15.00	32		5		5	47			11	
Compliance	10.88						1			11	
Office of Director	7.75						2			6	
Total	75.49	498	11	54	7	56	781	37	16	71	
Restraint of trade:											
Discriminatory practices	34.88	120	2	10		10	232	9	5	30	
General trade restraints	29.88	98		3		3	244	3	4	27	
Mergers	28.88	66	7	6	4	7	136	8	11	30	
Compliance	19.75	5					32			18	
Total	113.39	289	9	19	5	20	644	20	20	105	
Textiles and furs: Enforcement	9.25	167	2	125	1	125	239	19	2	9	
Grand total	198.13	954	22	198	13	201	1,664	76	38	185	

¹ Excludes 2 partial OCD.² Admissive answers, defaults, etc.³ Excludes cases referred for supplemental work.

COMPLAINTS ISSUED BY THE COMMISSION

ORDERS TO CEASE AND DESIST ISSUED BY THE COMMISSION^{1/}

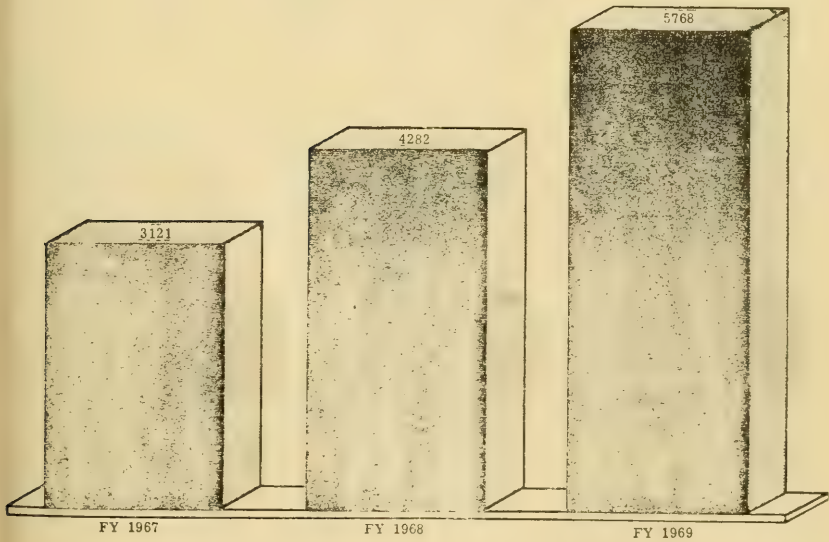
CASES^{1/} DISPOSED OF BY ORDERS TO CEASE AND DESIST - CONTEST AND CONSENT



^{1/} Partial orders excluded accordingly. Also excludes dismissals, declaratory and withdrawals, etc.

Type:
 [Pattern] Consent (C & D Series)
 [Pattern] Contest
 [Pattern] Admissive Answers and Defaults

INFORMAL CORRECTIVE ACTIONS



COMMISSIONERS AND COMMISSIONERS' OFFICES

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Commissioners.....	5	\$192,000	5	\$192,000		
Commissioners' offices.....	38	558,000	38	558,000		
Total, personal services.....	43	750,000	43	750,000		
Travel.....		12,000		12,000		
Total.....	43	762,000	43	762,000		

Funds requested provide the salaries and expenses of the Commissioners and the staffs in their offices. In fiscal year 1970, 43 positions are allocated to Offices of Commissioners consisting of attorney-advisers, administrative assistants, stenographers and messengers.

PERSONNEL AS OF DEC. 31, 1969

	Total	Executive	Attorney	Secretarial and messenger
Commissioners.....	5	5		
GS-15.....	10		10	
GS-14.....	1		1	
GS-13.....	2		2	
GS-12.....	1		1	
GS-10.....	1			
GS-9.....	3			3
GS-7 and below.....	16			16
Total.....	39	5	14	20

Note: Total annual salaries, \$659,855.

OFFICE OF PROGRAM REVIEW

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services.....	5	\$88,000	6	\$106,000	1	\$18,000

The principal function of the Office of Program Review is to devise ways and means for the Commission to improve strategic planning, and enable the Commission to focus its limited resources on the significant problem areas in the antitrust and consumer protection fields. The office aims to make decision-making on starting Commission investigations rational and economical by developing the formal means by which reasoned policy alternatives on potential resource uses are presented to the Commission.

Recommendations are made to the Commission on areas in the economy where the Commission could commit its manpower. The office prepares enforcement policy position papers for the Commission setting forth the decision options on the policy issues. The office also refines criteria for instituting new investigations, works with the enforcement bureaus on the process of developing program plans, and evaluates the bureaus' program proposals. The major ongoing long range project of this office is the development of a total system for planning the Commission's program and resource allocations on a rational basis.

An additional \$18,000 is requested to provide one GS-14 attorney in 1971.

By adding the requested attorney to this office for program evaluation, the office would have the mix of attorneys and economists recommended in a Budget Bureau Staff Report (No. CF-60-124) for a Commission-level program review staff. A planning function so reinforced can identify areas in the economy in which the Commission should apply its efforts. This analytical staff would also provide policy guidance by evaluating competing proposals for project-type investigations, and recommend to the Commission appropriate allocations of resources for accomplishing major missions.

PERSONNEL AS OF DEC. 31, 1969

	Total	Economist
Professional:		
GS-15.....	1	1
Total.....	1	1
Total annual salaries.....	\$23,749	

OFFICE OF THE EXECUTIVE DIRECTOR

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of Executive Director.....	3	\$54,000	3	\$54,000		
Office of Information.....	5	79,000	5	79,000		
Total personal services.....	8	133,000	8	133,000		
Travel.....		3,000		3,000		
Total.....	8	136,000	8	136,000		

The Executive Director, as the Commission's chief operating official, manages the Federal Trade Commission's activities to achieve effective and economical operations. He has responsibility for operational and administrative direction of all the Commission's Bureaus and Field Offices.

The Office of Information reports to the Executive Director and its overall policy, advisory and educational functions have been given additional emphasis.

PERSONNEL AS OF DEC. 31, 1969

	Total	Executive, administrative and other professional	Stenographic and clerical
Professional:			
GS-15.....	2	2	
GS-13.....	1	1	
GS-12.....	1	1	
GS-9.....	1	1	
Stenographic, clerical, etc.....	3		3
Total.....	8	5	3
Total annual salaries.....	\$127,000		

OFFICE OF ADMINISTRATION

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of Director.....	6	\$83,000	6	\$83,500		\$500
Management Staff.....	6	83,000	6	84,000		1,000
Division of Personnel.....	23	206,500	23	208,500		2,000
Division of Data Processing.....	16	125,000	18	137,500	2	12,500
Division of Administrative Services.....	60	448,000	60	453,000		5,000
Total, personal services.....	111	945,500	113	956,500	2	21,000
Travel.....		10,000		10,000		
Total.....	111	955,500	113	967,500	2	21,000

	Total	Executive, administrative and other professions	Stenography and clerical	Wageboard
Professional:				
GS-15.....	2	2		
GS-14.....	3	3		
GS-13.....	2	2		
GS-12.....	7	7		
GS-11.....	5	5		
GS-9.....	1	1		
GS-8.....	1	1		
GS-7.....	9	9		
Stenographic, clerical, etc.....	76		57	19
Total.....	106	30	57	19

Note: Total annual salaries, \$898,063.

The Office of Administration gives policy guidance and general supervision to the management and organization programs, administrative services activities and personnel programs of the Federal Trade Commission. Plans for effective organization and administration of the Commission's management programs. Formulates and puts into effect basic administrative policies. Develops long-range plans relating to needs for personnel, space, supplies, equipment, etc. This Office consists of the Management Staff and the Divisions of Personnel, Data Processing, and Administrative Services.

Management interns are assigned to the Office of Administration and are detailed during their training period to administrative positions throughout the Federal Trade Commission.

MANAGEMENT STAFF

The Management Staff is responsible for conducting agency-wide organizational and procedural studies; coordinating and issuing procedural and policy statements through a Directives System in the form of an Administrative Manual, Administrative Bulletins, and notices; conducting the Workload, Production and Manpower Reports System which also includes a Highlights narrative for all program functions; operating the Progress Report System covering the status of formal and informal casework; and the performance of special studies as assigned.

A recent survey indicated the necessity for expansion of management analysis activities in order to provide for economic and efficient correspondence, reports, and forms control activities as well as overall analysis and study of organization and procedures within the Commission. Truth-in-Lending will require the development of new computer systems applications. It is hoped that these additional responsibilities can be carried by the current staff.

DIVISION OF PERSONNEL

The Division of Personnel initiates, develops, and administers personnel policies and programs in the spheres of recruitment, appointment and placement, training, position classification, performance ratings, employee relations, welfare, and health and recreation.

Also this Division has been given the responsibility for position management and manpower utilization surveys and maintenance of necessary controls.

An orientation pool for stenographers and typists predominantly consisting of employees initially entering on duty with the Commission has been established under the Division. This group expedites overflow work from the substantive bureaus and is used for relief assignments to Commissioners' Offices, the Office of the Executive Director, and other top offices throughout the Commission.

Every effort will be made to carry additional workload related to new consumer protection activities, including Truth-in-Lending and the administration of the new Flammable Fabrics Act without additional personnel.

DIVISION OF DATA PROCESSING

The Division of Data Processing operates a Burroughs computer and peripheral equipment to service operating bureaus' needs for data processing. These include both administrative and substantive program activities. On the administrative side, this division has the continuing job of machine preparation of payroll, the maintenance of equipment inventories, the maintenance of workload statistics for attorneys, and among other administrative programs, the maintenance of personnel information concerning both employees and attorney applicants.

In regard to the substantive programs of the Commission, this Division prepares information relating to financial statistics (a sample of 9,000 businesses are covered by the F.T.C. segment of this study), various economic and legal programs, including rates of return for the Division of Accounting, and master case cards on legal cases currently being worked on in the legal divisions of the Commission.

This Division, in connection with the above programs and others, is responsible for advising operating officials in regard to adequacy of information supplied to accomplish objectives, the development of programs as required for various administrative and operating studies, and the establishment of good, workable priorities for the expeditious handling of data processing activities.

A data bank has been established covering all complaints and other information that will pinpoint industries and products, geographic areas, and practices on which to focus the attention of this Commission because of emerging consumer protection problems.

It is also planned to include in the data bank pertinent corporate and financial information concerning business corporations. Storage and accessibility of this mass of data will require a capacity far in excess of our current ability. To provide ready and feasible access will require two disc storage units. To provide this capacity and to annualize the cost of tape drives now being installed will require an increase of \$25,000 for 1971.

Additional computer applications will require the services of one GS-5 computer operator and one GS-3 card punch operator at a cost of \$11,000.

DIVISION OF ADMINISTRATIVE SERVICES

The Division of Administrative Services is a central administrative unit established for the purpose of publishing the material made public under Section 6(f) of the Federal Trade Commission Act; for the procurement of supplies and equipment; and for supplying other services essential to the functioning of the Commission. The Commission's Library is also located in this Division.

The Publication Branch of the Division clears for format, economy of reproduction and distribution, all material printed or duplicated by the Commission within the limitations of the laws and regulations as applicable thereto. This branch also operates a Class A Printing Plant established under the provisions of the regulations by the Joint Committee on Printing of the Congress; and provides photographic, photostat and drafting services. The services are performed by the following sections:

The *Composition Section* edits for format and typography, material to be printed by the Government Printing Office or printed or duplicated in the Commission's Printing Plant and provides stenographic services to over-burdened bureau pools. During 1969 over 1,459 pages of copy were produced by this activity for lithographic reproduction in the printing plant.

The *Photographic Section* provides the Commission with photographic, xerox and photostat services for use in connection with the Commission's legal proceedings and economic reports. Production reports for this section show that over 1,275,222 photographic, photostat and xerox prints were produced during 1969.

Functions of the *Printing Plant* include the printing of the Commission's orders, press releases, legal and economic reports, speeches, Trade Practice Rules, pamphlets, forms, letters, etc. Production during 1969 was more than 20,400,347 pages.

The *Library System* consists of: (1) the Commission Library; (2) the Medical Library in the Division of Scientific Opinions; (3) a small library in the Office of the Hearing Examiners; and (4) a small library in each of the Commission's field offices.

These libraries provide facilities for research by personnel of the bureaus and offices of the Commission, and assist in discriminating information regarding the antitrust laws and trade regulations.

The combined holdings of these collections total more than 150,000 bound volumes. Extensive files of legislative documents and statistical publications of other Government departments and agencies, and of trade associations are also maintained.

More than 400 different periodicals are received, indexed and routed among the staff on a weekly, monthly, quarterly or other frequency basis. Approximately 90,000 reference questions were answered during the year and more than 175,000 books are loaned for use outside the library.

The *Procurement and Services* Branch is responsible for providing services and controls in the necessary housekeeping functions as follows: procurement and maintenance of supplies, equipment, furniture, etc.; space control and building maintenance; communications including mail, telephone and telegraph and messenger.

Mandatory funding—1971

Funds totaling \$10,000 are requested in 1971 for the Office of Administration to annualize the mandatory costs of the 1970 Pay Act.

OFFICE OF THE COMPTROLLER

The Office of the Comptroller provides policy guidance and general supervision for the financial management activities of the Commission, serving as its chief technical office in these areas. It advises on and formulates the Commission's budget for presentation to the Bureau of the Budget and the Congress.

In addition to budgetary functions, this Office through the Division of Finance, is responsible for maintaining fiscal and accounting records; preparing financial statements and reports of the Commission; preparing all payrolls and related subsidiary records as to leave, retirement, withholding taxes, contributions, health and insurance deductions, etc.; audits and approves for payment all invoices, as well as travel and related items; prepares all schedules of disbursement, collections, and appropriation transfers; and distributes salary and expense checks.

Every effort will be made to carry increasing workloads related to new and expanding consumer protection activities without additional resources.

Mandatory funding—1971

Funds totaling \$3,000 are requested in 1971 for the Office of the Comptroller to annualize the mandatory costs of the 1970 Pay Act.

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Comptroller.....	4	\$71,000	4	\$72,000	-----	\$1,000
Division of Finance.....	21	162,000	21	164,000	-----	2,000
Total personal services.....	25	233,000	25	236,000	-----	3,000
Travel.....		500		500	-----	
Total.....	25	233,500	25	236,500	-----	3,000

PERSONNEL AS OF DEC. 31, 1969

	Total	Executive, administra- tive and other professional	Clerical
Professional:			
GS-14.....	1	1	-----
GS-13.....	1	1	-----
GS-12.....	1	1	-----
GS-9.....	1	1	-----
GS-7.....	3	3	-----
Fiscal and clerical.....	14	-----	14
Total.....	21	7	14

Total annual salaries, \$185,013.

OFFICE OF THE SECRETARY

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Secretary	12	\$116, 000	12	\$117, 000	-----	\$1, 000
Legal and Public Records	50	322, 500	52	337, 500	2	15, 000
Total personal services	62	438, 500	64	454, 500	2	16, 000
Travel		1, 000		1, 000		
Total	62	439, 500	64	455, 500	2	16, 000

PERSONNEL AS OF DEC. 31, 1969

	Total	Executive, administrative and other professional	Stenographic and clerical
Professional:			
GS-16	1	1	-----
GS-13	1	1	-----
GS-11	1	1	-----
GS-9	1	1	-----
Stenographic, clerical, etc	48	-----	48
Total	52	4	48

Total annual salaries, \$376,923.

The Secretary and his immediate office receive and handle mail on all phases of the Commission's work. He signs all orders and certain other official papers. He also is responsible for liaison with the Congress and Government agencies and for decisions on informal cases not submitted to the Commission.

The Assistant Secretary for Minutes takes the minutes of, and records the executive meetings of the Commission, prepares directives for the signature of the Secretary and keeps the docket of pending matters before the Commission.

DIVISION OF LEGAL AND PUBLIC RECORDS

The Division of Legal and Public Records set up new files in 1969 as a result of new programs of the Commission, such as the Fair Packaging and Labeling Act and the merger notification procedure. Procedures were also established placing matters on the public record regarding premerger clearance requests and applications for approval of divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders.

Requests for publications reached an all-time high as the general public became increasingly aware of the stepped-up activities of the FTC in the consumer protection area, through speeches by the individual Commissioners, publicity in trade, consumer-oriented magazines, and other news media. The distribution Section processed 14,807 requests for publications, of which approximately 8,500 were for copies of Regulation Z, the Truth-in-Lending pamphlet. The Correspondence Section, which sets up preliminary files on complaint letters received, processed approximately 5,580 complaints and inquiries and 611 follow-up matters in 1969.

In the first quarter of 1970 alone, increasing workloads were noted. For example, the Correspondence Section processed approximately 4,000 complaints and inquiries and over 600 follow-up letters. Many merger/divestiture matters were placed on the public record, some of which evinced widespread interest from the public. Considerable public interest was expressed also in the trade restraints hearings on automobile price advertising practices, incandescent light bulbs, unsolicited credit cards, and the merger notification program.

In 1971, increased workloads are expected for the Office of the Secretary as a result of projected workload increases related to other activities of the Commission, additional requests from the general public and others on matters of public record, and increased liaison activities with the Congress and other Government Agencies.

Increases requested—1971

The Office of the Secretary is inadequately staffed to carry out its important responsibilities in an effective manner. Considerable overtime costs have occurred during the past several years because of severe resource limitations.

Two GS-4 Clerks are requested in 1971 for the Division of Legal and Public Records at a cost of \$11,000. Also, \$5,000 is necessary for the Office to annualize the mandatory costs of the 1970 Pay Act.

OFFICE OF THE GENERAL COUNSEL

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of General Counsel.....	6	\$87,000	6	\$87,500	-----	\$500
Division of Litigation.....	28	441,000	28	446,000	-----	5,000
Division of Legal Services.....	17	251,000	17	254,500	-----	3,500
Division of Legislation-Federal-State- Cooperation.....	9	111,000	10	129,000	1	18,000
Total personal services.....	60	890,000	61	917,000	1	27,000
Travel.....	-----	10,000	-----	15,000	-----	5,000
Total.....	60	900,000	61	932,000	1	32,000

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Other Professional	Stenographic and clerical
Professional:				
GS-18.....	1	1	-----	-----
GS-16.....	1	1	-----	-----
GS-15.....	20	20	-----	-----
GS-14.....	3	3	-----	-----
GS-13.....	1	1	-----	-----
GS-12.....	2	2	-----	-----
GS-11.....	2	1	1	-----
GS-9.....	1	-----	1	-----
Stenographic, clerical, etc.....	23	-----	-----	23
Totals.....	54	29	2	23

Total annual salaries, \$857,554.

The General Counsel is the principal legal counselor and adviser to the Commission. In many respects, his responsibilities are similar to other chief law officers within the Government. He represents the agency before the courts of the United States; prepares memoranda for the agency and its operating bureaus on questions of law, policy, and procedure; evaluates federal and state legislative proposals directly affecting, or bearing upon, the agency's missions; serves as liaison officer in both adjudicatory and nonadjudicatory matters involving the agency and other Government offices; and, among other assignments, represents the agency and each employee as Tort Claims Officer in matters arising under the Federal Tort Claims Act, and as the administrator of workman's compensation claims filed pursuant to the Federal Employee's Compensation Act.

In at least two material respects, the responsibility of the Commission's General Counsel differs from that of most chief legal advisers within the Government. First, he is a lawyer to lawyers—the counselor to the Government's second largest employer of attorneys. Secondly, the mission of his Office is also affirmative in nature as opposed to being strictly a service operation. The Office is expected to propose and implement affirmative programs that will advance the overall goals of the Commission.

Reorganization of the office

With the appointment of a new General Counsel in May of 1969, the Commission requested a reevaluation of the functions and structure of the Office. On the basis of a thorough review of the past performance of the Office vis-a-vis the current demands of the Commission for legal advice and court representation, the General Counsel recommended, and the Commission ordered on June 11, 1969, a reorganization of the Office.

The essential changes in Office functions and organization directed by the Commission may be summarized as follows:

- A. Executive positions within the Office were reduced from ten to five.
- B. Administration of two statutes was transferred from the Office to operating bureaus within the Commission.

(1) The Office of Assistant General Counsel for Export Trade was abolished and immediate supervision of the Webb-Pomerene Act was assigned to the Bureau of Restraint of Trade.

(2) Supervision of Lanham (Trademark) Act complaints and actions was assigned to the Bureau of Deceptive Practices.

C. The Division of Consent Orders was abolished. The primary function of this Division had been the supervision and control of negotiations looking towards the disposition of matters by settlement orders under the procedure provided in Part 2 of the Commission's published rules. The General Counsel's study revealed that the operations of the Division had evolved to a point where they mainly duplicated work performed by the various trial staffs of the Commission. Accordingly, the Commission assigned primary supervision of consent order negotiations to the trial staffs. The Office of General Counsel retained the responsibilities of: (1) providing advice, when requested, as to whether the allegations of a complaint support a cause of action and require the order proposed; and (2) representing the agency in settlement negotiations after a matter has been litigated before the Commission.

D. The Office of Assistant General Counsel for Federal-State Cooperation was abolished and its duties were assumed by the Division of Legislation—Federal-State Cooperation.

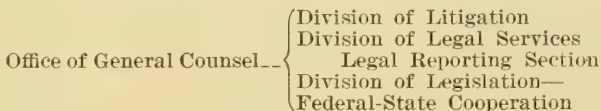
E. A new office unit, the Division of Legal Services, was established.

F. The Office of Assistant General Counsel for Voluntary Compliance was abolished and its duties were assigned to the Division of Legal Services.

G. The job descriptions of attorneys assigned to the Office were redrawn to accord with the Commission's beliefs that such attorneys should be generalists who could be readily redeployed within the Office to: (1) meet sharp variances in Commission demands for the several services extended by the Office; and (2) effectively coordinate affirmative Office projects.

THE POST-REORGANIZATION STRUCTURE OF THE OFFICE OF GENERAL COUNSEL

The organizational structure of the Office now comports with the following diagram:



DIVISION OF LITIGATION

The function of this Division is to represent the Commission in the federal courts.

Any party against which the Commission has issued an order to cease and desist may petition a federal court of appeals for review. The Commission may apply, through the Department of Justice, for federal district court orders enforcing subpoenas or Commission orders requiring special reports. Disobedience of a court's decree enforcing a Commission order or subpoena may be punished as a contempt. Collateral suits challenging the Commission's jurisdiction or procedure may be brought under certain circumstances in the federal district courts. The Division handles these and similar matters both directly and in participation with the Office of the Solicitor General in Supreme Court matters, and with offices of the various United States attorneys in certain other cases affecting the commission. The Division also has the responsibility for seeking injunctions *pendente lite* in certain Commission cases before the courts of appeal and district court restraining orders against dissemination of false food, or drug or cosmetic advertising in applicable cases.

General case workload

The workload of the Division is variable; and since the vast majority of it arises from actions taken by the Commission or parties being investigated or proceeded against, its timing and volume is governed by factors over which the

Division has little or no control. With respect to court litigation, during 1969 the Division handled 94 cases, six more than the previous year. It completed litigation in 45 cases, as compared to a total of 27 in 1968. Eleven of the completed proceedings involved deceptive business practices, 26 were restraint of trade cases, and 8 were extraordinary matters such as suits against the Commission.

Workload expected in 1971

A. From Current Cases:

At the beginning of 1970, the Division's assignments included 55 cases open for further action or pending final disposition in the courts. A number of these cases involve appeals from Commission cease-and-desist orders which, because of a combination of such factors as voluminous records, important, complex, and vigorously disputed legal issues, masses of economic data, and great financial consequences to the corporations involved, are considered to be major cases. Of this category, the following are examples of matters believed likely to require substantial efforts carrying over into 1971:

1. *United States Steel Corporation*—Respondent, one of the country's largest cement producers, acquired the second largest ready-mix concrete producers in the New York Metropolitan Area. It is appealing a Commission decision that found the acquisition to be unlawful and which requires divestiture. The case involves the relatively unexplored issue of the "failing company defense."

2. *L. G. Balfour Company et al.*—This matter involves monopolization and other unfair acts and practices in the national college fraternity insignia products market. The record consists of approximately 6,000 pages of testimony and 800 exhibits.

3. *P. F. Collier & Son Corporation*—The Commission's decision found that respondent, a national seller of encyclopedias, utilized a number of deceptive practices in the sale of its products. On appeal, respondent has conceded that it engaged in deception but has raised several complex issues concerning Commission procedures and the liability of a parent corporation for the actions of a subsidiary. The record in this matter consists of approximately 4,500 pages of testimony and some 600 documentary exhibits.

B. From Projected Commission Activity:

At the beginning of the fiscal year there were approximately 38 complaints in various stages of litigation within the Commission. Additionally, as indicated in their last budget presentations, the Commission's operating bureaus anticipate increases in adjudicatory proceedings in 1970. While there can be no certainty as to which cases will ultimately be decided adversely to the respondents involved and thereafter appealed to the courts, on the basis of past experience it is estimated that three-fourths of the matters litigated before hearing examiners are eventually causes for court presentations by the General Counsel.

In addition to appellate matters, it is expected that the volume of district court litigation will increase substantially in 1971. The Commission may expect to be sued more frequently. The Fair Packaging and Labeling Act and the Consumer Credit Protection Act should, because of their newness and vast coverage, occasion suits for declaratory and injunctive relief. (In the first two months of 1970, five petitions for declaratory relief have been filed against the agency.)

For several reasons, the number of subpoena enforcement proceedings should be expected to multiply. First of all, the *Guignon* decision of the 8th Circuit Court of Appeals has provided respondents with a new delaying tactic. Reversing a half century of administrative and judicial practice, the *Guignon* opinion held that the Commission lacks the authority to enforce its own subpoenas and must proceed through the Office of the Attorney General. Realizing that the agency must process subpoena papers through the Department of Justice which, after review, assigns the matters to the various U.S. Attorneys, respondents appear to be buying time by opposing compulsory process. From early 1967 until the late fall of 1968, the only subpoena enforcement proceeding handled by the Office involved *Guignon*. Since the *Guignon* decision became final, the Office has been called upon to process nine matters involving a total of twenty-three subpoenas.

The other reasons for anticipating a rise in subpoena enforcement actions are: the number of industrywide investigations proposed by the operating bureaus; and the fact that there are several multi-respondent complaints presently either approved by the Commission or in preparation by the staff. In the latter respect, Office experience indicates that a multi-respondent action usually generates subpoena problems and injunction suits against the Commission.

DIVISION OF LEGAL SERVICES

Over the past several years, there has been a steadily increasing demand for the preparation of legal memoranda on evidentiary, jurisdictional and procedural problems; the drafting and redrafting of special Commission reports and other public statements, and the examination of requests by private counsel and the public for Commission information, documents and files. The increase in such matters is attributed to, among other things, the several new statutes administered by the Commission; a number of changes in the Commission's rules and procedures (particularly those procedures wherein agency action is publically proposed for the purpose of obtaining the views of all affected individuals or companies prior to a final determination by the Commission); the Freedom of Information Act; and the Commission's increasing reliance on public hearings on national or industrywide practices.

The study that led to reorganization of the Office concluded that the aforementioned assignments should be handled by the General Counsel through a centralized unit within his Office. Accordingly, the Division of Legal Services was established for the purpose of handling day-to-day legal services and special assignments for the Commission and its operating bureaus.

Among the routine obligations of the Division are the following:

1. Analysis of Recent Decisions

Federal court decisions and federal agency determinations are scrutinized for possible effects upon Commission policies. When a decision is deemed significantly relevant to the Commission's missions or procedures, a preliminary memorandum of law is immediately forwarded to the Commission. If the Commission concludes that the matter requires further study, a comprehensive brief is supplied.

2. Review of requests for investigational resolutions

Prior to the issuance of investigational subpoenas and Special Report Orders authorized by the Federal Trade Commission Act, the agency usually adopts an investigational resolution. Upon either staff or Commission demand, the Division reviews such resolutions. The purpose behind such review is the anticipation and prevention of court actions that might delay Commission efforts.

3. Assistance to other Commission offices

For the purpose of anticipating and preventing court actions which may delay Commission efforts, the Division maintains continuous liaison with other Commission bureaus, divisions and other units and provides *ad hoc* advice and assistance on questions of law, policy and procedure.

4. Handling of nonadjudicatory requests for Commission documents and information

The Division reviews all such requests and immediately advises the Commission as to their disposition. Additionally, it maintains a continuing survey of other agency determinations and court rulings on requests made pursuant to the Freedom of Information Act.

5. Proposed complaints and orders; and settlement negotiations

The Division performs the aforementioned duties retained by the Office after abolishment of the Division of Consent Orders.

6. Miscellaneous administrative duties

The Division handles all correspondence and requests pertaining to voluntary agreements under the Defense Production Act of 1950 and small business pools authorized or proposed by the Small Business Administration Administrator. It also processes tort claims for the Commission and provides advice to Commission employees on matters covered by the Federal Employee's Compensation Act.

Expected workload, 1971

Demands for routine legal services depend on the operations of the Commission, actions by the public or parties which are subjects of Commission investigations or other proceedings, and court and federal agency rulings. In view of the great increase in projects of the operating bureaus, and the implementation of the new statutes, the Division expects a greater workload in 1971 with respect to the provision of day-to-day legal services.

Previously, special legal assignments had been handled by the General Counsel and other arms of the Commission. In calendar year 1968, the Office handled a total of 27 special matters. Within the first six weeks after reorganization of the Office, the Division received 38 special assignments.

DIVISION OF LEGISLATION—FEDERAL-STATE COOPERATION

This Division is the liaison between the Commission and Congress with reference to legislative matters. It prepares advice and comments for the Commission on enrolled bills, bills pending in Congress, and draft bills submitted to the Bureau of the Budget. It drafts, or assists in the drafting of, Commission legislative proposals which, after clearance by the Bureau of the Budget, are submitted to Congress. It prepares for inclusion in the agency's Annual Report, a list of legislation which the Commission believes is required to increase the effectiveness of its operations. Additionally, it provides assistance to the Chairman, the individual Commissioners, and staff officials, when they are summoned to testify before Congressional committees. If formal statements are required in connection with such appearances, the Division usually prepares a draft of such statement for approval of the summoned witness.

Division personnel represent the Commission at meetings called by the Bureau of the Budget, Executive Departments of the Government, individual members of Congress, and members of the staffs of Congressional committees to discuss proposed legislation affecting the operations of the Commission.

A major part of the Division's efforts are devoted to implementing the Commission's program of Federal-State Cooperation. This program encourages the states to enact laws similar to the Federal Trade Commission Act. It serves and facilitates cooperative effort with state and local agencies and officials for the purpose of increasing the protection of the consumer from unfair and deceptive practices. If such practices can be stopped at the state or local level, before they grow into problems of interstate proportions, the need for federal action will be minimized and the Commission can, thus, devote more of its resources to dealing quickly and effectively with problems of regional and national significance.

The Division seeks to implement the Commission's policy in this area by (1) supplying current information to state and local officials; (2) referring complaints to local agencies and extending enforcement assistance when requested; and (3) assisting in the implementation and, when requested, drafting of legislation directed against unfair and deceptive practices.

General workload

With respect to proposed legislation, the Division, in 1969, furnished advice and comment to the Commission on 39 bills pending in the Congress, 8 draft bills submitted to the Bureau of the Budget by other federal agencies, and 3 enrolled bills pending Presidential signature or veto. Frequent conferences with representatives of executive agencies, members of Congress, and staff personnel of Congressional committees were held to assist in the preparation of legislation and presentation of views of the Commission and the individual Commissioners. Members of the Commission appeared before Congressional committees to give oral testimony on 7 proposals for legislation during the year.

The increasing interest of the states in the Commission's program of encouraging Federal-State cooperation was evident during the year as the states directed to the Commission 477 requests for advice and assistance regarding legislative or enforcement matters involving prevention of deceptive and unfair trade practices. This was an increase of 70 percent over the 281 similar requests received in 1968. The increase is indicative of the general level of added emphasis on consumer protection in the states.

The complaints regarding interstate practices received from state officials numbered 575, an increase of 33 percent over the previous year. The intrastate matters referred by the Commission to state officials for action numbered 161, an increase of 80 percent over the number referred last year.

The States of Colorado, North Carolina, Pennsylvania, and South Dakota enacted consumer protection laws during the year.

State offices of consumer protection and Attorneys General were, and are being, furnished on a continuing basis with a variety of informational materials concerning enforcement actions by the Commission and by state governments against deceptive and unfair trade practices. This serves as a training medium and method of correlating such activities throughout the country, as well as an encouragement to states which have not yet established such programs.

Workload expected in 1971

In ordering reorganization of the Office of General Counsel, the Commission determined that a more thorough and affirmative approach to legislative drafting and counseling was in order. Accordingly, the Division will be providing more

advance background counseling than in the past, and will, through cooperation with the agency's operating bureaus, continually draft, and support with statistics and case histories, proposals for advancing the Commission's missions and closing loopholes in the laws it administers.

In 1971, the Division expects a substantial increase in the number of bills pertaining to consumer protection laws, mergers and other areas of Commission interest. There is every indication to believe that the consumer protection movement will accelerate during the coming years. Moreover, two recent studies, the *White House Task Force Report on Antitrust Policy* (1968) and the *Report of President Nixon's Task Force on Productivity and Competition* (1969), have called for reexaminations of the Robinson-Patman Act, one of the Commission's principal statutes.

The major affirmative project of the Division for 1971 will be the acceleration of the Commission's program of Federal-State cooperation. Among the Division's goals in this program are the following:

1. Increasing the outward referrals of consumer complaints involving companies with minimal transactions in interstate channels. For years the Commission has been criticized for pursuing such matters to the alleged neglect of its nationwide obligations. Until recently, however, the American consumer could only turn to the Commission with his complaints. Now, however, some 26 states have enacted consumer protection laws, and experience has shown that these states will act upon matters referred by the Commission, providing, in most instances, that the Commission is willing to proffer technical information and advice that will enhance the probability of successful prosecutions.

Through more effort, principally directed at analyzing matters in their preliminary stages, the Division intends to more than triple the number of referrals made in calendar year 1968. In that year, a total of 121 matters were transmitted to state agencies.

2. Aiming at obtaining enactment of, or improvement of, general consumer protection laws in ten additional states where such legislative proposals are in the embryonic stage, or where legislation is particularly needed because of low income concentrations: and

3. Expanding liaison with state and local officials. Until now, the Office's liaison effort has focused primarily upon the National Association of Attorneys General. While the Office must continue to "lobby" or assist the members of this Association, it is believed that Commission liaison with the various Attorneys General is now such that primary attention should be paid to other groups of state officials, such as the U.S. Conference of Mayors, the National Association of Counties, and the National District Attorneys Association. For effectuation of the Commission's overall goals regarding Federal-State cooperation, municipal and county ordinances might well be more important than state statutes.

The greater goal of such efforts would be the enactment of effective legislation by every state. This will not be achieved by the end of 1971; nor, for that matter, can one guarantee enactment of any consumer legislation. However, increased effort in this area would advance legislation, or at least the interest of state officials in consumer legislation within the states. Contacts, offers of assistance, and assistance would be repeatedly extended to these states.

In addition to keeping drafts of model general consumer laws current with developments in the states, the Office intends to prepare model laws to complement or displace Commission jurisdiction in the consumer credit and fair packaging areas. At least preliminary attention to the drafting and promotion of model state laws complementing Commission jurisdiction in regard to textiles, furs and flammable fabrics will be made in 1971.

An additional GS-14 attorney position and \$17,000 are requested for 1971 to accelerate the Commission's efforts for fighting victimization of the public through coordination of state and local efforts with those of the Commission. In addition \$5,000 is requested for travel related to this essential activity.

MAJOR OFFICE PROJECT FOR 1971

While primarily a service organization, the Office of General Counsel is also required to propose and implement affirmative projects furthering the overall goals of the Commission. As its major project in this regard for 1971, the Office intends to commence a comprehensive program directed at more effectively utilizing and expanding Commission authority to mitigate injury to consumers and competition resulting from deceptive practices and restraints of trade.

It is well settled that the Commission is empowered to proceed against anti-competitive practices in their incipency. However, experience has demonstrated that while challenge may be made in the incipient stage of a practice potentially harmful to the consumer and competition, arrest of the practice is frequently achieved only after much injury has been accomplished.

The basic approach to defense against charges such as attempts to monopolize, predatory pricing practices, and false advertising and marketing methods is greatly influenced by the profitability of the practice involved. To some extent, this factor is weighed against the possible ramifications of private treble damage actions encouraged by trial records developed by the Government. Empirical knowledge has confirmed, *ad nauseum*, an increasing preference for prehearing, adjudicatory, and appellate tactics and strategy that permit continuance of challenged practices which are eventually found to be unlawful and proscribed—but proscribed only after they have dealt severe injury to the consumer and competition. For example, as a result of nearly a decade of endeavor by the Commission, and several years of followup effort by the Department of Justice on the basis of the Commission's work, it was proven that the basic patent and the "wonder drug," the antibiotic, tetracycline, has been obtained through fraud, and that its price for many years had been fixed through unlawful conspiracy. The results of the Government's actions to date have been a \$120 million settlement of public claims and a proscriptive order that is presently under appeal. However, the results pale in insignificance when one considers how many American consumers may have suffered pale in insignificance when one considers how many American consumers may have suffered extended, debilitating sicknesses or died because of inability to meet the high, collusively fixed price for the antibiotic, and because of the Government's inability to mitigate the effects of this abhorrent conspiracy.

The Office's effort toward implementing the Commission's determination to reduce the adverse impact of trade restraints and unfair and deceptive practices will involve four areas of the Office's work: legal research, interbureau liaison, litigation and legislation. The effort will concurrently follow two avenues; each with short term and long term objectives.

One avenue of approach will concern injunctions. Its lesser goal will be more effective employment of the Commission's present, limited injunctive powers. Its greater or ultimate goal is the expansion, through broader court decisions and legislation, of the Commission's authority to enjoin unlawful practices.

The second avenue will concern expedition of Commission proceeding before hearing examiners and the courts. Its short-range objective will be a definitive analysis of the reasons for present delay in such matters and recommendations for the alleviation, if not the elimination, of such delay. The long-range goal would be the implementation, and revision as experience dictated, of the proposed procedures.

The project will proceed from the following basic presumptions:

(a) if imaginative theory offers a reasonable prospect of overturning an old case or fitting a matter within a narrow court holding, injunctive litigation will be instituted;

(b) if reasonable doubts concerning Commission injunctive authority are encountered, they will be resolved through litigation; and

(c) if changes in Commission policies or procedures offer the prospect of mitigating public injury through increased use of injunctive actions and expedition of adjudication, they will be tried.

Mandatory funding—1971

Funds totaling \$10,000 are requested in 1971 for the Office of General Counsel to annualize the costs of the 1970 Pay Act.

OFFICE OF HEARING EXAMINERS

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Personal services	24	\$448, 000	24	\$452, 000	.....	\$4, 000
Travel .....	.....	11, 000	.....	11, 000	.....	.....
Total	24	459, 000	24	463, 000	.....	4, 000

OFFICE OF HEARING EXAMINERS

Hearing examiners have complete charge of cases from the time the Commission issues its complaint until the initial decision is rendered. The responsibilities of the examiners are many and entail time-consuming efforts in the conduct of pretrial conferences and formal hearings. In all instances the examiner acts as the official hearing officer and rules on offers of proof, admissibility of evidence and all procedural and other interlocutory motions.

Since the Commission revised its Rules of Practice which resulted in acceleration of trials, the number of cases assigned per hearing examiner has been reduced. This revision has enabled the hearing officer to conduct consecutive hearings and continue to final disposition of matters more expeditiously.

The staff has been reduced by ten hearing examiners since 1965 and no replacements are contemplated during fiscal 1970.

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Stenographic and clerical
Professional:			
GS-17	1	1	-----
GS-16	10	10	-----
Stenographic, clerical, etc.	10	-----	10
Total	21	11	10
Total annual salaries	\$408,524		

BUREAU OF RESTRAINT OF TRADE

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director	46	\$403,000	48	\$424,000	2	\$21,000
Division of Mergers	35	586,000	37	622,000	2	36,000
Division of General Trade Restraints	34	607,000	34	614,000	-----	7,000
Division of Discriminatory Practices	44	699,000	44	707,000	-----	8,000
Division of Compliance	33	413,000	33	418,000	-----	5,000
Division of Accounting	13	223,000	13	224,000	-----	1,000
Total personal services	205	2,931,000	209	3,009,000	4	78,000
Travel	-----	90,000	-----	96,000	-----	6,000
Other expenses	-----	20,000	-----	200,000	-----	-----
Total	205	3,041,000	209	3,125,000	4	84,000

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Accountants	Stenographic and clerical
Professional:				
GS-17	1	1	-----	-----
GS-16	5	5	-----	-----
GS-15	34	33	1	-----
GS-14	31	26	5	-----
GS-13	16	13	3	-----
GS-12	23	22	1	-----
GS-11	12	12	-----	-----
GS-9	5	2	-----	-----
Stenographic, clerical, etc.	58	-----	-----	58
Total	182	114	10	58
Total annual salaries	\$2,729,536			

¹ Plus 2 WAE consultants.

The Bureau of Restraint of Trade is responsible for administration and enforcement of the restraint of trade aspects of Section 5 of the FTC Act and Sections 2, 3, 7 and 8 of the Clayton Act, as amended.

The reach of Section 5 of the Commission's organic act is broad. Section 5 not only encompasses conduct prohibited by the Sherman Act, but was designedly much more broadly drafted, enabling the Commission additionally to combat in their incipency trade practices which exhibit a strong potential for stifling competition. In large measure, definition of "unfair methods of competition" resides with the Commission itself.

It was intended by Congress that the Commission, in dealing with unfair methods of competition, discrimination, and illegal mergers or acquisitions, should broaden the Government's enforcement base in providing *cumulative* remedies against activity detrimental to competition. The interlacing of enforcement responsibilities between the Commission and the Department of Justice was thus specifically intended to augment existing enforcement through the operation of a separate body specially competent by reason of experience, information and careful study of business and economic conditions to address itself to the special problems of industry and their remedy. The different facilities, procedures and sanctions provided in this dual responsibility in the vital area of antitrust, find full application in the necessity for containment of the pervasive, complex and varied problems of an economy grounded on competitive enterprise. The range of practices under the broader jurisdiction of this Agency enlarges with the advent of each new method of competition emerging.

Increasing enforcement responsibility also attends the continued rapid expansion of the economy. In order to best husband resources, the Commission heretofore initiated a course of increasing reliance on nonadjudicatory procedures. Further clarification of the laws' requirements has been provided through publication of various compliance guidelines and in rendering advisory opinions concerning proposed courses of action having specific as well as general application. Promulgation of industrywide enforcement policy statements, a further preventive measure, has proved effective with respect to merger activity in specific industries. Greater emphasis upon use of consent settlement and voluntary discontinuance procedures was additionally undertaken in order to speed up and broaden enforcement coverage. Procedures seeking to minimize operational delay and time consumed in litigative processes were also instituted. Enforcement needs, however, continue to outpace such measures and further planning and expediting measures are currently under study.

The resource consuming and protracted processes of case-by-case adjudication cannot, in any realistic enforcement program, be avoided. In order to preserve enforcement integrity (in the instance of enforcement-policy declarations, for example) enforcement policy, when challenged must be supported by prompt enforcement action. Where adjudication is necessary to preserve or establish policy, issues of fact or law frequently cannot be resolved except by litigation. When it becomes necessary to test the breadth of Commission orders, necessary to reach anticompetitive practices involving first impression issues or necessary to preserve enforcement continuity, resources must be rendered available and so committed if effective enforcement is to be maintained.

Resources must additionally be regularly committed to develop information bearing upon and defining business practices of varying current dimensions at different marketing levels and in a spectrum of industries, together with indicated economic and competitive circumstances and effects. Substantially all mergers, acquisitions and joint ventures of significance are publicly reported shortly after and sometimes before consummation. These must be preliminarily examined or screened and selections made for further investigative development and analysis. The Commission's recently inaugurated premerger notification program looks to before-the-fact disclosure relative to major mergers and requires even more immediate assignments of manpower. The further responsibility to detect as well as evaluate other forms of anticompetitive practices adds to the work processes relative to investigations under Section 5 of the FTC Act and Sections 2 or 3 of the Clayton Act.

The rapidly increasing acceleration of the merger movement within the economy critically increases the need for additional attorneys in that statutory area. This does not mean, however, that the rate or significance of trade law violations otherwise are to any extent abating. The problem of increasing industry concentration is not confined to concentration resulting from mergers or other forms of

physical integration. Industry concentration by combination or conspiracy and adverse changes in the number and size distribution of competing companies in particular markets as a result of discrimination or other unfair methods of competition also constitute critical aspects of the problem.

The benefits of a wide choice among suppliers, prices leveled downward by competition and maximization of service and product quality, which number among the benefits which attend effective competition, remain the presumed right of purchasers at all marketing levels culminating with the level represented by the consuming public. The Commission's enforcement responsibilities, accordingly, apply to discriminations or other unfair practices by which these benefits may be unfairly or discriminatorily denied as well as to practices directly involving intensification of market concentration, whereby such benefits may be foreclosed. The extent of *non-competition* in already highly concentrated industries, in addition, demands substantial current study and attention.

Balancing enforcement value against administrative cost in these various areas is most difficult. Preventive measures are hard to equate with corrective measures. Formulas for quantification of the high burden of cost which marks the absence of competition, as reflected in high noncompetitive price levels in certain oligopolistic industries, or prices raised through conspiracy, cannot be applied to measure the merit of policing actions which serve to maintain a status quo of effective competition. The Bureau, however, continually strives to effect a satisfactory enforcement balance as to each of its assigned statutory areas of responsibility.

BUREAU WORKLOAD SUMMARY

	1969	Estimated 1970	Estimated 1971
Applications for complaint: ¹			
On hand beginning of year.....	* 367	436	511
Received or reopened.....	1,775	1,800	1,825
Disposed of.....	1,706	1,725	1,825
Pending end of year.....	436	511	511
Formal investigations:			
Pending beginning of year.....	* 752	644	544
Initiated or reopened.....	181	180	215
Completed or closed.....	289	280	300
Pending end of year.....	644	544	459
Complaints issued:			
Pending beginning of year.....	24	20	21
Approved for negotiation or reopened.....	24	35	35
Dispositions:			
Consent settled.....	19	20	24
Litigated.....	9	14	15
Pending end of year.....	20	21	17
Litigated cases:			
Pending beginning of year.....	20	20	34
Complaints issued or reopened.....	9	24	23
Docketed orders disposed of.....	9	10	15
Pending end of year.....	20	34	42
Voluntary compliance.....	45	45	55

¹ Division totals do not necessarily total Bureau summary because of matters handled directly by the Office of the Director. Applications for complaint include basic source, i.e., letters of complaint, field reports, merger announcements, and other sources.

* Adjusted figure.

² Includes 2 export trade matters transferred to General Trade Restraints June 10, 1969, and 28 investigations, compliance.

Bureau program—1970 and 1971

The work programs of each of the Bureau's enforcement divisions, reported in detail below, are geared to the particularized expertise, experience and enforcement criteria applicable to each division's statutory province.

Where practices fall within more than one statutory area, or when one division as a result of prior involvement has developed special competence with respect to the economic and marketing conditions in a particular industry, appropriate assignment of primary enforcement responsibility is determined by the Bureau, with provision for such interdivisional correlation of activity as may be necessary. The operations of the five divisions of the Bureau are substantially interdependent and complementary.

The Division of Accounting operates essentially as a service division. The work of the Division of Compliance is also closely allied with work projects

of the three enforcement divisions. Compliance assumes responsibility for all final restraint of trade orders including prescriptive orders and those requiring divestiture, as well as orders to cease and desist, to assure compliance with the requirements of such orders and, as may prove necessary, to initiate enforcement or civil penalty proceedings in the event of serious order violation.

In the merger area, vigorous enforcement by the Commission and by the Antitrust Division of Justice relative to vertical and horizontal mergers, has already significantly curtailed threatening concentration trends in a number of industries. The issuance of enforcement policy guidelines has also operated to brake particular kinds of mergers in specifically addressed industries. Continued active enforcement however, is essential.

The current upsurge of conglomerate mergers additionally requires careful attention and analysis. Complex issues are presented such as the extent of justified corporate diversification, the extent to which economies of scale can be realized, synergism, the inducement of tax benefits, the role of management inefficiency, the particular effects of conglomerate acquisition of major industry factors in markets already highly concentrated and the significance of continued increases in the overall aggregation of economic power. Certain conglomerate mergers may operate to affect a heightening of barriers to new entry. Such mergers may otherwise tend to weaken competition by eliminating significant potential competitors or by providing opportunities for reciprocal dealing. Particular attention to these matters will be provided in the ensuing fiscal period and particularly as anticompetitive effects may be discerned in consumer goods industries where market concentration continues to intensify.

Problems of noncompetition in particular highly concentrated industries are similarly under study. The existence of discretionary market power in the hands of a few industry leaders sufficient to control and administer prices and extent of production is a matter of serious antitrust concern. Additionally, product differentiation, and other means by which barriers are raised against the entry of new competition, are being examined, looking to the possibility of corrective action under existing statutes. What reallocation of resources within the Division of General Trade Restraints may be necessary upon completion of these studies is not yet determinable. Further definition of the law, particularly the reaches of Section 5 of the FTC Act, however, is anticipated in the Bureau's planning.

Close attention will continue to be given the practice of systematic reciprocal dealing, wherever such practice is found prevalent and competitively pernicious. Such business arrangements may fall within projects classified by industry but also frequently cut across industry classifications.

The basic consumer industries merit priority consideration and anticompetitive practices in such industries will receive primary attention during fiscal 1971 in all statutory areas.

"Power buyer" induced discriminations in the form of special prices, allowances or promotional services, particularly to major retail food chains, will provide a principal base for Robinson-Patman enforcement.

The primary areas of enforcement action projected to fiscal 1971, accordingly, fall within the following areas. *Food and Grocery Products*, involving Section 7 and Section 2 Clayton Act application and Section 5 of the FTC Act. Associated matters, with various sub-industry breakdowns, will remain active in each enforcement division as well as in Compliance. With increasing market concentration at all levels, high price levels, discrimination and increasing product differentiation, this most basic industry must receive first priority attention. *Automotive Parts*, involving Section 7 and Section 2 of the Clayton Act and Section 5 of the FTC Act. This complex industry not only manifests substantial consumer interest but is competitively significant in the various markets representing the thousands of independent parts distributors and replacement and repair establishments that it supports. Each of the enforcement divisions is substantially committed at this time and will remain so throughout fiscal 1971. *Apparel*, involving matters under Sections 7 and 2 of the Clayton Act and Section 5 of the FTC Act. Mergers and containment practices on the part of manufacturers of synthetic and natural fibers present the most significant problems to be met in 1971. *Compliance with TBA Orders*, under Section 5 of the FTC Act. The method and extent of compliance with the orders of the Commission governing the distribution, through petroleum company outlets, of TBA products (tires, batteries, and accessories) is a matter of particularly far reaching effects on competition in the automotive service and supply industries and will require substantial attention through 1971. *Special Studies and Activities*, including the Section 7 conglomerate merger study, the study of high concentration industries, the pre-merger notification program, and

implementation of outstanding enforcement policy statements. These will be particularly active in both 1970 and 1971. *Lumber and Building Supplies*, pursuant to Section 7 of the Clayton Act. The recent rash of acquisitions among manufacturers of products as critical as construction materials, creates a threat to the public interest that requires particular attention in the ensuing year. *Hearing Aid Industry*, involving Section 5 of the FTC Act. The Bureau regards this matter as meriting special emphasis because of its impact on a consumer group least able to pay, providing, by example, the concern of the Commission with consumer oriented restraint of trade matters. *Cement Industry*, pursuant to Section 7 of the Clayton Act. This is an area in which the Commission is already deeply committed. At least through 1971 its priority must remain high.

Unpredictable changes in circumstance during this year may modify these priorities, of course, and bring to the forefront other of the major projects being developed by the enforcement divisions, discussed in detail below.

OFFICE OF THE DIRECTOR

The Office of the Director coordinates and supervises the work of the Bureau's five divisions. In addition to the immediate staff of the Director, a central stenographic pool and records section is maintained which serves all operating divisions.

Through this Office, liaison is maintained with the Antitrust Division of the Department of Justice and with other governmental departments. Planning and programing activities of the Bureau are also centered here. The Director's staff also includes a special Legal Adviser on food industry matters who serves all organizations of the Commission.

An additional \$16,000 is requested for one GS-11 management analyst to assist Bureau planning activities and for one GS-3 coding clerk to aid in processing and coding of practices, commodities and geographical areas revealed in the growing number of letters of complaint.

DIVISION OF MERGERS

The Division of Mergers is responsible for the investigation, litigation, and rule-making proceedings relating to corporate mergers and acquisitions, and for joint ventures and interlocking directorates, under Sections 7 and 8 of the Clayton Act and under Section 5 of the FTC Act where applicable.

Workload statistics	1969	Estimated 1970	Estimated 1971
Preliminary investigations:			
Mergers examined.....	2,850	3,000	3,050
Joint ventures examined.....	185	190	195
Applications for complaint:			
On hand beginning of year.....	26	29	29
Received.....	157	160	160
Disposed of.....	154	160	170
Pending end of year.....	29	29	19
Formal investigations:			
Pending beginning of year.....	153	135	125
Initiated or reopened.....	47	50	75
Completed or closed.....	65	60	70
Pending end of year.....	135	125	130
Complaints issued:			
Pending beginning of year.....	7	8	8
Approved for negotiation or reopened.....	14	15	17
Dispositions:			
Consent.....	6	5	10
Litigated.....	7	10	7
Pending end of year.....	8	8	8
Litigated cases:			
Pending beginning of year.....	11	12	16
Complaints issued or reopened.....	8	10	12
Docketed orders issued.....	7	6	8
Pending end of year.....	12	16	20

Workload 1969-1970

The Division of Mergers workload continues to expand significantly. During 1969, the workload of formal investigations was 200, comprised of 47 new investigations and 153 pending from the prior year; however, manpower shortage necessitated a reduction of 40 percent in new matters to be investigated (75 estimated

vs. 47 initiated), and an 8 percent increase in the number of investigations closed (60 estimated vs. 65 actually completed), in order that the overall workload could be reduced commensurate with professional manpower available during the year. At the same time, due to the tremendous increase in merger activity, our preliminary examination of mergers jumped from the estimate of 2,100 to 2,850, while joint ventures dropped from an estimated 195 to 185. These statistics indicate an inability to add further to the workload, while at the same time accelerating disposition of matters heretofore carried as a part of the normal yearly docket. The staff handled 19 docketed cases in 1969, a 36 percent increase over 1968.

The legal staff of this Division has not increased since 1963. The allocation has remained at 32 attorneys, but the number actually available averaged less than 29 during 1969 because of employment limitations. Unlike the other enforcement units of the Commission, this Division does not utilize the field offices to conduct investigations. Accordingly, its staff must handle both the investigation and the formal litigation of all merger cases, plus any Section 8 matters involving interlocking directorates, and other attendant responsibilities.

The Division's major enforcement effort continues to focus upon conglomerate transactions, which usually require a disproportionate amount of investigational time and analysis because of the diverse product lines involved. The Division works closely with the Bureau of Economics with respect to individual cases, and also in the conduct of industrywide studies as directed by the Commission. A joint effort is also made to give preliminary study to reported mergers and acquisitions, and a flexible selection procedure is followed in choosing those transactions which will be studied in depth. Major criteria used in determining which mergers will be investigated include the following:

- (1) Importance of the industry to the national economy;
- (2) Industry structure, degree of concentration present (whether increasing or decreasing) and conditions of entry into the industry;
- (3) Competitive significance of the merger with the industry involved;
- (4) Concern expressed by members of the industry as to probable competitive effects;
- (5) Remedy to be anticipated;
- (6) Possibility of developing new and novel theories of law with respect to mergers, and
- (7) The economic and legal resources available for challenging the transaction.

Insofar as it is possible, the Division of Mergers has endeavored to give priority in its enforcement activities to the basic areas of food, clothing and shelter, and to implement overall policy as it is expressed at the Commission level.

Merger division program—1970 and 1971

A major concern of antitrust enforcement and particularly the Division of Mergers for 1971 and beyond, will be that of conglomerate acquisitions and mergers. The first phase of an in-depth study of the conglomerate merger movement has been completed and the Commission published its report. The Commission will now undertake the second phase of its study in this area. This will involve additional and continuing work for the Division, over and above its regular responsibilities for challenging illegal mergers as they occur from day to day.

Four industries are now operating under Commission "Enforcement Policy" pronouncements:

- (1) Product extension mergers in grocery products manufacturing;
- (2) Food distribution industry;
- (3) Vertical mergers in the cement industry; and
- (4) Prospective and future mergers in the textile mill products industry (effective November 22, 1969).

These policy statements include guidelines for future mergers in particular industries. They are the means by which the Commission attempts to obtain voluntary compliance, on an industrywide basis, with Section 7 of the Clayton Act in specific industries. To date, and since the issuance of the first two such statements for the cement and food distribution industries in 1967, this approach has been highly successful to slowing down and stopping developing merger trends in these four industries. Accordingly, issuance of similar pronouncements for other industries are expected.

The continuing nature of these industrywide programs create common problems with respect to workload and manpower requirements for the Division. With respect to food and cement, Section 6(b) reports requiring advance notice of pro-

posed mergers are regularly received and must be promptly reviewed for probable statutory violations. The publication of new policy statements, such as for textile mill products during 1969, compounds manpower requirements for these continuing programs and often adds to the litigation docket by revealing mergers which might otherwise remain unreported, and hence unchallenged.

A new and separate but important demand upon available manpower is the recent pronouncement relating to the "pre-merger notification program", issued May 6, 1969. Under this program, which was instituted under Section 6 of the FTC Act, advance notification and special reports are required from large corporations entering into contracts, agreements or understandings to merge or acquire the assets of another corporation within a specified asset category. Again, over and above the administrative problem of analyzing and screening these reports there will be an added amount of investigative and litigative work to be done to keep the program viable by challenging those transactions which appear to violate the statute. All of these policies and programs have a limiting and restricting effect upon the normal case-by-case approach generally relied on by this Division.

A current evaluation of the Division's enforcement program indicates ten industry categories which are considered the priority group, and about the same number which make up a backlog of non-priority work to be done as resources become available. These listings are subject to change, and are shifted from priority to non-priority as the situation demands.

Priority projects

The *grocery products* industry was the subject of a Commission enforcement policy statement and has remained active. Eleven investigations are pending, six were opened during 1969, and four complaints are anticipated during the next few months. *Automotive parts* is a field which will require considerable manpower due to vigorous opposition which is developing from three complaints which have issued. This is an area of considerable public interest and one in which successful litigation could have a salutary effect upon future merger trends. The *Cement* industry is also under an enforcement policy statement. In addition, there has been and there will continue to be active litigation for several years. Four new investigations were opened in 1969 and additional complaints are expected to issue. The industry is in a continuing state of flux due to recent Commission action, with eight additional matters under investigation and one decided case being considered for reopening and modification of the order. The industry uses a major portion of the Division's available manpower.

The demands upon resources available to take care of the four enforcement policy programs mentioned above, and including work incident to the pre-merger notification program, have been grouped under a *Special Projects* heading, which is expected to require the equivalent of several man-years of professional time during the fiscal period. Another project grouping called *Commercial and Industrial Equipment, Machines and Supplies*, acts as a repository for approximately fourteen separate investigations which are not directly related to a common industry, but which involve heavy equipment manufacturers in general and the supplies incident thereto. *Minerals, Metals and Mining* was the outgrowth of a major conglomerate merger involving a leading copper producer and a leading coal mining operation. The litigation of this case will be concluded in 1970, but there remains six investigations and one recommended complaint outstanding. In *Lumber and Building Supplies* the merger activity has increased. There are nine investigations outstanding in this major adjunct of the overall building industry and increased merger activity in this area may be expected to occur.

Of the three remaining priority industry categories, the *Apparel Industry* has continued its merger pace and there is a current workload of eight separate investigations pending. In *Paper and Paper Products* one complaint has issued and two other comprehensive investigations are under way. Finally, there are always isolated investigations under way as a result of current merger activity in unrelated industries, and in this *Miscellaneous* category a total of fourteen are outstanding. One recommendation for complaint is anticipated in the near future.

Non-Priority projects

The remaining industries of concern to this Division are either those which have been the subject of considerable attention in past years and are phasing out, or consist of newly emerging industries, from the standpoint merger ac-

tivity. The *Vending Industry* is an example of the former, and a recent order of divestiture against one leading industry member has resolved some of the major issues involved in the remaining six investigations which are outstanding. *Department Store* mergers is another area which has received considerable attention in the past, and presently two investigations are active. Another industry group, *Drugs, Pharmaceuticals, Cosmetics and Sundries*, has been reduced to one complaint in the consent order stage which is expected to be litigated. Other project groupings which have passed their zenith and have become caretaker operations include *Baking, Confectionery, Plastics* and a varied group involving the theory of *Reciprocity*.

Industries which have emerged and are receiving increasing attention include *Insurance and Truck-Trailers & Shipping Containers*. In the *Fertilizer Industry*, one case was settled with a consent requiring substantial divestiture and five remaining investigations are being reconsidered on a policy level in view of drastic technological changes which have taken place in the chemical-fertilizer field.

Summary by projects	1969	Estimate, 1970	Estimate, 1971	Estimate, 1972
PRIORITY				
Grocery products.....	2.5	3.0	6.0	4
Automotive parts.....	5.0	5.0	6.0	5
Cement.....	4.0	4.0	6.0	5
Special projects.....	2.0	3.0	5.0	6
Commercial and industrial equipment, machinery, and supplies.....	2.5	3.0	6.0	6
Metals, minerals, and mining.....	3.0	2.0	2.0	2
Lumber and building supplies.....		2.0	4.0	5
Apparel.....	1.0	2.0	4.0	5
Paper and paper products.....	1.0	1.0	3.0	2
Miscellaneous.....	3.0	3.0	6.0	7
NONPRIORITY				
Baling.....	.25			
Department stores.....	.25	.5	1.5	2
Drugs, pharmaceuticals, cosmetics, and sundries.....	1.0	1.0	2.0	1
Food distribution.....	.5	.5	1.5	2
Furniture.....		.25	2.0	2
Insurance.....	.25	1.0	2.0	3
Plastics.....	2.0			
Reciprocity.....	.25			
Truck-trailers and shipping containers.....	.5	.75	1.0	1
Total man-years.....	29.0	32.0	58.0	58
Total attorneys available.....	29.0			

Increases requested, 1971

An additional \$29,000 is requested for two new attorney positions, consisting of one GS-13 and one GS-12 to initiate or reopen formal investigations. Also, \$6,000 is requested for related travel.

DIVISION OF GENERAL TRADE RESTRAINTS

The Division of General Trade Restraints has responsibility for investigations and other proceedings relating to restraints of trade and unfair methods of competition under Section 5 of the FTC Act.

The responsibility of this Division is substantially broader in coverage than that of other divisions in the Bureau. It seeks to maintain close touch with industry problems in many markets, examining a diversity of methods of competition, restrictive practices and conduct which may tend to stifle competition and, if permitted to persist, ultimately to unreasonably restrain trade. In addition, it has responsibility under the broad coverage of Section 5 of the FTC Act to consider entrenched practices and methods of competition which, because of economic environments in which they may exist, or the extent to which they may interfere with the free conduct of trade, also fall within the prohibitions of Section 5. Thus, the Division, on the one hand, must disperse attention to many matters still at incipient stages of development, while also closely attending such fully developed problems as, for example, oligopolization, inherently coercive marketing relationships, product differentiation and barriers to market entry.

At the close of 1969, this Division was responsible for 242 formal investigations involving 125 different industries and 14 different types of alleged illegalities, from classic price fixing to advertising rate discriminations.

Workload statistics	1969	Estimate, 1970	Estimate, 1971
Applications for complaint:			
On hand beginning of year.....	269	302	302
Received.....	983	1,125	1,150
Disposed of.....	950	1,125	1,150
Pending end of year.....	302	302	302
Informal investigations:			
Pending beginning of year.....	69	62	87
Initiated.....	243	295	310
Completed.....	250	270	300
Pending end of year.....	62	87	97
Formal investigations:			
Pending beginning of year.....	267	242	212
Investigations initiated.....	73	75	80
Completed or closed.....	98	105	111
Pending end of year.....	242	212	181
Complaints issued:			
Pending beginning of year.....	9	7	7
Approved for negotiations.....	2	5	5
Disposition:			
Consent.....	3	4	4
Litigated.....	1	1	1
Pending end of year.....	7	7	7

General trade restraints program—1970 and 1971

Discussed below are the major projects to which this Division will commit its resources during 1970 and 1971. The projects are listed in order of economic priority.

Concentrated Industries-Producer Goods: By direction of the Commission, this Division, in cooperation with the Bureau of Economics has undertaken a pilot program in development of a "Plan of Study of Important, High Concentrated Industries". Six industries are proposed, with the steel industry scheduled for initial analysis. The remaining five industries are automobiles, drugs, electrical machinery, energy industry and chemicals.

This aspect of enforcement is aimed at the important undifferentiated sector of the economy, i.e., the *producer* goods industries. Such industries appear to be characterized by high concentration ratios, high entry barriers and poor performance in terms of higher-than-competitive prices, expanded internal costs and often, poor records of technological advance. An in-depth legal and economic analysis of these problems is of vital antitrust importance.

Consumer Goods Industries: The Division is engaged in separate consideration of problems of concentration and structure in consumer goods industries. These matters include inter alia, entry barriers erected through massive advertising, product differentiation, exclusive dealerships, exclusive territorial assignments and the like. Investigations in these areas will be developed, as manpower can be allocated to them, looking to test case proceedings under Section 5 of the FTC Act. Because these are pilot matters realistic manpower projections cannot be made. They involve, however, a particularly significant aspect of Section 5 enforcement.

Reciprocity: The practice of reciprocal trading when systematically pursued, results in substantial foreclosure of competition and rigidification of markets. Tacit or express agreements to enter into mutual purchasing and/or selling arrangements for either related or disparate goods, serves to substitute negotiated private advantage for the public benefits which result from open competition. The Commission initiated this project in 1965. The Division has to date secured four affidavits of discontinuance and has presently under investigation twenty further matters involving reciprocity. Some of the industries involved are chemicals, paper and paper products, auto parts, vending machines, dairy products, paints, petroleum and coal.

Food Products (Retail and Wholesale): Any illegality that limits the buying power of the food purchaser merits serious attention. High market concentration is not conducive to price competition. Anticompetitive practices may well

result in further elimination of small and medium size competitors. Accordingly, substantial manpower is committed for investigation of a variety of illegal practices prevalent in the food industry, both on the wholesale and retail levels. Complaints of predatory pricing, conspiracy, resale price maintenance and sales below cost are regularly received.

Investigations are pending looking into alleged attempts to monopolize the sale of coffee, cereal, frozen foods, package desserts and pet food. Alleged price fixing among growers and canners of asparagus on the West Coast, already investigated, is presently awaiting action by the Commission. Investigation of several major beer producers and a leading retail food chain has been completed, involving alleged vertical price fixing and allocation of customers. The granting of free fountain equipment and other services by a major soft drink producer as an inducement for exclusive dealing remains under investigation. A further significant matter recently docketed for investigation involves an alleged attempt by certain major retail chains to foreclose new entrant competition in the sale of food at retail in the Washington, D.C. metropolitan area.

Confinement (Natural and Man-Made Fibers): The Commission has directed an industrywide investigation relative to the anticompetitive effects of "confinement" programs by concerns engaged in the manufacture, distribution and sale of fibers used in the manufacture of various fabrics. Essentially, this practice involves an arrangement whereby the manufacturer of the fiber sells to a manufacturer of, for example, wearing apparel on the condition that said manufacturer will only use it in the manufacture of agreed upon end products. Nine major manufacturers including DuPont, Kodak, Fibers Industries, Hercules, Inc., Monsanto Chemical, Allied Chemical, Beaunit Corp., American Euka and American Cyanamid, are presently under investigation.

Petroleum Industry: Three distinct projects under this heading include the *Gasoline Industry*, where several investigations are pending involving alleged price fixing, predatory pricing and other unfair practices. *Petroleum Coke*, where an industrywide investigation with respect to the competitive effects of long-term supply contracts has recently been completed, and a recommendation for complaint forwarded to the Commission. The *LP Gas Industry*, in connection with which alleged price fixing, boycott and monopolization charges on the part of the major producers, are under investigation.

The *Hearing Aid Industry* has been designated by the Commission as one meriting special attention. The reported high and almost uniform prices within this industry affect principally the elderly, a group least able to afford any loss with respect to the benefits of effective price competition. Eleven investigations are presently in process.

Among the remaining major matters, particular note should be made of the *Newspaper Industry*, where the Commission has directed full-scale investigation of alleged discriminatory rate structures, and *TV Advertising* where, with the Bureau of Economics, this Division is studying alleged discriminations in advertising rates. *Office Equipment, Drugs*, particularly the matter of alleged price fixing in the sale of quinidine, and *Bus Tires*, where restrictive tire leasing arrangements are under study, also represent areas of major manpower commitment for the current and ensuing year.

Franchising and Miscellaneous: Current concern with the franchise form of business undertaking, brings before the Division a number of methods and practices under this format, which, strictly speaking, must be resolved under traditional concepts of law. These matters frequently involve allegations of price fixing, tying or exclusive dealing terms or customer and territorial allocations.

These and other practices are under surveillance at this time in the ready-mixed concrete industry, farm equipment, TV, propionic acid, calcium and sodium propionates, auto parts, cosmetics, linen rentals, footwear, home appliances and furniture. These exploratory and informational investigations represent a continuing surveillance and preventive program.

Small Business: In addition, this Division utilizes informal procedures to resolve a number of matters at early stages of controversy. The successful resolution of complaints from individual businessmen on an informal basis, has increased steadily from 30 in 1966 to 102 in 1969. Manpower limitations prevent use of this procedure on a broader scale.

The following summary identifies projects to which the Divisions major efforts are directed, together with an estimate of the man-years allocated to each project:

Summary of projects	1969	Estimated 1970	Estimated 1971	Estimated 1972
Concentrated industries:				
Producer goods	0.25	1.5	2	4
Consumer goods .....	.75	2.0	2	4
Reciprocity	1.0	2.5	3	3
Food Products	3.0	3.0	3	3
Natural and manmade fibers .....	.25	1.5	2	3
Petroleum products industries	3.0	3.0	2	2
Hearing aids	1.0	2.0	3	3
Advertising:				
Newspaper	3.0	2.5	2	2
TV	1.0	1.0	1	1
Office equipment	2.0	2.0	1	1
Drugs .....	.5	.5	1	1
Bus tires .....	.25	.5	1	1
Franchising and miscellaneous	8.0	7.0	6	6
Informal dispositions	4.0	4.0	4	4
Total man-years	28.0	33.0	33	36
Total attorneys available	27.0			

DIVISION OF DISCRIMINATORY PRACTICES

The Division of Discriminatory Practices is responsible for the investigation and trial of cases relating to violation of Section 2 (a), (c), (d), (e) and (f) and Section 3 of the Clayton Act and Section 5 of the FTC Act on the part of buyers who knowingly induce or receive discriminatory allowances or services from suppliers.

Workload statistics	1969	Estimated 1970	Estimated 1971
Applications for complaint:			
On hand beginning of year	67	81	106
Received	315	325	350
Disposed of	302	300	325
Pending end of year	81	106	131
Formal investigations:			
Pending beginning of year	299	242	177
Investigations initiated	53	60	70
Investigations completed or closed	120	125	120
Pending end of year	242	177	127
Complaints issued:			
Pending beginning of year	13	9	11
Approved for negotiation	8	15	10
Dispositions:			
Consent	10	10	10
Litigated	2	3	3
Pending end of year	9	11	9
Litigated cases:			
Pending beginning of year	4	5	13
Complaints issued or reopened	2	10	7
Docketed orders issued	1	2	5
Pending end of year	5	13	14
Voluntary compliance	15	20	20

Division program—1970 and 1971

The primary objective of amended Section 2 of the Clayton Act is preservation of an equality of opportunity among businessmen, to assure, to the extent reasonably practicable, that businesses at the same functional level start on equal competitive footing. Effective enforcement is aimed at forestalling monopolistic concentration of economic power. To achieve this goal, smaller, viable competitors must be protected from unlawful discriminatory practices. This provides them opportunity to compete and survive.

Discriminatory practices are discovered largely as a result of complaints from those alleging resultant injury and upon the basis of information secured during the course of investigation. The Division has developed considerable expertise as to industries particularly prone to price discrimination and other forms of discriminatory practice adversely affecting competition. Project teams have been organized for these industries. The Division is extremely selective in its screening process and eliminates approximately 80 percent of complaints received from entry into the investigational workload.

A. Major Projects.

The major project areas below will actively continue through 1970 and 1971, and very probably through 1972.

Food Distribution—(Chain Grocers): The food industry is probably the largest volume business in the national economy. Retail sales exceed \$75 billion. Nine investigations involving chain grocers and suppliers are in process. Probable cases in litigation by 1971 requiring substantial manpower commitments include: *Colonial Stores, Inc.*, charging alleged unlawful inducement of promotional allowances, which in anticipation of appeal before the Commission, will probably carry over into 1971; *United Fruit Company, et al.*, a seller-customer proceeding under Section 2(a) and (f) of the amended Clayton Act, bringing to challenge a tendency to monopoly on the part of the inducing customer; *Purex Corporation Ltd.*, involving discriminations in price of private brand goods; and complaints appear likely against *The Kroger Company* and *Altman Foods, Inc.*, for alleged violations of Section 5 of the FTC Act in receiving discriminatory promotional allowances.

Apparel Industry: Industry sales exceed \$26 billion. This project arose through Commission directed industry surveys which disclosed that manufacturers of men's, women's and children's wearing apparel granted substantial discriminatory advertising and promotional allowances to large specialty stores and chain department stores. Consent cease and desist orders were issued against 302 manufacturers. In addition, several contested orders were issued.

This Division was assigned the task of reviewing the compliance reports and cooperative advertising plans submitted. Two hundred and forty or these cases have already been forwarded to the Commission. The remaining sixty-two are being processed and should be completed by mid-1971. Litigation involving companies refusing to take consent orders will carry beyond 1971.

Dairy Industry: A high level of concentration in the dairy industry has been caused by (1) horizontal mergers in the industry over the years, (2) forward and backward integration, and (3) a continuing decline in the number of independent dairies that can remain viable in the face of worsening marketing conditions. There are severe barriers to new entrants due to the strength of large national and regional chains, and competitive conditions prevailing in the wholesaling of fluid milk and dairy products.

The Commission continues to receive large numbers of complaints from independent dairies who claim they are being threatened with extinction because of pricing practices of large national and regional dairies. They charge that these large dairies are selling vendor and private label to large grocery chains at prices which are substantially lower than the prices charged independent grocers. Lower prices received by the major retail chains permit them to use milk as a loss leader and in frequent weekend specials. The price structure thus becomes depressed. In these circumstances, home delivery sales continue to decline. Although private label is usually sold by grocery chains for a few cents less than vendor brands, only a very small part of the discriminatory prices received by chains appears to be passed on to consumers.

The objective here is to forestall further concentration by insuring that viable independent dairies will be given an opportunity to compete and eliminate the competitive impact of price advantages which chain grocers have over independent grocers. It is anticipated that some time prior to 1971, at least two or three presently docketed investigational matters will result in recommendations for complaint. Litigation will undoubtedly extend into 1972. Two matters nearest complaint are *Prairie Farms Dairy, Inc.*, and *The Borden Company*. Six other investigations are pending in the field.

Fresh Fruit and Vegetables: Industry sales approximate \$7.5 billion. Involvement comes as a result of numerous industry complaints that the brokerage provisions of the Commission's Trade Practice Rules for the Fresh Fruit and Vegetable Industry are being violated. Shippers allege that competitors grant brokerage to large buyers or to field brokers when the latter acts as agents of the buyers. The Commission recently issued complaints charging five retail food chains and six "ground" or "field" brokers with violations of Section 2(c) of the amended Clayton Act in connection with their purchases of fresh fruit and vegetables. The chains are *Jewel Companies, Inc.*, *Borman Foods Stores, Inc.*, *H.C. Bohack, Inc.*, *First National Stores, Inc.*, and *Food Fair Stores, Inc.*

Tri-Partite Arrangements: This project was undertaken pursuant to Commission direction. Investigations of the effects of two such arrangements (involving

10 top chain grocers) are in progress. Pursuant to such arrangements participating suppliers directly or indirectly grant preferential advertising allowances or services to participating retail grocery chains. The programs make no provision for granting allowances or furnishing services on a proportionate basis to competing retailers. Litigation of this matter appears likely by 1971.

Publishing Industry: This project was also undertaken pursuant to Commission direction. Industry sales approximate \$1.1 billion. An educational and advisory phase was designed to eliminate payment of discriminatory allowances by publishers of hardback and prestige softback books to large retailers. The Divisions now proposes service of orders on approximately 50 publishers pursuant to Section 6(b) of the FTC Act, requiring the filing of special reports setting forth the terms and conditions under which advertising and promotional allowances are made available to customers. The Division reasonably anticipates that such reports will disclose violations of Section 2(d) of the Clayton Act, as amended. The goal of this project is to bring about industrywide compliance with the *Commission's Guides for Advertising Allowances and Other Merchandising Payments and Service*. This project will require substantial manpower in 1971 and will probably continue into 1973.

B. Other projects.

Drug Industry: Investigations involve the following problems: (1) institutional and professional purchase and resale in derogation of private markets; (2) diversion by exempt or noncompetitive sources into regular commercial channels; (3) arbitrary offering and pricing of bulk and non-standard package sizes; (4) price and discriminatory concessions; and (5) dual distribution. Six investigations pending in the field should be completed and evaluated in 1971.

Baking Industry: The Commission continues to receive complaints from independent bakers because of discriminatory and below cost selling of bread by large national and regional bakeries. Private label is the most serious problem in the industry. Vertical integration by grocery chains has cut into the market share of independents. Five investigations in progress should be completed and evaluated by the end of 1971.

Automotive Replacement Parts: Industry sales total \$1.7 billion. A continuing program of surveillance of discriminatory pricing is necessary because of the many complaints received from competing manufacturers, warehouse distributors and jobbers with regard to volume discounts and functional discounts to buyers who do not perform the function for which the discounts are granted. The Division is also investigating private label items sold to major oil company. Eight investigations are in progress which will require substantial manpower commitments in 1971.

Major Appliance Industry: Because of manpower commitments to pending projects and nonproject activity, the Division has not been able to focus sufficient attention on this industry. Industry sales at retail are over \$10 billion. The industry comprises approximately 100 manufacturers and 1300 distributors. Manufacturers and jobbers are reported to grant special discounts and advertising allowances to large department stores, discount chains and other large buyers. Private label is a significant factor. The opportunity of independent appliance dealers to compete effectively is involved as well as the general availability to consumers of wider supplier choices at competitive prices.

Miscellaneous: A significant number of man hours is devoted to matters in varying stages of development which involve a range of industry problems and a miscellany of product lines. The following are examples: frozen foods distribution, dry cleaning fluid, household aluminum foil, wrapping film, scales, plastics, shoes, coffee, ornamental light fixtures, citrus products, furniture, men's and boys' leisure hats, shower curtains, cellophane, photographic equipment, fishing equipment, sporting goods, cement, bicycle tires, industrial bleach and fertilizer. This type of probing and inquisitorial activity represents a continuing surveillance process.

Additional work commitments are required in obtaining compliance with voluntary assurances; proposed legal guides and questions concerning legal guidelines, review of advisory opinions (38 in 1969), and obtaining compliance with the broadened requirements under Sections 2 (d) and (e) of the Clayton Act pursuant to the *Fred Meyer* decision. Twelve cases in the latter category, involving toiletries, are now being processed. It is anticipated that work of this nature will continue through 1971.

The following summary identifies projects to which the Division's major efforts are directed, together with an estimate of the man-years allocated to each project:

Summary of projects	1969	Estimated 1970	Estimated 1971	Estimated 1972
Food distribution.....	5	6	8	8
Apparel industry.....	3	4	1	1
Dairy industry.....	3	3	4	4
Fresh fruit and vegetables.....	2	6	3	2
Tripartite arrangements.....	2	2	5	5
Publishing industry.....	2	2	3	3
Drug industry.....	1	2	3	3
Baking industry.....	1	2	1	1
Automotive parts.....	2	2	2	2
Major appliance industry.....	1	1	1	1
Miscellaneous industries and activities: Completion of litigation, pending investigations, new investigations and complaints, obtaining voluntary assurances and processing advisory opinions, guides and rules.....	11	13	15	16
Total man-years.....	33	43	46	46
Total attorneys available.....	33			

DIVISION OF COMPLIANCE

One of the main objectives of the Commission is to insure that the prescriptive and proscriptive language of final orders which it enters is translated into meaningful action and relief in the marketplace. It is the primary responsibility of the Division of Compliance to insure that these objectives achieve timely fruition. This Division assumes responsibility for all final orders issued by the Commission as affecting the broad area of restraint of trade and antimonopoly issued pursuant to the provisions of Section 5 of the FTC Act, Section 2 (a), (c), (d), (e) and (f), and Sections 3, 7 and 8 of the Clayton Act, as amended.

During 1969 the Division sent 22 major investigations to the field offices and certified two major civil penalty cases to the Attorney General. At year end, an active workload of 217 cases remained on hand. Pertinent statistics typical of the volume and variety of the workload handled follows:

Workload statistics	1969	Estimated, 1970	Estimated 1971
Advisory opinions issued.....	26	35	50
Compliance reports processed.....	188	195	200
Inquiries from public concerning final orders.....	421	500	690
Complaints of order violation.....	9		
Conferences with public.....	142	160	200
Investigational hearings.....	1	4	6
Subpenas, sec. 6 orders and resolutions prepared.....	8	10	15
Active caseload:			
Pending, beginning of year.....	262	217	227
Received.....	42	50	60
Disposed of.....	87	40	60
Pending, end of year.....	217	227	227
Civil penalty:			
Pending, beginning of year.....	2	2	5
Certified.....	2	2	3
Suits concluded.....	0		
Pending, end of year.....	2		
Returned by Attorney General without filing.....	2		

In 1969, of over 1,500 final orders committed to the jurisdiction of the Compliance Division, a market increase in workload was noted in the areas of merger and divestiture activity involving final orders. This workload is expected to increase appreciably by 1971. In addition to handling complex divestitures, this Division also must process an increasing number of merger clearances under final orders which have been issued requiring any covered respondent to seek prior Commission approval before it makes an acquisition in any of the covered product lines.

Compliance activity under Section 7 orders falls into three general categories: (1) divestitures; (2) processing acquisitions subject to Commission approval;

and (3) special provisions which appear in various orders. The need to increase manpower commitments in this most vital anti-concentration undertaking is great. For example, by 1971 the Division of Mergers projects ever increasing activity, and Compliance therefore must anticipate handling an increased number of final orders in such basic areas affecting our national economy as grocery products, construction materials, automotive parts, apparel, paper and paper products, and drugs. With the ever increasing activity in the area of mergers and acquisitions, we must realistically project the need to buttress substantially the present Compliance staff. For example, at the present time 15 orders presently require divestitures; 1 major divestiture case is in civil penalty litigation before the courts; another major case alleged acquisitions without prior Commission approval and is also before the courts. Both of these matters are extremely important to the development of meaningful case law as affecting the efficacy of final orders in this critical area. These cases will require substantial manpower commitments continuing through 1971. The projection time-wise of these 15 orders, for example, is illustrated by the fact that 3 require divestitures to be made now; 5 require divestitures within the next year; 2 require divestitures within the next two years; 1 within the next three years; and 3 within the next five years.

The processing of requests to make acquisitions involving the Section 7 area is an ever increasing activity. Fifty-two orders which are presently final prohibit future acquisitions in various industries without prior Commission approval. For example, 4 of these orders run for a period of five years; 43 run for a period of ten years; and 2 run for a period of twenty years. Thus, these moratorium provisions will continue at least beyond two fiscal years and some beyond 1986. We must anticipate that within the period of the next several years this burden might well be tripled. Superimposed upon the above considerations is the fact that 25 final Section 7 orders involve special requirements. These orders variously involve noncompetition prohibitions, affirmative requirements to grant licenses on products or processes, feathering requirements as to disposition of shares of stock, prohibition on types and methods of advertising, affirmative requirements as to quantitative sales of products to particular trade sources, and limitations on supply arrangements. These special provisions in present orders alone run into 1979.

Typical 1969 achievements by this Division included: The culmination of successful efforts to establish a new factor in the liquid bleach industry; the entry of a new competitive factor in the dairy industry in the Southwest; a new entrant into the baking industry in the Southwest; and new entrants in the following industries—department stores, household cleaning pads, and plastics. There were also other very significant divestitures in other industries.

During 1969 the Robinson-Patman Act area also saw some significant results in insuring the eradication of prohibited practices involving major factors in the following product lines, among others; carpets, automotive replacement bulbs, macaroni products, automotive bearings, shower curtains, various food products, cosmetics, railroad equipment, and furniture.

This Division was also instrumental, by way of illustration, in eradicating price fixing activities in certain bread markets involving major industry factors and in the electric shaver industry. A variety of other actions insured the continued elimination of proscribed practices under orders in other industries including scrap steel and shrimp processing equipment.

Because of manpower limitations, the Division continues to be behind in servicing many aspects of these final orders. By 1971, even with the most conservative estimate of increasing workloads in these areas, at least 14 man-years will be required on a continuing basis to handle Section 7 final orders alone.

Similar workload increases at the Compliance level are projected in both the Section 5 and Robinson-Patman Act areas. The Division of General Trade Restraints anticipates ever increasing case loads in price fixing, oligopolistic practices, producer goods in concentrated industries, food products, fuel, retail food industry, office equipment and other product and industry lines which will result in more compliance work by this Division.

The same practical considerations pertain to increased activity by the Division of Discriminatory Practices in food distribution, dairy products, fresh fruits and vegetables, publishing, automotive parts, drugs, and other commodities.

The following summary identifies projects to which the Division's major efforts are directed, together with an estimate of the man-years allocated to each projects:

Summary of projects	1969	Estimated, 1970	Estimated, 1971	Estimated, 1972
Orders re sec. 5 FTC Act and sec. 2(a), (c), (d), (e), and (f) Clayton Act, as amended:				
Procuring and analyzing compliance reports, various industries.....	7.5	6	6	7
Initiating and reviewing compliance investigations.....	2.0	3	3	4
Conduct of investigational hearings.....	.5	2	3	4
Initiation and conduct of civil penalty cases.....	1.0	2	3	4
Special projects including special Commission directions.....	1.0	1	1	1
Achievement of order divestitures.....	3.0	4	6	7
Processing of requests to make acquisitions subject to Commission approval as required by final orders.....	2.0	3	5	8
Investigational hearings re violations of sec. 7 orders.....	.5	1	1	3
Administration of special compliance features in orders, e.g., granting of licenses, supply arrangement limitations, advertising limitations, etc.....	.5	1	1	2
Total man-years.....	18.0	23	29	40
Total attorneys available.....	18.0			

DIVISION OF ACCOUNTING

The Division of Accounting prepares analyses and studies of the pricing policies of respondents or proposed respondents in connection with the Commission's law enforcement work in regard to: (1) alleged price discrimination, illegal brokerage, discriminatory promotional allowances and services under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act; (2) cost data submitted by respondents or proposed respondents in justification of alleged price discriminations under the Robinson-Patman Act; (3) alleged price fixing in cases arising under Section 5 of the FTC Act; (4) alleged sales below cost in violation of the FTC Act; (5) compilation of statistics concerning financial position and operating results of companies under Section 6 of the FTC Act; and (6) evaluation and analysis of financial data of companies and competitors involved in mergers under Section 7 of the Clayton Act.

This Division performs accounting services primarily for other Divisions of the Bureau. Consequently, its workload depends largely upon the activity of these Divisions. During 1969, the Division furnished accounting services on 64 matters of investigation and litigation: 22 involved violations of Section 2 of the Robinson-Patman Act, 34 involved violations of Section 5 of the FTC Act, seven involved mergers under Section 7 of the Clayton Act, and one involved Section 12 of the FTC Act.

In addition, the Division provides accounting services for the Bureau of Economics, and on occasion, for other Bureaus in the Commission, and for the Congress. Annually, it prepares for publication "Rates of Return for Identical Companies in Selected Manufacturing Industries".

Currently, two staff members are engaged in work on the Commission's Conglomerate Merger Study and other related accounting work for the Bureau of Economics. It is anticipated that the Division of Accounting will provide services for the Truth-in-Lending which became effective July 1, 1969.

During 1969, casework for the Bureau required approximately 8.5 man-years; services for the Bureau of Economics and other Bureaus necessitated approximately 2 man-years; and the report on "Rates of Return for Identical Companies in Selected Manufacturing Industries" required one man-year. Changes recommended in the latter report, if approved by the Commission, will increase the workload for this project to 1.5 man-years.

BUREAU SUMMARY—INCREASES REQUESTED 1971

In order to carry out the programs described in detail for this Bureau, an additional 3 professional and 1 clerical positions are requested at an increase of \$45,000. Travel associated with the professional positions will require \$6,000. Also, funds totaling \$33,000 are needed in 1971 for the Bureau to annualize the mandatory costs of the 1970 Pay Act. The requested resources are summarized below:

Office of the Director:

1 GS-11 management analyst (planning)

1 GS-3 clerk

2

\$16,000

Division of mergers:

1 GS-13 attorney

1 GS-12 attorney

2

29, 000

Personnel compensation (4 new positions)----- 45, 000

Annualization of 1970 pay act costs----- 33, 000

Travel----- 6, 000

Total increase—1971----- 84, 000

BUREAU OF DECEPTIVE PRACTICES

	Allotment fiscal year 1970		Requested fiscal year 1971		Increase fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director-----	24	\$270, 000	28	\$303, 000	4	\$33, 000
Division of Consumer Credit-----	32	353, 000	32	357, 000		4, 000
Division of Special Projects-----	18	255, 500	24	320, 500	6	65, 000
Division of Food and Drug Advertising-----	51	544, 000	51	550, 000		6, 000
Division of General Practices-----	47	674, 000	47	682, 000		8, 000
Division of Compliance-----	15	252, 000	16	266, 000	1	14, 000
Division of Scientific Opinions-----	18	292, 000	21	338, 000	3	46, 000
Division of Consumer Information-----	9	89, 000	9	90, 000		1, 000
Total personal services-----	214	2, 729, 500	228	2, 906, 500	14	177, 000
Travel-----		79, 000		100, 000		21, 000
Other expenses-----		85, 000		85, 000		
Total-----	214	2, 893, 500	228	3, 091, 500	14	198, 000

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Scientists, chemists, and doctors	Stenographic and clerical
Professional:				
GS-17-----	1	1		
GS-16-----	4	2	2	
GS-15-----	26	21	5	
GS-14-----	19	16	3	
GS-13-----	14	14		
GS-12-----	17	17		
GS-11-----	27	27		
GS-9-----	2	1	1	
Stenographic, clerical, etc-----	73			73
Total-----	183	99	11	73
Total annual salaries-----	\$2, 383, 910			

1 Plus 1 consultant.

I. MISSIONS AND GOALS OF THE BUREAU

The Bureau of Deceptive Practices is the Commission's vanguard, shouldering major responsibility in its battle against consumer deception. In addition to the vast responsibility inherent in Section 5 of the FTC Act, Congress has recently passed some of the most far reaching consumer legislation in history. The FTC and, in turn, this Bureau have responsibility for enforcement of two of these Acts, namely, Title I of the Consumer Protection Act, known as the Truth-in-Lending Act, and the substantial portion of the Fair Packaging and Labeling Act not specifically designated to FDA.

Although Congress has appropriated funds to implement the Fair Packaging and Labeling and the Truth-in-Lending programs, the staff for the Commission's basic responsibilities and ever increasing program requirements in the consumer protection field has increased only 25 positions in seven years. Thus, while our economy has been experiencing an unparalleled growth accompanied by fantastic increases in the needs and demands for consumer protection, resources for the Bureau's basic ongoing functions have increased minimally.

Consumer problems are broad and complex and also have important implications for the Nation's social well-being. Acute manifestations of consumer discontent, even anger, are evidenced by the report of the National Advisory Commission on Civil Disorders that consumer frustrations were among the twelve most deeply held grievances which led to the disorders of American cities. The housewives' boycotts and the rapid increase in the number of consumer organizations are also manifestations of consumer unrest. The individual complaints received by the Federal Trade Commission about the marketplace are appalling. Since the Congress has discovered the consumer at the Federal level it is indeed timely that the regulatory agencies and the executive branch of the government also recognize the potency of his force as well and tool-up to meet his complaints.

The answers of course do not rest in any one area or any one agency of government. But the Government's responsibility is implicit, not only to guarantee a sound economy but, to assure social well-being. To construe government involvement with consumer problems as "anti-business" is to miss entirely the thrust of consumer economics. Elimination of marketplace malfunctions ultimately serves both consumers and producers by insuring economics of stability and growth. Government responsibility for the financial well-being of its citizens by a promotion of full employment and economic growth has been established policy since the passage of the Employment Act of 1946. There is a reasonable corollary between government protection of consumer rights in the marketplace and its long accepted role as the protector of the ethical businessman against those who compete unfairly. Thus, it is argued that the charter of the Bureau of Deceptive Practices is to fully identify it with the cause of the consumer but at the same time it is a step fully compatible with the historic mission of the FTC.

Under the budget plans for 1971 it is planned that the Bureau of Deceptive Practices:

1. Be recognized as the consumer voice in the Federal Trade Commission and act as the ear for the Commission for input reflecting general problems received from individual consumers. Moreover, the Bureau will make recommendations to the Commission on consumer policies and consumer legislation; and study the plans and programs of other Federal agencies affecting consumer interest. Additionally, the Bureau staff in cooperation with the Assistant General Counsel for Federal-State Cooperation will act as consultants and supply comments or assistance concerning consumer legislation and ordinances when so requested by the states, local governments, or private groups.

2. Provide input to the Office of Information concerning (1) all consumer activities in the FTC and to recommend policies and provide appropriate guidance and assistance to assure fulfillment of the requirement to keep the public adequately informed as to FTC consumer activities; and (2) planning, developing and implementing comprehensive public relations programs and campaigns to inform and educate the general public, the business community, and special interest groups, concerning the objectives of the consumer affairs programs of the FTC.

3. Maintain effective liaison with national and state organizations having consumer programs by—

- (a) Assisting and planning educational and legislative conferences or workshops;

- (b) Assisting and identifying specific problems which can be resolved by effective actions on the part of organizations; and

- (c) Disseminating information regarding state level and city level consumer affairs in coordination with the Assistant General Counsel for Federal-State Cooperation; and identifying consumer problem areas common to the states which appear to require legislation.

4. Participate in consumer education by—

- (a) Providing leadership in the fields of FTC interest by developing long-range plans for nationwide programs, in coordination with Federal and State educational authorities with the objective of developing and advancing consumer education for use both in and out of the conventional classroom, to include television and other communications media designed to meet the needs of both child and adult of differing income and environmental levels;

(b) Stimulating the development of experimental programs in conjunction with educators, administrators, and interested community, civic, and professional groups;

(c) Preparing reports, articles and other informative and evaluative materials on consumer education programs; and

(d) Maintaining liaison with appropriate Federal, State and local officials in educational associations.

Everybody has found the consumer—the legislator, the government administrator, the corporate executive and, most importantly, the citizen who has discovered that as a consumer it pays to complain. Demands for solutions to the aggravations and frustrations of the consuming public impel a widening of the objectives of the Bureau. Such goals include: (1) development of techniques for identifying nationally-important marketplace problems; (2) responding to individual consumer complaints; (3) legislation to fill existing gaps in consumer protection laws; (4) consumer education as the subject relates to marketplace; (5) a program for improving producer-consumer relations; (6) a marketplace information program for consumers; (7) effective liaison with consumer organization and organizations with identifiable consumer interests; (8) participation in, and sponsorship of, significant institutes and seminars on consumer problems in concert with law schools and other graduate disciplines (i.e., economics and business administration schools) trade association and labor unions, and organization of state, county and city officials; (9) sponsorship, annually, of a national marketplace conference with participants recruited from consumer spokesmen, businessmen, government, and the academic community; and (10) the development of a government program to achieve "... uniform and intelligible consumer product standards...."

In sum, this budget attempts to meet realistically the now strident demands of the American consumer and businessman for a fair shake and an honest deal.

Bureau workload summary	1969	Estimated 1970	Estimated 1971
Applications for complaint:			
Pending beginning of year.....	589	2,184	1,084
Received or reopened.....	10,152	12,500	16,250
Disposed of.....	18,557	13,600	15,500
Pending end of year.....	2,184	1,084	1,834
Formal investigations:			
Pending beginning of year.....	1,076	781	681
Initiated or reopened.....	203	500	1,300
Completed or closed.....	498	600	1,000
Pending end of year.....	781	681	981
Complaints issued:			
Pending beginning of year.....	23	37	37
Approved or reopened.....	84	95	150
Dispositions:			
Consent orders.....	54	75	100
Litigated.....	11	20	23
Other.....	5	0	0
Pending end of year.....	37	37	64
Litigated cases:			
Pending beginning of year.....	25	16	16
Complaints issued or reopened.....	12	25	35
Cases completed.....	21	25	30
Pending end of year.....	16	16	21
Assurances of voluntary compliance: Accepted.....	181	210	350
Compliance matters:			
Miscellaneous:			
Pending beginning of year.....	169	180	205
Received.....	848	925	1,025
Dispositions.....	837	900	1,000
Pending end of year.....	180	205	230
Penalty actions:			
Pending beginning of year.....	8	12	17
Certified.....	5	10	15
Dispositions.....	1	5	10
Pending end of year.....	12	17	22
Compliance reports:			
Pending beginning of year.....	146	181	81
Received.....	89	100	130
Accepted.....	54	200	170
Pending end of year.....	181	81	41

¹ In addition, 2,200 matters on automobile warranties were handled.

II. CURRENT PROGRAMS AND PLANS FOR 1971

Historically, the principal function of this Bureau has been case-by-case enforcement of the FTC Act. Its efforts and its personnel were directed to that end. This situation began to change in 1967, when the Division of Special Projects was formed within the Bureau. While this Division at the outset expended most of its effort in the enforcement field by handling casework of the D.C. Consumer Protection Program, it has now departed completely from that role and is engaged solely in programs having an industry or nationwide application. If a need for a case-by-case approach is discovered within one of its programs, the program is shifted to one of the other divisions. Examples of the types of matters assigned to this group are a nationwide study of automobile warranties, a study and report of national consumer problems and a continuing testing and investigation of cigarettes. Understandably, subsequent events beyond our control, or not now foreseen, may reorder priorities and resources. However, it is assumed that the Bureau will continue to be assigned consumer protection programs having application throughout the industry or the nation and will carry through programs presently underway.

The rise of "consumerism" has forced the Bureau to devote an ever-increasing amount of effort to anticipating and responding to the demands of the highly vocal and visible spokesmen of this phenomenon. While the Bureau has received a minuscule increase in personnel for basic ongoing activities over the years, it can in no way compare with the increased demands and new functions assigned. The result has been that the number of attorneys now engaged in casework enforcement is twenty percent smaller than the number engaged in that work in 1964. During the fourth quarter of 1969 we had about forty-two men ostensibly engaged in enforcement, whereas in 1964, we had fifty-two engaged in this pursuit.

Turning now from the general to the specific, the following is a seriatim presentation of the Bureau's major programs, their aims and their needs.

The Input Programs:

These are the programs which supply the information needed to plan and conduct campaigns in consumer protection. The programs include, not only the consumer mail input, where information is thrust upon the Commission, but also encompass the affirmative efforts to acquire information, such as monitoring, and liaison contacts with groups and individuals who possess needed information. All of these programs are now understaffed, with the result that necessary information is either not being gathered or when gathered can not be properly analyzed and utilized in developing programs.

Consumer Complaints—The processing, answering and analyzing of written complaints and inquiries from the public, other government agencies and the like, is being handled by four experienced attorneys and three recent law school graduates. The current practice is to break in new attorneys on such duties for a period of three to six months after which they are transferred to other divisions and newly hired law school graduates take their place.

It should not be thought that this small force is up to the task of responding to all complaint and inquiry letters received by the Bureau. A substantial volume must be referred to attorneys assigned to other divisions because the nature of some complaints demands the unique expertise or experience of a particular attorney and in addition, many communications concern investigations or studies in progress.

The mail volume is growing markedly. In 1968, the Bureau received 7,215 applications for complaint. In 1969, this figure rose to 12,352 (including 2,200 automobile warranty complaints). In 1968, the Bureau received 944 inquiry letters. This figure increased to 2,004 for 1969. Due to the absence of adequate manpower, the Bureau can do little more than merely handle this torrent of mail: it cannot be properly analyzed for trends or implications. Only the most pressing and serious allegations are docketed for investigation. During 1971, the passive input, that is the sum total of all unsolicited applications for complaint, referrals, and inquiries received from all sources will reach, utilizing a simple straight-line projection, a minimum of 16,250 complaint applications. Inquiries will total a minimum of 2,400.

Contingent upon funding, 1971 plans entail a new approach to this avalanche of mail. A first step will be to change the type of personnel utilized in this endeavor by employing and training a nonlegal staff of consumer specialists to

handle the routine correspondence. This staff will operate under the supervision of one or more seasoned trade-regulation attorneys. Handling the mail in this fashion will free professional personnel for other duties. Additionally, such personnel can be expected to be more permanent than new attorneys who are anxious to move on to purely legal positions.

Presently, seven attorneys and law graduates and four clerk typists are engaged in this function on a full time basis. During 1971, the use of two attorneys, eight consumer complaint analysts and five clerk typists is contemplated. This represents an increase of four GS-7 positions.

The Advertising Monitoring Program—The Monitoring Program as presently conducted has serious deficiencies. The monitors, three part-time law students, perform a purely clerical function. Attorneys throughout the Commission submit requests for advertising of products in which they are interested. Material received from various sources is examined and pertinent advertisements referred. Only network radio and television advertising is subjected to searching scrutiny by lawyers and other professionals to discover law violations. Personnel is not available to monitor regional television and radio, national print media, and newspapers. Plans for 1971 involve an effective wide ranging monitoring program conducted by a staff of four nonlegal full-time employees. The actual study of advertising to discover law violations will also be expanded in the enforcement divisions. Personnel will be transferred from other duties for these positions.

Consumer Information and Education—Funds to set up a Consumer Information program are included in the Commission's 1970 appropriation. This function will be staffed by 7 consumer information and editorial specialists and 2 supporting clerical employees.

This is planned as a dynamic new consumer information program to provide, through all possible media, opportunity for the consumer to become knowledgeable regarding misleading advertising, unfair credit practices and other dishonest sales practices that tend to exploit them, and how to protect themselves.

Under this program, emphasis will be directed toward the information of consumers through various media including pamphlets, TV, radio, newspapers, etc., after determination as to the most efficient ways to reach various categories of consumers. One of the very definite programs to be undertaken will be the preparation of spot-television productions directed toward low-income consumers together with spot public service announcements on specific radio stations. Staff will negotiate with various media for presentation of programs once developed.

The Enforcement Program:

The "Enforcement Program" denotes that activity which is devoted to the enforcement of the FTC Act via the traditional investigation and case-by-case approach. In this Bureau, this program is the responsibility of the Divisions of General Practices and Food & Drug Advertising. During 1969, only forty-two attorneys were attempting to handle the entire enforcement caseload of the Bureau. The forty-two attorneys included two division chiefs, and three senior grade attorneys who assisted them and handled practically no cases themselves. The number of effective case producers shrinks even more when necessary details to other duties are considered.

Recognizing the acute shortage of manpower and the futility of opening new cases that could not possibly be handled, the two enforcement divisions reduced their caseload from 1,076 investigations at the beginning of the fiscal year to 781 on June 30, 1969), but the procedure by which this was accomplished was definitely not in the public interest. Simply stated, the Bureau has been opening very few new cases. In 1967, 666 investigations were opened. In 1968, the number dropped to 388. In 1969, only 192 seven-digit investigations were opened. This means that more than 12,000 written pleas for action or assistance were turned down.

The case-producing attorneys labored assiduously during 1969, and have compiled quite a record. They completed about 500 new and auxiliary investigations, secured the approval of 84 complaints and the issuance of 68 final orders to cease and desist. We can only hope that production at this rate will continue in 1970, since the enforcement divisions have lost by resignation, transfer and illness, ten of their most effective case-producing attorneys, and replacements, no matter how talented, require at least a year to swing into full production.

Attorney replacement was hampered during 1969 by employment restrictions. Removal of these restrictions resulted in the immediate employment of new attorneys and clerks to bring the Bureau to its authorized strength. The two en-

enforcement divisions are currently training and assimilating their new personnel. By early 1971, the enforcement staff should be at full strength and fully trained. Careful screening of prospective casework and the summary termination of dated and marginal matters currently in process should result in a 1971 enforcement caseload which can be handled by presently authorized staff.

The Truth-in-Lending Program:

The Truth-in-Lending Program is a developing operation at present conducted by seven attorneys in Washington with the temporary, full-time assistance of two attorneys in each field office. This small force has performed yeoman service in 1969. It has mailed out three quarters of a million copies of Regulation Z by utilizing a private distribution source. The force has distributed more than fifty thousand copies of the booklet itself by direct mail from Washington and by **utilization of the eleven field offices. The mail for this group, consisting for the most of injuries, has now reached an average of approximately fifty letters a day.** The field office personnel are at present entirely engaged in an educational effort aimed at informing lenders and creditors how to comply with the statute. The field men have spoken to about fifteen thousand businessmen during the past four months.

The plans for 1970 call for an increase in the manpower for this program to the fully authorized complement. Present plans envision the placement of over one hundred personnel in the field offices. Budget requirements for the field staff are reflected in the justification for Bureau of Field Operations.

The Washington staff, named the Division of Consumer Credit, will consist of three supervisors, seventeen staff attorneys, four professionals with nonlegal discipline, and a clerical staff of eight for a total of thirty-two.

Much of 1970 will be devoted to recruiting, organizing, and training for an Enforcement Program, as well as continuing present educational efforts. During the latter part of 1970 and by 1971 the program will shift emphasis from educational efforts to enforcement. The goal is to achieve across-the-board compliance by all lenders.

The Scientific Advice and Assistance Program:

This program is conducted entirely by our Division of Scientific Opinions. The Division has suffered key retirements during 1969 and is currently recruiting replacements. The FTC is dependent upon the scientists in this Division for expert advice in drug and medical cases. Moreover, the personnel of this Division are expected to act as the scientific eyes and ears of the Commission and to bring to its attention any detected need for action by the Commission in the scientific field. Scientists in the Division are currently reviewing all food, drug and cosmetic advertisements secured through the national television Monitoring Program. A substantial portion of the almost 3,000 television scripts and storyboards which this program produces each month involve these products.

The Division of Scientific Opinions provides scientific advice and assistance in scientific matters to the entire Commission staff. Since this Division is technically not an operating division but serves more in an advisory capacity, the subject matter and volume of work performed by it depends upon the demands for advice and assistance made by the Commission and the various operating divisions. This makes it difficult to project unilaterally a program of future activities for the Division of Scientific Opinions. This Division does, of course, actively participate in projects and program planning with respect to Section 15 and other commodities for which health or other scientific claims are made in advertising.

The Division's present workload is becoming unmanageable and without additional manpower (in addition to filling existing vacancies) adequate coverage cannot be given to projects currently underway, much less planning or taking on a variety of new ones. The unrelenting pressures of Commission requests and the day-to-day operational demands preclude this Division's assuming any further responsibilities and probably will necessitate curtailing or stopping significant programs now underway. A physical limit was reached some time ago as to what its scientists can handle no matter how selective the program planning or the priority ratings. It is not an exaggeration to state that the mounting volume of work and pressures have left the staff near the point of exhaustion and complete frustration.

The present situation leaves virtually no time for the reflective thinking or meaningful planning exhorted by the Commission of the staff. There is likewise little time for planning for more effective operational relationships with other

divisions with whom we are involved in joint project operations or from whom requests for assistance are received on an ever-increasing scale.

There is a definite need for additional scientific disciplines within this program. Needed are a pharmacologist, GS-15, an expert in the fields of mechanics and electricity, GS-13, and one supporting clerical position, GS-4.

The FDA Drug Evaluation Program:

This involves the review and enforced revision, when necessary, of the advertising claims of at least 2,000 and perhaps as many as 4,000 individual drug products in light of labeling requirements being promulgated by the Food & Drug Administration.

It was originally estimated that this project would commence in the early part of 1969 and carry through 1970 and 1971. However, due to delays within FDA, FTC participation was slowed, and demands upon manpower will reach a peak in 1971 and extend into 1972. Recruitment for this program is underway. Obviously, the progress of this program in 1970 depends upon the recruitment of legal and medical personnel for the two responsible divisions, Scientific Opinions and Food and Drug Advertising.

The Compliance Program:

The eleven attorneys in the Division of Compliance are unable to keep up with the workload. A glance at the statistics shows the situation. During 1969, the Division handled 752 complaints of order violation, but ended up the year with a backlog of 169 matters, six more than they had at the start of the fiscal year. The same situation exists with respect to reports of compliance. They had 146 on hand at the beginning of the year and ended the year with 168 on hand. They began the year with 164 compliance investigations in progress and ended the year with 181.

Five matters were certified to the Department of Justice for penalty proceedings during 1969, but this figure will be substantially increased in 1970. However, penalty certifications are a reflection of the compliance investigations instituted. FY 1970 will see a reduction in the number of investigations commenced, for a crash effort will be made to reduce the number of reports of compliance awaiting processing. Since only 54 were accepted by the Commission during 1969, the backlog of 181 is formidable.

One additional GS-11 attorney is requested in 1971 to enable the division to keep abreast of the daily work flow, and to eliminate delays which are being experienced.

The Packaging Program:

Presently five professionals are assigned full-time on packaging. A steady input of requests for information and technical interpretation has occupied the main efforts of two members of the staff. Telephone requests have averaged 150 calls per month for one of these members. Since the initial publication of the first interpretative bulletin in March, the mail-list has risen to 1,500 by individually submitted requests. Requests for written, technical interpretations have numbered 200 in the past eight months and conferences with visiting attorneys and businessmen average at least two per day. One member of the staff is required full-time in screening and responding to complaints concerning packaging and labeling matters. In the past eight months, 125 complaints have been answered. Industry has been contacted in at least one-third of these cases, with encouraging response to corrections suggested.

During 1970, the first public hearing under the regulatory procedure is scheduled. This is an uncharted course and will be time consuming. In addition, the staff has been directed to undertake an investigation of nonfunctional, slack-fill in the toy industry, investigate the necessity of proper naming and ingredient-listing in the charcoal industry, and to complete the issuance of "cents-off" regulations. These duties will be the maximum possible with the staff of five professionals as now planned. Primary enforcement efforts must be devoted to additional liaison and schooling assistance to field offices, state agencies and Customs' officials. Complaints are anticipated to sharply increase with timely screening and answering becoming a major concern. An involved study of state integration and uniformity; surveys and market studies for effectiveness of the Act desired by Congress; enforcement; and industry and consumer aids to the total understanding of this Act, must await appropriate staffing. Interpretations are anticipated to continue in high demand for at least the next six months after which, it is hoped, a limited amount of effort may be turned to industry survey followed by

possible voluntary compliance where mistakes are discovered. Since new compliance actions are not available for this year and enforcement will be meager, some apathy is anticipated which will be a severe burden for future years. Industry has already shown the desire for these basic regulations and will perform a great deal of self-policing. But, if these reports are not aggressively followed up, the entire thrust of the Bureau's efforts will wane to ineffectiveness at this beginning stage.

In view of recent developments, proposals to amend the statute, substantial issues involving interpretations, definitions, and procedures it now appears that resolution of these matters will peak in 1971. Since the staff, working overtime cannot keep up with the present workload, it is estimated that seven professionals and three clerical employees will be needed in 1971. This is an increase of only two GS-11 positions.

Enforcement activities to bring packers in compliance with the statute will place an additional workload upon the field offices and upon the enforcement attorneys in this Bureau. Presently, there is no experience upon which to base a prediction as to the size of the truth-in-packaging caseload. Therefore, we hope to be able to handle it with the current staff plus the increase requested for 1971.

Special Continuing Projects:

Cigarettes—The continued surveillance of the industry and work associated with the laboratory will continue to demand the services of at least two attorneys, two chemists, and the full-time services of a doctor. No increase is asked for this program.

Automobile Warranties—The Bureau will be engaged in a continuing effort to insure that manufacturers and dealers fully comply with the constructive obligations created by the manufacturers' new car warranties. This effort will require two attorneys full-time in 1971. Such surveillance will involve: (1) the accumulation of data through a scientifically selected sampling of the owners of cars of model years 1967-1969; (2) FTC follow-up on a percentage of consumer complaints; (3) monitoring and evaluation of advertisements, commercials, display posters and materials including the warranty; (4) study and evaluation of industry actions taken effecting the warranty; (5) an expected requirement to prepare and submit to Congress annual reports; and (6) possible litigation on a case-by-case basis.

Some idea of the public interest in this program can be gotten from the fact that the Bureau received 2,200 written complaints from irate new car owners in fiscal 1969.

Currently, we are using only one attorney and one clerk-typist on this project. Additional manpower will be assigned to this project in 1971.

New Projects and Programs:

Affirmative Disclosure—The principal of affirmative disclosure in a statutory sense was set in motion by the enactment of "Truth-in-Lending". It seems reasonable to anticipate that if there is to be full disclosure as to the cost of credit, there will also be demands for full disclosure (product information) as to the characteristics of the product to be financed. The continuing drive for equality between buyer and seller in the marketplace will mean an important, new program area for the FTC on the general subject of affirmative disclosure.

Product Standards, Including Safety Standards:

Consumer Products Standards is one of the most important frontiers yet to be defined in the area of consumer protection, clearly within the Commission's charter and closely akin to affirmative disclosure. Consumer groups have been insisting in increasingly strident tones since 1961 that standards be devised and made available to assist them in making intelligent choices in the marketplace. Moreover, there is strong Congressional interest in this area. Additionally, consumer groups are asking the Government to disclose its standards for those products in common civilian use and for which government standards had been developed which could be restated in laymen's language for the private citizen. The justification for such disclosure on the part of the Government is to be found in the view that the citizen taxpayer, in paying the cost of the government's testing activities, is entitled to be the beneficiary of such information as well.

The likelihood of the extension of the life of the National Commission on Product Safety and its anticipated findings that the Government should have

more responsibility for the development of mandatory product safety standards, supports the assumption that there will be increased activity in this portfolio during 1971. The FTC is already on record with respect to the National Commission on Product Safety in expressing an interest in certain categories of household products that should be investigated.

The Bureau is planning to develop a study for Commission approval which will state the alternatives by which a product standardization program can be developed.

There is increasing consumer concern that fair marketing practices should also require full safety in the matter of radiation and that a manufacturing technology should be developed in the public interest which would have as its objective a "fail-safe" or "zero-defect" standard for those consumer products that may harm the person. In this area, in addition to color television, there are other potentially harmful products, i.e., products which utilize high-frequency sound, short-wave energy radiation, etc. Moreover, increasing attention must be paid to the problem of improper servicing of such consumer products which can result in insidious injuries.

Three GS-11 attorneys and one GS-4 clerical employee are required for the described new programs in 1971.

III. BUREAU SUMMARY—INCREASES REQUESTED, 1971

In order to carry out the activities described in detail for this Bureau, an additional 14 positions and \$167,000 are requested. In addition, funds totaling \$31,000 are necessary in 1971 for the Bureau to annualize the mandatory costs of the 1970 Pay Act. The requested resources are summarized below:

Office of the Director:

4 GS-7 consumer complaint analysts----- \$30,000

Division of Compliance:

5 GS-11 attorneys

1 GS-4 clerk

6 ----- 62,000

Division of Scientific Opinions:

1 GS-11 attorney ----- 11,000

Division of Scientific Opinions

1 GS-15 pharmacologist

1 GS-13 electrical engineer

1 GS-4 clerk

3 ----- 43,000

Total personal compensation (14 New Positions)----- 146,000

Annualization of 1970 pay act costs----- 31,000

Travel ----- 21,000

Total increase 1971----- 198,000

BUREAU OF TEXTILES AND FURS

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Decrease, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director-----	21	\$168,000	21	\$168,000		
Division of Enforcement-----	22	351,000	20	318,000	-2	-\$33,000
Division of Regulation-----	103	1,174,000	63	762,000	-40	-412,000
Total personal services-----	146	1,693,000	104	1,248,000	-42	-445,000
Travel-----		138,000		88,000		-50,000
Other expenses-----		10,000		5,000		-5,000
Total-----	146	1,841,000	104	1,341,000	-42	-500,000

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Technologists	Field investigators	Clerical
Professional:					
GS-17-----	1	1			
GS-16-----	1	1			
GS-15-----	8	8			
GS-14-----	6	6			
GS-13-----	12	9		3	
GS-12-----	24	4		20	
GS-11-----	17	6	1	10	
GS-9-----	7			7	
GS-7-----	2			2	
Stenographic and clerical-----	36				36
Total-----	114	35	1	42	36
Total annual salaries-----	\$1, 457, 614				

The Bureau of Textiles and Furs has responsibility for administering the Wool Products Labeling Act, the Textile Fiber Products Identification Act, the Fur Products Labeling Act and the Flammable Fabrics Act. In order to carry out these duties, the Bureau has been divided into the Office of the Director, the Division of Regulation and the Division of Enforcement.

The principal work of the Bureau is to guard or protect the public; only when efforts to obtain compliance with the assigned statutes through education, cooperation and voluntary compliance are unsuccessful is enforcement sought through complaint and cease and desist order, or, if wanted, by injunction or criminal penalties.

DIVISION OF ENFORCEMENT

The Division of Enforcement is responsible for the investigation and effective disposition of serious violations of the Wool, Textile, Fur and Flammable Fabrics Act. The Division consists of a staff of trial attorneys who supervise the investigation and are responsible for the prosecution of violations considered to be serious enough to warrant issuance of a complaint. It also has a compliance section which policies the cease and desist orders issued under each of these Acts.

During the past year the Division of Enforcement continued to give fast attention to cases arising under the Flammable Fabrics Act. There were twelve cases under this Act which were concluded with cease and desist orders.

The small staff of the Division of Enforcement processed 186 cases either by a recommendation for complaint or by a closing recommendation. Thus, each trial attorney concluded an average of approximately 24 cases during the year.

The Division also includes the Commission's testing laboratory which, during 1969, made 498 fiber content analyses of fabrics and fibers, conducted 599 burn tests under the Flammable Fabrics Act (each of which consisted of 3-10 individual tests), and 327 tests for fur fibers to determine if dye, bleach or other artificial coloration had been added to the furs.

Of the 599 items tested for dangerous flammability, 111 products failed the tests and were removed from public sale as wearing apparel. These products, which numbered in the tens of thousands of individual items, were in 6 different categories, as follows:

Type of wearing apparel	Number of products failing burn tests
Fabrics-----	6
Scarves-----	55
Sweat shirts-----	3
Garments-----	10
Non-woven fabrics and garments-----	3
Wood chips and flowers-----	34
Total-----	111

The 323 tests of fur products included, for example, samples of furs obtained from some 170 manufacturers, some 75 of which the tests revealed were misbranding dyed fur skins as natural. Tracing the products and subsequent cor-

rective action in thousands of individual garments resulted in a savings of many thousands of dollars by the consuming public.

As of June 1, 1969, the formal cases on the Docket of this Division were:

Wool.....	56
Fur.....	120
Textile.....	69
Flammable fabrics.....	15
Total.....	260

It is considered desirable, *as an average*, to handle all cases in a period of one year. Although some cases will remain on the docket for longer periods and many may be disposed of in a shorter period, the target to be achieved in this plan is disposition of cases, on the average, in one year.

Compliance Section

The Compliance Section of the Division of Enforcement obtains compliance with Commission cease and desist orders as they are issued under the four Acts administered by the Bureau, directs and analyzes investigations of suspected violations of orders, and refers through the Commission such violations as warrant proceedings for civil or criminal penalties in the Federal District Courts.

FY 1969 commenced with 105 active compliance cases. During the year new orders and reopened cases brought the total assignment to 264 cases of which 116 were closed, leaving 148 at the beginning of 1970.

A judgment in the amount of \$15,000 was filed during the year in a civil penalty suit. Seven other civil penalty suits were pending in various United States District Courts at the close of the year. This phase of the Compliance Section's work is particularly exacting and time-consuming. It requires the preparation of all essential papers to be filed in court and for use in trial and cooperation with the United States Attorneys throughout the proceedings.

In instances where serious violations of orders are found, full enforcement necessitates proceedings for penalties, not only for the effect on the violating parties but also to operate as a deterrent against others who may be similarly involved. In 1969 only four cases were prepared for certification to the Attorney General as civil penalty suits. Some matters which might have resulted in penalty cases were by necessity handled administratively.

At the end of June 1969 the Compliance Section of the Division had approximately 1,650 Commission orders to supervise and police.

DIVISION OF ENFORCEMENT—OPERATIONS AND STATUS REPORT FOR YEAR ENDING JUNE 30, 1969

INVESTIGATIONAL CASES

Workload statistics	Wool	Fur	Textile	Flam- mable fabrics	Total	Percent change from 1968
Cases at the beginning of 1969.....	51	60	80	16	207	+9
Investigations initiated.....	46	127	48	18	239	+61
Total number of docket cases considered.....	97	187	128	34	446	+31
Complaints recommended.....	21	48	20	6	95	-14
Complaints previously sent to Commission with recommendation for complaint.....	11	21	11	8	51	-----
Complaints approved for issuance.....	29	56	29	12	126	-----
Final orders issued by Commission.....	29	56	29	12	126	+95
Consent.....	29	56	28	12	125	-----
Docketed.....	-----	-----	1	-----	1	-----
Assurances of voluntary compliance received.....	11	4	25	7	47	+20
Cases closed for other reasons.....	4	9	6	-----	19	-34
Total cases disposed of during year.....	41	67	59	19	186	+42
Cases on hand at end of 1969.....	56	120	69	15	260	+25

DIVISION OF ENFORCEMENT—DISTRIBUTION OF CASES ON JULY 1, 1969

	Wool	Fur	Textile	Flammable fabrics	Total
Pending cases:					
Awaiting investigation.....	19	48	18	5	90
Awaiting analysis.....	11	11	17		39
Total.....					129
Cases in which complaints or closings have been recommended but are in various processing stages:					
Affidavits.....		1	7		8
Sec. 2.14.....	21	43	18	8	90
Consent agreements.....	4	15	3	2	24
Closings.....	1	1	6		8
Total.....					130
Cases in trial status.....		1			1
Grand total.....	56	120	69	15	260

DIVISION OF REGULATION

The Division of Regulation is responsible for the inspection of textile and fur products in manufacturing establishments and distribution channels in order to protect manufacturers, distributors and consumers against misbranding or false and misleading advertising of these products, and to insure consumer safety against the hazard of flammable fabrics. In so doing, not only is the safety and welfare of consumers increased directly, but also indirectly, in that competition is made fairer by the elimination of certain unfair trade practices.

Consultation with industry members and their counsel is a continuing responsibility of the attorneys in the headquarters office. This may follow inspection trips by men in the field or prior correspondence with the industry member involved. From time to time representatives of large mills or fiber producers will have their production engineers and counsel check with us on proposed or changed tags, labels, tickets, etc., intended to be sent to the cutters who use these labels on the end products.

In addition to the general duties and responsibilities set out above, the Division has close contact with the Customs authorities as well as considerable activity with other governmental agencies. Substantial correspondence and many personal conferences are carried on with organizations such as Better Business Bureaus, Chambers of Commerce and Trade Associations which represent all phases of manufacture and distribution of textiles and furs. All of these activities require the expenditure of a considerable amount of time and are most important in obtaining voluntary compliance by business and industry.

In 1971, the Bureau plans to vigorously enforce the four statutes assigned to it for administration as far as its personnel and funds will allow. Priority will be given to inspections and investigations under the Flammable Fabrics Act, and local and State fire officials will be contacted and educated as to the Federal requirements and as to the type of fabrics and products that might fail the flammable fabrics test. The assistance of these officials will be solicited in enforcing the Flammable Fabrics Act in order to afford the greatest possible protection to the general public from injuries and death resulting from fabric and clothing fires.

The labeling, invoicing and advertising requirements of the Wool Act, the Textile Act and the Fur Act, together with the policing of the Flammable Fabrics Act, are administered primarily through the inspection of mills, manufacturers, importers, wholesalers and retailers of textile and fur products. The staff stationed throughout the country give priority to formal investigations of the Division of Enforcement, looking toward possible Commission complaints and orders against the hard core violators. The balance of their time is spent on the inspection and education work of the Division.

New specifications are expected to be published soon by the Department of Commerce which will require the inspection of many manufacturers and distributors not now subject to the statutes administered by the Bureau, i.e., manufacturers, wholesalers, and distributors of mattresses, box springs, upholstered furniture, etc. When specifications are issued by the Department of Commerce covering interior furnishings, it is expected that State and local fire officials will ask for the assistance of the Bureau's investigators whenever fires occur

in which products subject to the Flammable Fabrics Act are involved and when there appear to be possible violations of the Federal law.

The Division's textile and fur investigators in the field perform inspections and counsel businessmen regarding the requirements of the four Acts and the rules and regulations. Administrative handling of minor deficiencies in labeling, advertising or invoicing (as the case may be with the particular Act involved) is performed. Immediate informal correction is often made by the person being interviewed and reported to the headquarters office by the investigator.

DIVISION OF REGULATION—WORKLOAD STATISTICS, 1969

Gross sales of firms inspected.....	\$16,625,675,000
Approximate inventory of firms inspected.....	\$1,744,168,000
Firms inspected revealing deficiencies (percent).....	61

	Wool	Textile	Fur	Flammable fabrics	Other	Total
Number of establishments inspected.....	4,751	7,127	1,545	6,513	16	19,996
Number of products with labeling deficiencies.....	345,041	4,386,607	30,847		11,472	4,773,967
Dollar value of deficiency labeled products.....	7,532,000	41,521,000	2,817,060		120,000	51,990,000
Records deficiencies.....	227	527	197	2		953
Invoicing deficiencies.....		492	570	1	2	1,065
Advertising deficiencies found during inspections.....		548	120		6	674
Supplier deficiencies.....	1,468	7,348	508	4	8	9,336
Informal assurances obtained.....	1,072	3,262	786			5,120
Registered numbers issued.....	135	1,154	81			1,370
Continuing guaranties filed.....	119	420	44	860		1,443
Publications issued.....	3,013	18,253	3,423	1,179	335	27,203

In the headquarters office, the staff engages in the several activities to achieve voluntary compliance, renders legal opinions and interpretations, maintains records of approximately 32,000 active continuing guaranties filed under the four Acts, issues registered identification numbers to be used in lieu of the manufacturer's or distributor's name under the Wool, Fur and Textile Acts, which currently approximates 45,000 active firms, and maintains inspection and other records concerning the activities of the Bureau. Another important duty is the drafting of proposed rules and regulations for submission to the Commission for consideration and appropriate action.

Reduction in Bureau resources—1971

The Bureau of the Budget has recommended that the resources available for administering the Wool Products Labeling Act, the Textile Fiber Identification Act and the Fur Products Labeling Act be reduced by 42 positions and \$500,000 in 1971. No reductions were recommended for policing the amended Flammable Fabrics Act.

BUREAU OF FIELD OPERATIONS

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	6	\$86,000	6	\$87,000		\$1,000
Field offices.....	370	4,053,000	391	4,325,000	21	272,000
Total personal services.....	376	4,139,000	397	4,412,000	21	273,000
Travel.....		329,000		374,000		45,000
Total.....	376	4,468,000	397	4,786,000	21	318,000

BUREAU OF FIELD OPERATIONS—PERSONNEL AS OF DEC. 31, 1969

	Washington headquarters staff	Attorneys	Clerical
Professional: GS-15.....	2	2	
Stenographic, clerical etc.....	3		3
Totals.....	5	2	3

Total annual salaries, including field, \$3,884,725. Total employees, including field, 304.

FIELD OFFICE EMPLOYEES IN THE BUREAU OF FIELD OPERATIONS, BY GRADE, AS OF DEC. 31, 1969

	Total, field	Atlanta	Boston	Chicago	Cleveland	Kansas City	Los Angeles	New Orleans	New York	San Francisco	Seattle	Washington
Attorney, GS-15-----	24	2	2	3	1	1	1	3	5	1	2	3
Attorney, GS-14-----	32	4		5	1	3	2	3	6	2	2	4
Attorney, GS-13-----	44	3	6	8		2	1	3	10	4	3	4
Attorney, GS-12-----	27	1	1	1	1	1	3	6	5	1	1	6
Attorney, GS-11-----	56	5	2	7	5	4	3	3	14	3	1	9
Attorney, GS-9-----	11	1			1	1	1	3	4			
Total, attorneys-----	194	16	11	24	9	12	11	21	44	11	9	26
Stenographic or clerical, GS-7 or below-----	105	8	6	9	6	8	7	12	23	5	6	15
Total-----	299	24	17	33	15	20	18	33	67	16	15	41

The Commission maintains field offices in eleven strategically located metropolitan areas of the Country. These field offices and a small headquarters group constitute the Bureau of Field Operations. This Bureau is the investigative arm of the Commission and its enforcement bureaus. Through the field offices it also serves as a liaison between the Commission and other enforcement agencies of the Federal, State, and local governments. The Bureau primarily discharges its responsibilities by conducting assigned investigations, negotiating settlements where appropriate by assurances of voluntary compliance or consent orders, and by performing such advisory, public relation, and educational activities as will enhance the effectiveness of the Commission's enforcement efforts. In fact, it is from the field staff that businessmen and the public generally form their impressions of the Commission since their contacts are limited largely to visits and communications with the field staff. Thus, although the investigative case load assigned to the field consumes a major portion of the Bureau's resources, these other related activities are of vital importance and require substantial amounts of staff efforts.

Although the Bureau experienced a heavy loss of qualified investigative personnel during 1969, it was still able to sustain a highly commendable record of performance throughout its varied operations. It began the fiscal year with one hundred fifty-four field attorneys and had the same number at year end. This represents a decrease in average employment of eight from 1968, primarily due to restrictions on employment. During the year the Bureau lost the services of 31 experienced attorneys. While the loss of several attorneys was related to death, retirement and transfer, the greater number resulted from resignations of attorneys desiring to engage in private law practice. Even though the losses were eventually replaced with recent law graduates, the overall effectiveness of the staff was reduced because the inexperienced replacements do not attain full effectiveness until they have served for more than a year.

The workload of the field offices for 1969 follows:

Pending cases beginning of fiscal year-----	786
Referrals to field for investigation during fiscal year-----	779
Total cases in field during year-----	1, 565
Cases completed-----	960
Pending July 1, 1969-----	605

While there was some reduction in the number of cases referred to the field offices for investigation, their complexity, as well as the attendant increases in the evidentiary requirements necessitated by Commission direction more than offset the decrease in numbers. Many of the cases involved industrywide considerations. In addition, the Commission directed the field offices to expedite many special projects and surveys which necessitated the diversion of large numbers of attorneys from casework investigations. At one time during 1969 there were approximately 85 attorneys assigned to special investigations and educational programs.

In connection with their casework assignments in 1969, the field offices negotiated or participated in the negotiation of over 400 consent settlements. These included 170 affidavits or letters of voluntary compliance and 239 consent orders. Of the consent orders 76 were in deceptive practice cases, 7 in restraint of trade matters and 3 in Industry Guidance cases. There were also consent orders in 153 textile and fur matters which were administratively handled by the field offices, although the actual negotiations were conducted largely by the textile and fur investigators who are under the supervision of the field offices.

The burden and length of investigations have been influenced by the increased necessity of resorting to subpoenas, processing motions to quash, and other delaying actions that often follow the issuance of subpoenas. During 1969 it was necessary to resort to subpoenas in 31 cases. This is a substantial increase over prior years and will continue to increase during 1970 and 1971.

The average number of cases completed per attorney was 6.23 cases, which represents a slight decrease from 6.97 cases per attorney for 1968. This slight decrease is readily understood by a review of the special activities required of the field staff. It is anticipated that the role of the field offices in informal matters and special assignments will continue at an accelerated rate during 1971.

There was an unprecedented increase in the number of special contacts with businessmen and the public, particularly during the last quarter of 1969 when the burden of educating creditors and others as to the requirements of the Truth-in-Lending Act and Regulation Z promulgated pursuant thereto by the Federal Reserve Board. There were 33,635 special contacts with the public during 1969, compared with 13,214 in 1968. This includes speakers furnished on 827 occasions of which 608 involved audiences numbering from 25 to 1,000 businessmen, trade associations, chambers of commerce and other groups who were interested in the effects of Truth-in-Lending on their business practices. During the fourth quarter of 1969, 37 field attorneys were assigned to Truth-in-Lending activities substantially on a full time basis.

As the Federal-State Cooperative programs continue to grow, field offices are being called upon to expand their contribution to the administration of these programs. This is particularly so in the Truth-in-Lending Act educational and enforcement programs and the "little" FTC Acts which many of the states are enacting through the encouragement of the Commission. Many of the field offices have already developed valuable contacts, techniques, skills and leadership in these areas through such activities as attending regional and area meetings of businessmen, trade associations, etc. on interstate cooperation in consumer fraud and deception and interstate cooperation in antitrust; providing key state officials with information for adopting deceptive and unfair trade practice legislation; providing continuing assistance to legal aid and "poverty law" offices, Better Business Bureaus, and similar agencies; and holding consumer conferences in conjunction with other agencies comprising the federal executive boards.

The Commission has directed that the Bureau of Field Operations and the General Counsel establish and participate in the operation of consumer protection law enforcement coordinating committees in each of the 50 large trading areas in the nation, with priority first being given to the establishment of such committees in the 15 largest trading areas.

The Commission has now placed all Truth-in-Lending activities in the field under the direction and supervision of the Bureau of Field Operations, with the overall responsibility for program planning and policy vested in the Division of Consumer Credit, Bureau of Deceptive Practices. The educational program initiated by the field offices to acquaint all affected parties and others with respect to disclosures and other requirements under the Truth-in-Lending Act and Regulation Z will continue to some extent throughout the year. Inspections and other enforcement activities are under way, and this phase of the work will be expanded substantially during the year as fast as new staffing permits. No additional funds are being requested in 1971 for field activities related to the Truth-in-Lending Act.

Based on the projections of the various enforcement bureaus, the investigative programs charted by the Commission for 1971, the enlargement of its consumer enforcement and educational activities, and the experience of the Bureau of Field Operations with its expanding investigative and compliance activities, an additional 13 field attorneys and 8 clerical-stenographic personnel are required together with supporting costs totaling \$272,000 for 1971. Also, funds totaling \$46,000 are requested in 1971 to annualize the mandatory costs of the 1970 Pay Act. The requested resources are summarized as follows:

Increases requested—1971

- 1 GS-15 attorney (headquarters)
- 1 GS-14 attorney
- 3 GS-13 attorneys
- 4 GS-12 attorneys
- 4 GS-11 attorneys
- 3 GS-5 clerk-stenographers
- 5 GS-4 clerk-stenographers

21 New positions.....	\$227, 000
Annualization of 1970 pay act costs.....	46, 000
Travel	45, 000
Total.....	318, 000

BUREAU OF INDUSTRY GUIDANCE

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	17	\$164, 000	17	\$166, 000	.....	\$2, 000
Division of Industry Guides.....	23	375, 000	23	379, 000	.....	4, 000
Division of Advisory Opinions.....	7	156, 000	7	158, 000	.....	2, 000
Division of Trade Regulation Rules.....	12	159, 000	12	161, 000	.....	2, 000
Total, personal services.....	59	854, 000	59	864, 000	.....	10, 000
Travel.....	.....	3, 000	.....	3, 000	.....	.....
Total.....	59	857, 000	59	867, 000	.....	10, 000

PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Stenographic and clerical
Professional:			
GS-16.....	1	1	.....
GS-15.....	17	17	.....
GS-14.....	4	4	.....
GS-13.....	4	4	.....
GS-12.....	3	3	.....
GS-11.....	4	4	.....
Stenographic, clerical, etc.....	22	.....	22
Totals.....	55	33	22
Total annual salaries, \$827,493.			

Through the Bureau of Industry Guidance, the Commission endeavors to obtain industrywide voluntary compliance with statutes it administers by informing and guiding businessmen as to the requirements of such statutes. The Bureau is comprised of three Divisions, each using a different technique to accomplish this vitally important phase of the Commission's work. In carrying out its objectives, the Bureau not only counsels, guides and advises businessmen as to legal requirements applicable to various business practices, but also affords the business community the opportunity to voluntarily discontinue unlawful practices, and thereby avoid the expense and delay of litigation.

The procedures utilized by the Bureau call for (1) the issuance and administration of industry guides which interpret statutory provisions as applicable to practices of particular industries or practices common to many industries, (2) promulgation of trade regulation rules defining specific practices considered to be unlawful and upon which the Commission may rely in litigated cases, (3) the preparation of advisory opinions concerning proposed courses of action, which are binding upon the Commission. These procedures are utilized, respectively, by the Division of Industry Guides, the Division of Trade Regulation Rules, and the Division of Advisory Opinions.

During its history of almost fifty years, the concept of industrywide voluntary compliance has repeatedly proved its effectiveness. The program was significantly enhanced in 1962 with the addition of the trade regulation rule and the advisory opinion functions. As presently constituted, the program provides businessmen an extraordinary opportunity to assess the legality of business programs from their very inception and to make such corrections as may be necessary to assure that Commission administered laws are observed. When the industrywide voluntary compliance concept is utilized to its fullest extent, not only the business community but consumers and the national economy itself benefit. Fair and equitable competitive conditions prevail in the marketplace and assist to promote and maintain a prosperous business climate. Consumers are afforded the opportunity to make informed purchases, select the best buy and avail themselves of legitimate savings—secure in the knowledge that manufacturers and sellers intend to stand behind guaranteed merchandise to the limit of what they have promised.

In 1969, the industry guidance program continued to place heavy emphasis on consumer protection programs. An increased number of rules and guides were adopted by the Commission and, at the close of the year, the Commission was giving active consideration to several other sets of rules and guides upon which work had been completed by the staff. In addition, the number of staff level interpretations as to the application of guide and rule provisions, given in response to requests from the business community, had increased by more than fifty percent over the previous year.

Because of the demonstrated need for continued efforts by the Commission to develop new consumer protection programs, added emphasis will be placed on the formulation and implementation of such new programs. This objective will be accomplished not only through the issuance of new rules and guides, but also through preparation of consumer pamphlets in important problem areas wherein the Commission wishes to place the general public, as well as a particular industry, on notice of the need for corrective action.

The program for 1971 does not, however, ignore the problems of maintaining competition. A continuing program to evaluate the effectiveness of the recently promulgated *Guides for Advertising Allowances and Other Merchandising Payments and Services* will be carried forward. In addition, new rules and guides dealing with problem areas particular to certain industries will be developed.

DIVISION OF INDUSTRY GUIDES

This Division is responsible for administering the Industry Guides program, the primary objective of which is to obtain expeditious industrywide voluntary compliance with laws administered by the Commission. Its work falls in four main categories: (1) the establishment of Guides, (2) furnishing advice and guidance concerning the provisions and applicability of Guides, (3) obtaining through continuous administration of the Guides the greatest possible degree of voluntary compliance with the provisions thereof, and (4) special projects.

Accomplishments, 1969

Establishment of Guides—The most significant contribution toward maintaining competition was the development of the *Guides for Advertising Allowances and Other Merchandising Payments and Services*, which provide extensive and comprehensive advice and guidance on how industry can meet the legal requirements of Sections 2(d) and (e) of the amended Clayton Act.

The Commission promulgated *Guides for the Beauty and Barber Equipment and Supplies Industry* offering guidance to avoid discriminatory or anticompetitive practices as well as dealing with problems of consumer deception.

Comprehensive Guides were also issued in the *Greeting Card Industry*, to assist in avoiding discriminatory practices and to maintain competition.

Guides for the *Dog and Cat Food Industry* were adopted to deal with misrepresentations of the content of such food, as well as misrepresentations concerning nutrient requirements and medicinal and therapeutic benefits to be derived through the use of such food.

Guides for the *Ladies' Handbag Industry* were also adopted in final form and deal with problems of deception due to the misrepresentation of material composition, finish, embossing, and processing, as well as other industry problems including deceptive pricing and anti-competitive practices.

Three new sets of Guides, as well as an amendment to an existing set of Guides, were released in proposed form for the purpose of soliciting public comment. The three sets of proposed Guides for the *Over-The-Counter Drug Industry*, *Decorative Wall Panel Industry* and dealing with *Use of the Word "Free" and Similar Representations* are intended to cope with various forms of deceptive or misleading practices. Likewise, a proposed amendment to the existing Guides for the *Household Furniture Industry* seeks to clarify problems with respect to misleading practices.

Staff work on proposed Guides for the *Wig Industry* had been completed and the Guides were being considered by the Commission at the close of the year.

Special Projects and Assignments—The Commission issued an enforcement statement challenging misleading speed and safety representations in automobile tire advertising.

Compliance—Three hundred and seventy-eight alleged violations of Commission administered laws were given attention to and disposed of by the Division. Of this total, 263 matters were disposed of on the basis that the practices in question had been discontinued and would not be resumed.

In addition, particular attention was being paid to guarantee problems arising in connection with the sale of various major home appliances, as well as problems involving debt collection deception.

At the close of 1969, 378 matters were pending for disposition.

Work programs—1971

The programs of the Division for 1971 seek to deal with new problems, especially in the field of consumer protection, while insuring the continuing effectiveness of those programs which will be put into operation during 1970. Likewise, efforts will be continued to strike a balance between efforts expended to develop new guides and time spent in obtaining compliance with those guides which have been promulgated.

Product Information—This program will be developed to obtain disclosure in advertising and/or by labeling of important product information for various consumer products. Many products on the market today are sold with either minimal or no information being provided the purchaser as to performance, content, care, durability or safety characteristics. As a consequence, consumers have little or no basis for making comparative evaluations of competing lines of merchandise prior to buying an item. Annually, after comparative testing, many consumer organizations release data to demonstrate that certain products are safer, more dependable, more easily cared for, etc., than are competing products.

Subsequent to the completion of studies involving application of the Commission's organic act to the problem of product information and the identification of important product lines requiring disclosure of one or more types of information, Industry Guidance proceedings will be initiated to determine the types of disclosures necessary for given products as well as the means by which such disclosures should be made to carry out the Commission's objectives.

Deceptive Franchise Agreements—Following development, in 1970, of a consumer pamphlet on franchise agreements, industry Guides will be formulated in 1971. The problems involved fall both in the area of deceptive practices and restraint of trade. In essence, substantial deception occurs through misleading promises of lavish earnings, exclusive territories, training, franchisor assistance, and others. In addition to covering these practices, the Guides will deal with such anti-competitive practices as exclusive buying arrangements, the "cutting off" or termination of franchise agreements by franchisors, and others.

Currently, cities, private organizations and Federal agencies, in an effort to persuade and assist minority groups to participate in the ownership and operation of small business in the inner city, have determined that franchising is an exceptionally well suited means to accomplish their objectives. Franchisees derive the benefit of proven know-how developed and tested by franchisors and enjoy the benefits of product identification.

Lawn and Garden Power Equipment Industry—This industry has burgeoned during the past twenty years to reach its current size of 175 manufacturers with annual sales approaching \$350 million.

Preliminary information indicates that there is a growing tendency toward deceptive misrepresentation in the advertising of industry products, particularly in connection with representations as to quality, capability and performance of products, conformance of products' design to recognized standards, as well as use of deceptive guarantees or the failure to set forth the material terms

and conditions of such guarantees, fictitious pricing claims and misrepresentations as to savings.

During 1971, industry Guides will be developed to deal specifically with these practices.

Special Compliance—Household Furniture Industry—During 1970, the existing Guides for this industry will be amended to provide additional advice to industry members concerning the labeling and advertising of their products, especially with respect to the type and method of disclosing wood names, identity of woods, stuffing, and origin and style of furniture. Subsequently an accelerated compliance program will be instituted in this large industry (4,000 manufacturers, \$4 billion in sales).

Guarantees and Warranties of Major Home Appliances—This project, inaugurated during 1969, is being conducted in conjunction with efforts in the same area on the part of the President's Advisor on Consumer Affairs, the Department of Commerce and the Department of Labor. The purpose of the project is to prepare guidelines which will specify the methods of disclosing guarantee provisions as well as to seek ways to improve repair work and servicing. Subsequent to issuance of such guidelines, a comprehensive compliance program is anticipated in this large industry (80 manufacturers with \$4.7 billion in sales).

Over-the-counter Drugs—Guides for this industry will become effective during 1970, having as their purpose the elimination of false advertising claims made in connection with the sale of proprietary drugs. Essentially, the guides will limit claims in advertising to those which are permissible in labeling under regulations administered by the Food and Drug Administration. Due to the large number of affected products on the market and the substantial amount of advertising done by manufacturers of such products, extensive compliance work will continue throughout 1971.

General Compliance Program—Guides for the *Household Metal Cookware Industry*, the *Simulated Stone, Marble and Related Products Industry*, as well as *Guides Against Deception in Referral Selling*, will be adopted during 1970, necessitating carry-forward compliance activity during the year. In addition, compliance activity along product lines will be continued in connection with the *Guides Against Deceptive Advertising of Guarantees*.

PROGRAMS FOR 1970-72

Projects	Type of action	Estimated man-years		
		1970	1971	1972
Deceptive franchise agreement negotiations.....	Guide and consumer pamphlet promulgation.....	1.0	1.0	0.5
Deception in referral selling.....	Promulgation of guides and compliance.....	.5	.5	.5
Pet food industry.....	Compliance.....	.5	.5	.5
Ladies' handbag manufacturing industry.....	do.....	.5	.5	.....
Free film industry.....	do.....	.5	.....	.....
Decorative wall panel industry.....	Guide promulgation and compliance.....	.5	.5	.....
Household furniture industry.....	Guide revision and compliance.....	2.0	2.0	2.0
Toy manufacturing and wholesale distributing industry.....	Guide promulgation and compliance.....	.5	.5	.....
Athletic goods industry.....	do.....	.5	.5	.....
"Earn money at home" offers.....	do.....	1.5	.5	.5
Cut carpet sizes.....	do.....	.5	.5	.5
Household metal cookware.....	do.....	.5	.5	.5
Simulated stone, marble and related products industry.....	do.....	.5	.5	.....
Guarantees and warranties for major home appliances.....	Preparation of guidelines and compliance.....	2.0	2.0	2.0
Lawn and garden power equipment industry.....	Guide promulgation and compliance.....	.....	.5	.5
Tobacco auction markets.....	do.....	.5	.5	.....
Use of the word "free".....	do.....	.5	.5	.....
Feather and down industry.....	Guide revision and compliance.....	.5	.5	.5
Wig industry.....	Guide promulgation and compliance.....	.5	.5	.5
Over-the-counter drug industry.....	do.....	.5	1.5	1.0
Product information.....	Study and I.G. proceedings.....	.....	1.0	1.0
Revision of industry guides.....	Revision and compliance.....	1.0	.....	.....
(a) Private home study schools.				
(b) Watch industry.				
Day-to-day compliance activity, special projects and assignments, interpretive work under guides.....		6.0	6.0	.....
Total man-years.....		21.0	21.0	.....
Total man-years presently authorized.....		21.0	.....	.....

DIVISION OF ADVISORY OPTIONS

The Division of Advisory Opinions prepares, for the Commission's consideration, proposed advisory opinions in response to the request of individuals, partnerships and corporations. These opinions discuss the legality of proposed courses of action and, when finally rendered, are binding upon the Commission. The Agency retains a right to rescind any opinion, however, should subsequent developments indicate a necessity for so doing. The advisory opinion procedure is offered to businessmen to assist them in avoiding use of practices which may be contrary to laws administered by the Commission.

Accomplishments—1969

During 1969, the Division processed and transmitted to the Commission 174 requests for advisory opinions. This compares with 173 requests during the previous year. The Commission acted on 173 advisory opinion requests and issued 127 opinions.

Nearly all the advisory opinions issued affect the consumer either directly or indirectly through their effect on the national economy, or through protection of competition throughout the United States.

Twenty-eight opinions were issued interpreting Section 5 of the FTC Act in the area of general trade restraints, dealing with such problems as employment of a competitor's personnel, the propriety of proposed exclusive-dealing contracts, the use of uniform warranties, the various problems of franchising so vital to small business, the right to limit trade association memberships to non-competitors, and the legality of statistical reporting through industry and trade associations.

Another 29 opinions were issued in response to requests for interpretations of the Robinson-Patman amendment to the Clayton Act. Many of these requests involved the legality of proposed tripartite promotional assistance plans. While varying greatly in detail, these plans essentially dealt with the question of using a third party intermediary through whom a supplier or manufacturer offers promotional assistance to his competing customers. Most of the plans are used in the distribution and merchandising of food-stuffs. Through advisory opinions in this area, the Commission has done much to preserve fair competition between the large chains and small independents, many of whom would not be able to stay in business, except for Commission action.

The Commission issued three opinions dealing with cooperatives, one under Sec. 6 of the Clayton Act and two involving the Capper-Volstead Act.

Fifteen requests for merger and acquisition clearances were processed under Sec. 7 of the Clayton Act. Of these 15 requests, only 5 clearances were granted by the Commission, 2 involving agricultural cooperatives, 2 involving small independent dairies having a difficult time financially and one merger of two small grocery chains in the interest of increasing competition in an area dominated by large chains. Clearance was denied in the 10 remaining matters and the economy was protected from further economic concentration in the areas involved.

The Commission issued 64 opinions concerning deceptive practices under Section 5 of the FTC Act. Five Food, Drug and Cosmetic opinions, four under Section 12 of the FTC Act and one under Section 15 were also issued. Twenty-five opinions were issued outlining the marking requirements of imported products, thereby informing consumers of a material fact bearing on their selection.

Two of the most difficult problems have been in the field of computerized credit services and the franchising field. Both of these areas have deep bearing on the future of the economy and the technological operation of businessmen in a modern world and the protection of small business men and consumers from the trade restraints and easy deceptions latent in franchising operations.

Program for 1971

The workload of this Division is dependent upon the number of requests received and it is reasonable to assume that this number will continue to exceed two hundred requests for the program year, as it has for the past several years. However, in view of the continuing publicity given to the program through the publication of Advisory Opinion Digests which, for the first time in 1969, were indexed and published in volume form, the number of requests may increase as more businessmen become aware of the availability of the Advisory Opinion procedure. It should be noted, however, that applications for opinions in certain

areas of the law may be reduced owing to the current requirement that information previously treated as confidential is now placed on the public record.

A portion of the Commission's available manpower will continue to be devoted to the preparation and indexing of the advisory opinion digests, so as to prepare these valuable tools for further publication in additional volumes.

DIVISION OF TRADE REGULATION RULES

This Division deals with the newest of the Commission's industry guidance procedures, the Trade Regulation Rule, which was designed to eliminate and prevent unlawful practices on a broad, industrywide basis without the expense of costly litigation. Such Rules express the judgment of the Commission concerning the substantive requirements of the statutes it administers and, as such, it is expected that they will be observed by all persons to whom they apply. If litigation is necessary as to recalcitrant industry member, the Commission may rely upon a Trade Regulation Rule to resolve any relevant issue therein, provided that the respondent shall have been given a fair hearing on the applicability of the Rule to the particular case.

Accomplishments—1969

During 1969, the Division was actively engaged in, or giving study to, six separate rulemaking proceedings, which culminated, by the close of the year, in the issuance of two new Trade Regulation Rules.

The Commission promulgated a Rule covering *Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cock-tail Glasses*. This proceeding had as its purpose the protection of consumers from hazards resulting from use of a common household product. The proceeding was undertaken following receipt of evidence that inhalation of the concentrated vapors from these spray products is extremely dangerous and may cause death due to asphyxiation or freezing of the larynx. The Rule requires that the product be labeled with a clear and conspicuous warning.

Another Rule promulgated by the Commission deals with the *Deceptive Advertising and Labeling as to Length of Extension Ladders*. This Rule requires disclosure in advertising and labeling of the maximum length of ladders when fully extended for use, since substantial footage is lost due to necessary overlapping of two sections when fully extended.

In connection with proceedings to which considerable activity was devoted during the year, but which were not finalized, a Notice of Public Hearing was published in a proceeding directed toward *Automobile Price Advertising*. In this matter, during 1970, consideration will be given to various pricing practices employed in the sale of automobiles, including the validity under law of the manufacturer's suggested list price affixed to automobiles pursuant to the Automobile Information Disclosure Act of 1958.

In response to a rising consumer demand for action, a proceeding was initiated related to the *Mailing of Unsolicited Credit Cards*. The proposed Rule, which was released for public comment, would prohibit the mailing of credit cards by those subject to Commission jurisdiction to any party without first receiving an express written request or consent therefor.

Staff consideration of the proposed Rule for *Non-prescription Systemic Analgesic Drugs* continued, pending outcome of an appeal in the Court of Appeals for the District of Columbia on the ruling of a lower court, dismissing a complaint filed by an industry member seeking to enjoin the proceeding. The staff will be in a position, as the result of its effort during 1970, to make final recommendations to the Commission following a favorable opinion by the Court.

A public hearing was held during the year on a proposed Rule relating to the advertising of Economic Poisons. Approximately 4,500 producers make up this industry and the advertising claims with respect to their products may represent a serious public health problem. At the close of the year, the staff was in the process of preparing recommendations for the Commission's consideration.

Of major interest was the public hearing involving *Games of Chance*, which has culminated in the issuance of a Rule in 1970. The public hearing was primarily concerned with the need for regulating the future conduct of these games in the gasoline and food retailing fields.

Work programs—1971

Special Care Project—A survey and study will be initiated to locate and identify products which, because of their nature, may require special care and handling. The study will have as one of its objectives the determination of

whether the Commission not only can, but should, attempt to make further entry into this area beyond the proceeding in the textile industry, which is presently pending in the Division. Should it be determined that further Commission action is warranted in this area, one or more industry guidance proceedings will be initiated. However, until such time as the initial study phase of the program is completed, it cannot be determined whether Commission action may be directed toward entire product lines or restricted to a product-by-product undertaking.

Automobile Lubricants & Crankcase Additives—This proceeding involves possible false and deceptive advertising as to the efficacy of various chemical preparations which are added to lubricating oil in the crankcase of automobiles. While some of the industry products are said to be harmless, although ineffectual to accomplish the purpose for which they are advertised, others may in fact be harmful to automobile engines. This industry is composed of approximately 121 producers having annual sales at the manufacturing level of \$150 million.

Newspaper Advertising Rates—Preliminary information indicates that newspapers may be engaging in discrimination between national and local advertisers through a disparity of advertising rates charged by such newspapers to the two different classes of advertisers.

Work will be commenced looking toward a Trade Regulation Rule Proceeding, in the event that the practice is determined to be industrywide in nature, to correct discriminatory rate structures and advertising rate changes in this industry. The project is significant due to the size of total advertising budgets for national and local advertisers, which has important economic significance within the advertising industry.

Special Project—Compliance Activity—During 1970, the Commission will issue two important Rules involving *Games of Chance* used as promotional devices in service stations and grocery stores, and *Sweepstakes*, generally conducted by mail. It is anticipated that in 1971 a major effort will be required to obtain compliance with the Rules, thereby insuring their effectiveness. In addition, issuance of one or more Rules affecting *Automotive Pricing*, in 1970, will necessitate a substantial program of planned compliance activity in 1971.

Compliance activity will also be required on previously issued Rules since, in many instances, a period of between six to twelve months may intervene between adoption of a Rule and its effective date. After the initial round of compliance activity, some follow-up work, usually in the form of a limited advertising monitoring program and periodic spot checks with industry members is needed.

PROGRAMS FOR 1970-72

Projects	Type of action	Estimated man-years		
		1970	1971	1972
Games of chance	Rulemaking and compliance	1.0	1.0	0.5
Paperback reprint agreements	do.	.5		
Unsolicited credit cards	do.	.5	.5	
Disclosure of cholesterol count	do.	.5	.5	
Automobile pricing	Investigation, rulemaking, and compliance	2.0	1.0	.5
Light bulbs	Rulemaking and compliance	1.0	.5	
Analgesics	do.	1.0	.5	
Economic poisons	do.	.5	.5	.5
Home entertainment equipment (wattage)	do.	.5	.5	
Food products containing cyclamates	do.	.5	.5	
Automobile lubricants and crankcase additives	do.		.5	.5
Sweepstakes	do.	1.0	1.0	.5
Newspaper advertising rates	do.	1.0	.5	
Special care project	Study and possible I.G. proceedings		.5	
Day-to-day compliance activity, special projects and assignments, interpretive work under rules		2.0	2.5	
Total man-years		11.0	11.0	
Total man-years presently authorized		11.0		

Mandatory Bureau fundings—1971

Funds totalling \$10,000 are requested in 1971 for the Bureau of Industry Guidance to annualize the mandatory costs of the 1970 Pay Act.

BUREAU OF ECONOMICS

	Allotment, fiscal year 1970		Requested, fiscal year 1971		Increase, fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the Director.....	38	\$321,000	38	\$324,500	-----	\$3,500
Division of Economic Evidence.....	27	345,000	29	368,500	2	23,500
Division of Industry Analysis.....	29	340,000	32	380,000	3	40,000
Division of Financial Statistics.....	37	345,000	37	349,000	-----	4,000
Total, personal services.....	131	1,351,000	136	1,422,000	5	71,000
Travel.....	-----	11,000	-----	14,000	-----	3,000
Other expenses.....	-----	15,000	-----	15,000	-----	-----
Total.....	131	1,377,000	136	1,451,000	5	74,000

PERSONNEL AS OF DEC. 31, 1969

	Total	Economist	Statistician, accountant, and analyst	Administrative, stenographic, and clerical
Professional:				
GS-16.....	1	1	-----	-----
GS-15.....	11	9	2	-----
GS-14.....	7	6	1	-----
GS-13.....	5	2	3	-----
GS-12.....	11	10	1	-----
GS-11.....	6	4	2	-----
GS-9.....	13	7	3	3
GS-7.....	8	-----	3	5
Consultant (when actually employed).....	6	6	-----	-----
Stenographic, clerical, etc.....	54	-----	-----	54
Totals.....	122	45	15	62

The principal responsibilities or objectives of the Bureau of Economics are (1) to review, study, analyze and make reports on economic developments affecting the structure, conduct and performance of the economy with the view to pinpointing actual or potential problems which may adversely affect competition, and to suggest appropriate corrective actions for such problems; and (2) to assist in the implementation of the Commission's law enforcement programs relating to antimonopoly and deceptive practices. In carrying out these responsibilities the Bureau's principal output is information and analyses which give direct support to the development and implementation of Commission actions associated with its efforts to maintain competition and protect the consumer.

DIVISION OF INDUSTRY ANALYSIS

Personnel requirements with respect to the Division of Industry Analysis arise in the context of a research program designed to provide information and analysis associated with problems of policy planning and evaluation. These programs are designed first and foremost to assist the Commission in the implementation and development of competition and consumer protection programs. They are designed also to provide Congress and other interested government agencies with information suitable for consideration of legislative and administrative reforms with respect to government policy toward business.

*Accomplishments, 1969:**Maintaining competition*

Study of Conglomerate Mergers—The bulk of the division's staff was utilized to prepare the study of conglomerate mergers, almost all of which was completed in fiscal 1969. This study was an extensive review of merger trends, changes in concentration, and the sources and consequences of conglomerate mergers. Because this project was unusually broad in scope and because it was done in about 1 year, it required the attention of more than half the economists in the Division of Industry Analysis. Work on several other projects was reduced or

postponed in order to complete this important study rapidly. This project constitutes an overall review and evaluation of merger activity. Several more detailed follow-up studies will be made in 1970, as described in the next section.

Trends in Merger Activity—The Commission's annual review of merger activity was prepared and published, continuing our series that has come to be regarded as the principal source for data concerning trends in merger activity. Two series of data are regularly presented in this report. One measures total merger activity. The other surveys large acquisitions (those with assets of \$10 million or more) involving mining and manufacturing firms. Both of these series reached new heights in 1969. This year each series was published separately, under the titles *Current Trends in Merger Activity, 1968* and *Large Mergers in Manufacturing and Mining, 1948-1968*.

This statistical program is the key indicator in our merger enforcement program as well as a prime indicator of changing characteristics in the current merger movement which may require special economic analysis. The trend of recent years toward more conglomerate mergers was accelerated during 1969.

Consumer protection

Food Chain Selling Practices—The final draft of the *Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco* was completed and published. Additional store surveys were made during 1969 in connection with this revision. This study found that the distribution system performed less satisfactorily in low-income areas of the inner-city than in suburban areas.

Many food stores serving low-income, inner-city areas are small, less efficient and have higher prices. Consumers in these areas are frequently sold lower quality merchandise and are provided fewer services than in other areas. Moreover, the retail facilities of low-income areas are often old and in a shabby state of upkeep. However, this report found no evidence that leading chain store operators in the District of Columbia and San Francisco have discriminatory policies designed to exploit low-income customers. Each of the largest food chain operators had an official policy of price and quality uniformity. To a significant degree, systematic departures from store-to-store price uniformity were discovered. However, for the most part, these involved responses to special competitive situations and could not be interpreted as reflecting an effort to discriminate against low-income customers, although that was generally the effect.

Analysis of Automobile Insurance—Work on this project was second only to the conglomerate study in terms of the number of economists involved. This study was undertaken at the request of the Department of Transportation, and is designed to develop and analyze information necessary for an evaluation of the automobile insurance industry. Our work will constitute a portion of the overall report which the Department of Transportation will submit to Congress. Our specific topics are the structure of the automobile insurance industry, and the high-risk market for automobile insurance. The former includes analysis of merger activity by the largest auto insurance companies, and an examination of trends in concentration. The high-risk project probes the effectiveness of high-risk plans, including an assessment of proposed plans designed to overcome deficiencies in existing high-risk programs.

Trading Stamps—Because of widespread public interest, the chapter on trading stamps in the *Economic Report on the Structure and Competitive Behavior of Food Retailing* was issued as a separate report. This was done to allow more widespread distribution of this chapter and to enable us to fulfill requests more readily for this portion of the study of good retailing. Some revisions in format were made so that the report could be issued independently of the rest of the study of food retailing.

Programs and staff requirements, 1971

The present staff of the Division of Industry Analysis is inadequate to effectively perform its mission as the Commission's research and planning arm in the field of competition policy. Three additional economists are needed in 1971 to exploit fully the research and planning opportunities presently available. These additional resources would assure the maintenance of a continuing planned research program. As has been noted many times in the past, the need to perform special ad hoc projects with a comparatively small staff has meant that most planned research projects have either been delayed or cancelled.

Also, beyond the ability to maintain a persistent planned research program, they would enable us to engage in a broader array of special projects relating to more rational policy planning toward competition both within the Commission and by other government agencies. Currently, most such projects in a given year are at the direction of the Commission or are initiated within the Bureau. Because of staffing limitations we have thus far been unable to give advice and assistance to other bureaus on a continuing basis. A recent example of our inability to provide assistance involves the Division of Special Projects (Bureau of Deceptive Practices) which asked for aid in evaluating and summarizing the recent consumer protection hearings. Additional staff is an absolute necessity to develop a program of continuing cooperation in assisting other bureaus and the Office of Program Review in planning and evaluating enforcement priorities. With present staffing levels we will continue to get involved in most such questions only after the fact, if at all.

Still another area of demand for special assistance that we have had to generally ignore involves servicing requests for aid by other government agencies. Because the Bureau of Economics in this Commission is generally recognized as a central source of economic expertise on problems of industrial organization by economists in other government agencies, it receives many inquiries for assistance. In recent months the Small Business Administration, the Federal Communications Commission and the Interstate Commerce Commission have asked for aid in the development of special studies. Though we provided them very limited assistance we do not have the resources to give continuing support or direction to their efforts despite the fact that the problems involved are significant for antitrust policy and the competitive functioning of the economy. The SBA, for example, wanted assistance in examining the competitive consequences for the food industry of recent changes in meat inspection laws. The ICC requested aid in studying and evaluating the competitive consequences of the merger movement in the trucking industry. Many have argued that transportation is an area in which reliance on competition as a market regulator could be greatly expanded. Whether this will continue to be true as mergers restructure the transportation sector is doubtful.

From this it can be seen that recent work done for the Department of Justice in the preparation of their cases on the Northwest Industries—B.F. Goodrich merger and the work currently under way for the Department of Transportation involving automobile insurance represent only a small sample of the planning, coordinating and integrating role that could be played by an adequately staffed Bureau of Economics at the FTC.

Adequate performance in each area of responsibility, long-term plan research, special projects for the Commission, planning and evaluating assistance for other bureaus, and assistance to other government agencies can contribute significantly to the Commission's basic mission of maintaining competition and consumer protection. With present staff limitations, full exercise of responsibility has thus far not been possible.

On the basis of currently approved staffing levels the following allocations are planned for 1971:

I. Maintaining competition

A. Effect of Conglomerate Mergers—This project is a follow-up of our research program studying trends and patterns of conglomerate merger activity. A major part of the Division's resources in fiscal 1970 is being devoted to carefully delineating the structural and behavioral consequences of the current merger movement and various key financial and performance characteristics of merging firms, an analysis of key industries affected by recent merger activity and a series of special statistical studies.

B. Studies of Major Concentrated Industries—Though a strong and well developed merger policy may be effective in preventing the emergence of inadequately competitive industries, it has relatively little impact on industries that are already highly concentrated. Such industries may represent instances of significant departures from competition but currently are only sporadically the object of active antitrust enforcement programs. It is therefore useful to determine in what way the balance of antitrust enforcement might be shifted to impinge more directly on persistent competitive trouble spots in the economy. A long-term research program is planned that would focus on a series of highly concentrated industries, long recognized to be ones in which competition is weak. The first industry to be examined in this program is the steel industry. Initial

research would be undertaken in 1970 as soon as personnel can be shifted from the conglomerate study. The full program, however, cannot be implemented until 1971, at which time we plan to allocate four professional economists on a continuing basis.

II. Consumer protection

A. *Affirmative Disclosure*.—The Commission recently directed the Bureau of Economics, in cooperation with other bureaus, to implement a program of affirmative disclosure with respect to petroleum products. This is the first part of a program designed to encourage advertising and product promotion efforts which provide consumers with usable information on the quality and performance characteristics of products they purchase. This is a continuing program that will supplement our efforts to prevent deceptive advertising.

B. *Truth-in-Lending*.—Still another aspect of affirmative disclosure is the requirement that borrowers be fully informed with respect to costs of borrowing. We anticipate a continuing role in assisting in the planning and implementation of our truth-in-lending program and stand ready to provide assistance in determining priorities.

A question has been raised regarding the adequacy of the rationale for studying truth-in-lending. It is our estimate that by 1971 the Commission's experience in enforcement in this area will be such that (1) adequate information will be available to evaluate program effectiveness, and (2) that ample statistical information (developed as a by-product of enforcement) will be available to prepare a special study of the consumer credit industry.

III. Special and statistical reports

A. *Trends in Mergers*.—For some years the FTC has been looked to as the principal reliable source for data on merger activity. These data were originally developed to determine our merger enforcement priorities. Commencing in 1962 the Bureau began developing a comprehensive merger series of "large" mergers, those wherein the acquired corporation had assets of \$10 million or more. These data have become widely used by researchers and serve as the basis for special statistical reports published annually.

B. *Program Planning and Special Projects*.—Experience indicates that this area of the Division's operation regularly absorbs the largest portion of available manpower. Specific activities include: Special ad hoc projects at the direction of the Commission and at the request of other bureaus of the Commission involving the development and planning of enforcement programs; advisory assistance to the Chairman and individual Commissioners on special matters; analysis of economic implications of proposed legislation; preparation of testimony evaluating legislative proposals and evaluating information for such proposals.

As noted earlier, our special project involvement currently consists for the most part of a series of ad hoc assignments at the direction of the Commission. Examples of such assignments for 1970 already include an analysis of anticompetitive practices in the department store industry, and an examination of structural and competitive changes in the apparel industry to determine the necessity and feasibility of issuing merger guidelines.

Based on past experience a wide variety of other activities will be undertaken. A brief sampling of projects for 1969 follows. Aside from the vastly expanded program of research on conglomerate mergers, examples of special projects last year include work on such topics as: pre-merger notification; automobile price increases; Gortons of Gloucester; discrimination in shopping center rental rates; textile mill products; cooperative tire advertising; affirmative disclosure; and testimony before the House Ways and Means Committee on mergers and taxation and before the House Banking Committee on one-bank holding companies. Most recently the Bureau assumed major responsibility for an investigation of pricing and availability practices of Washington supermarkets. Except for the study on conglomerate mergers none of the projects was included as planned programs for 1969.

This is not to imply lack of importance. Of the contrary, some of the most important work done recently (for example, the Retail Credit Study) started out as special projects. Their recitation is designed rather to emphasize as forcefully as possible the fact that a major part of the Division's staff is regularly involved in special projects. We cannot anticipate the specific of such assignments, but we do know that in any given year they absorb a major part of available manpower. We know further that the variety of special projects presently undertaken, particularly insofar as they involve forward planning assistance to other bureaus,

the Program Review Office and other government agencies is greatly circumscribed by present staffing limitations.

An example of forward planning for 1970 and 1971 is the projected auto pricing study. At the present time we have no personnel assigned to this project. On its face it appears to be a project of considerable importance both from the public's and Commission's standpoint. It should be noted that the Commission has under way investigations of the auto parts industry, and automobile warranty practices, and it has approved a special study of the automobile industry in its concentrated industry program. This study will be designed to assist the Commission in integrating these various programs in order to maximize its enforcement impact.

PROJECTED MANPOWER REQUIREMENTS FOR INDUSTRY ANALYSIS—1971

<i>I. Maintaining Competition</i>	
A. Effect of Conglomerate Mergers-----	9
B. Studies of Major Concentrated Industries-----	4
<i>II. Consumer Protection</i>	
A. Affirmative Disclosure-----	2
B. Truth-in-Lending-----	1
<i>III. Special and Statistical Reports</i>	
A. Trends in Mergers-----	3
B. Program Planning & Special Projects-----	13
Total -----	32

DIVISION OF ECONOMIC EVIDENCE

The Division of Economic Evidence has responsibility for making economic analyses which will aid the Commission in enforcing laws under its jurisdiction and assisting the legal bureaus in the implementation of enforcement programs designed to deal with designated problem areas, all of which are concerned with the principal goals of maintaining competition and protecting the consumer. In 1971 two additional economists are requested to further these objectives.

Accomplishments, 1969:

Maintaining Competition—Although practically all of this Division's work involves some aspect of maintaining competition, only those projects in which this aspect predominated are reviewed. In addition, the Division makes studies and reports where the complexity or obscurity of problems presented warrant extended research. Thus, the Division's work separates into analytical studies and case work. The Division's major projects in each of these categories are given below.

Economic Report on the Use of Games of Chance in Food and Gasoline Retailing—An extensive study of the use of games of chance in retailing was finished by this Division and printed as a staff report in December 1968. Among other things, the study concluded that games were used by large grocery chains to increase or preserve their market positions. In the short run, games may raise a given chain's market share but as the use of games becomes widespread, market positions tend to revert to their pre-game status. Game costs either lower the user's profit or are paid by the consumer through higher grocery prices. As a result of this study, the Commission inaugurated a rule-making procedure covering the use of games of chance in retailing.

Enforcement Policy With Respect to Mergers in the Textile Mill Products Industry—Studies by this Division formed the basis upon which these merger guidelines were predicated. Those studies showed that the structure of the textile mill products industry was changing due to numerous acquisitions particularly by the largest firms; to substantial increase in concentration in the industry and in specific product lines and to a trend to integration among the leading textile companies. These changes have raised entry barriers into an industry traditionally regarded as having a competitive structure. In order to arrest these marked trends away from a competitive structure, the Commission issued its guidelines respecting mergers in the textile mill products industry.

Other Staff Studies—A staff report titled *An Economic Analysis of Structural Changes in the Fertilizer Industry and Their Competitive Consequences* was completed in 1969. A survey of the automotive parts industry was also completed and summarized. This survey was undertaken because of the large number of possible Section 7 violations in the auto parts business that are under investigation or have been the subject of formal complaints. A preliminary study of

household consumer products is under way, but due to lack of staff it has not been given adequate attention. Many of the Division's staff have also worked on the Bureau's study of conglomerate mergers. That study will attempt to determine inter alia, the impact of such mergers upon competition and whether conglomerate firms tend to create industries that are not competitively structured.

Case Work—This is the area where attempts are made to maintain competition in specific markets and among specific firms. Failure here is quite likely to be final. The Division was active on all fronts in this area in 1969.

The Division maintains a day-by-day surveillance of merger activity as publicly reported. Outstanding or significant mergers and acquisitions are quickly brought to the attention of the Division Chief and others who can initiate an investigation. At the start of an investigation, the Division helps to prepare and/or reviews each letter of inquiry (about 61 in 1969) in Section 7 investigations and has participated in the collection of information in Section 5 investigations. Analyses of the data gathered during investigation were prepared by the Division for about 58 matters. The Division also participated actively in most of the Section 7 cases that were at the trial stage. Compliance work for previously issued orders as usual required substantial amounts of time. Such work always has a high priority, however, because it is at the compliance stage where restoration of competition, temporarily lost through merger, occurs.

Consumer Protection—The Commission's program for consumer protection was supported by the work of this Division in a number of ways in 1969. Hearings held as a result of the Division's report on games of chance resulted in the issuance of trade regulation rules respecting the use of such games. The Division is cooperating with the Division of General Trade Restraints in an investigation to determine if lower prices to the user for hearing aids and accessories can be achieved. The Division is working closely with other FTC staff groups to ascertain the effects of the use of extensive advertising programs by synthetic fiber firms. Such programs may have as one of their effects the artificial enhancement of fiber prices and so make apparel using those fibers more expensive to the consumer. The Division has under way a study of the marketing of household consumer products. This study may disclose the relative importance of non-price competition in the sale of such products and the cost to the consumer of such methods of competition.

Programs for 1971

Maintaining Competition: Significant activities planned for 1971 include:

(1) *Pre-Merger Notification*—This project was begun in May 1969 in close cooperation with the Division of Mergers. The project will obtain data about the largest mergers and acquisitions directly from the parties concerned. Already about a half dozen investigations have been opened as a result of information received.

(2) *Study of Conduct and Performance of Conglomerate Mergers*—It is planned that substantial time will be allocated by this Division to Part 2 of this study of conglomerate mergers, particularly referring to the effect of larger conglomerates on industry structure, conduct and performance. This will involve a study of the motives for merger, and the financial and efficiency consequences of merger activities of nine large acquiring firms.

(3) *Study of Industries Affected by Conglomerate Mergers*—This will involve an in-depth investigation of the effects on competitive behavior and performance in a series of industries affected.

(4) *Study of Company Take-Over Attempts*—Begun as an adjunct to the study of conglomerate mergers, this investigation can result in valuable insights into the manner in which many mergers are planned and executed. Take-over attempts can weaken competitive aggressiveness because expensive management talent must spend time fighting off the corporate raider rather than attending to the firms' business.

(5) *Dairy Industry Study*—This involves a review of recent developments in the industry in respect to such factors as vertical integration, private branding, price discrimination, milk marketing orders, economies of scale in processing and marketing and related factors as a basis for providing the Commission with a factual basis for its surveillance of mergers in the industry.

(6) *Industry Guidelines for Merger Enforcement*—The Commission has directed the Bureau of Economics to prepare a study as to the types of enforcement guidelines which might be adopted for the apparel industry. It is anticipated that other industries, including forest products, may also be studied in order to formulate merger enforcement guidelines.

(7) *Household Consumer Products*—The study should yield valuable insights into the nature and causes of changes in industry structure in this field.

Consumer Protection

Sweepstakes—As a follow-up of the recently enunciated trade practice rules covering games of chance in grocery and gasoline retailing, the Commission is in the process of developing proposed rules to cover sweepstakes promotions. This Division may be called upon to assist in this area.

In order to evaluate the personnel needs of the Division of Economic Evidence in 1971, it is important to recognize the central role this Division should play in the Commission's enforcement program. This role must be meshed with the changing broad problems affecting our competitive economy with the view to establishing important priorities. A case in point is the allocation of resources as between two major problem areas, namely the escalating conglomerate merger movement, on the one hand, and the study of concentrated industries on the other. The staff is devoting a major portion of its resources to the first problem, while making plans for moving into the concentrated industry studies. A basic premise for future planning may be that some solution may be brought to bear upon the wave of conglomerate mergers which would enable us to allocate a greater amount of resources to concentrated industry questions. This would not mean, of course, that merger problems would not continue. Rather it would mean that we should move to implement economic assistance to divisions other than the Division of Mergers, most notably General Trade Restraints and Discriminatory Practices as efforts are made to solve the problems posed by the concentrated industries.

In short, in planning manpower requirements it is essential that the operations of the Division of Economic Evidence be keyed-in to broad developments involving potential enforcement questions so that the available manpower may be best deployed.

DIVISION OF FINANCIAL STATISTICS

The Division of Financial Statistics produces, jointly with the Securities and Exchange Commission, the *Quarterly Financial Report for Manufacturing Corporations*. This publication is the basic and official government source of current facts on the financial condition and operating results of a major segment of the nation's economy—corporate manufacturing. (Nearly one-third of the national income originates in corporate manufacturing; manufacturing corporations account for more than half of all corporate profits.)

According to the latest of these quarterly reports, there are 87 multi-billion-dollar manufacturing corporations. They own nearly half of the total assets of all corporate manufacturers. Also, a total of 569 firms, each with assets in excess of \$100 million, own nearly three-fourths of all corporate manufacturing assets.

Bureau Summary—Increases 1971

In order to carry out the activities described in detail for this Bureau, an additional five positions and \$59,000 are requested. In addition, funds totaling \$15,000 are necessary in 1971 for the Bureau to annualize the mandatory costs of the 1970 Pay Act. The requested resources are summarized below:

Division of Economic Evidence:

- 1 GS-9 economist
- 1 GS-11 economist

2 ----- \$20,000

Division of Industry Analysis:

- 1 GS-13 economist
- 1 GS-11 economist
- 1 GS-9 economist

3 ----- 36,000

Personnel compensation (5 new positions)----- 56,000

Annualization of 1970 Pay Act costs----- 15,000

Travel ----- 3,000

Total increase—1971----- 74,000

OTHER EXPENSES

The sum of \$3,487,500 is required for costs other than salaries for 1971. These costs are itemized below:

Item of expense	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increases, fiscal year 1971
Personnel benefits.....	\$1,306,000	\$1,337,000	\$31,000
Travel and transportation of persons.....	697,500	727,500	30,000
Transportation of things.....	9,000	11,000	2,000
Rent, communications, and utilities.....	493,000	518,000	25,000
Printing and reproduction.....	140,000	155,000	15,000
Other services.....	249,000	259,000	10,000
Supplies and materials.....	230,000	234,000	4,000
Equipment.....	241,000	246,000	5,000
Total.....	3,365,500	3,487,500	122,000

PERSONNEL BENEFITS

The sum of \$1,337,000 is required for personnel benefits as shown in the following table. These benefits are statutory, and the cost reflects the Commission's pro rata share for these items. Funds necessary to annualize the mandatory costs of the 1970 Pay Act are included in the 1971 request.

	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increases, fiscal year 1971
CSC retirement fund.....	\$1,130,000	\$1,158,000	\$28,000
CSC employee life insurance.....	53,000	54,000	1,000
Employee health benefits.....	106,000	108,000	2,000
Employers share FICA taxes.....	8,500	8,500	-----
Public health services.....	5,000	5,000	-----
Incentive awards.....	3,000	3,000	-----
Allowance for uniforms.....	500	500	-----
Total.....	1,306,000	1,337,000	31,000

TRAVEL AND TRANSPORTATION OF PERSONS

The amount of \$727,500 is required for travel expenses in 1971 which is an increase of \$30,000 over the allocation for 1970. This amount will provide for the payment of transportation expenses, rental of automobiles, subsistence, incidental expenses and mileage costs for the use of privately owned automobiles for official travel. Per diem costs have increased sharply as a result of the increased rates authorized pursuant to P.L. 91-114.

The increase of \$30,000 is explained and justified in the Bureau requests as follows: \$45,000 for Field Operations; \$21,000 for Deceptive Practices; \$6,000 for Restraint of Trade; \$50,000 for Textiles and Furs; \$5,000 for General Counsel; and \$3,000 for Economics. This increase is required to provide travel for new professional employees. It is estimated that 20 of these will travel an average of 35 days per year. Also, 1970 per diem increase will bring minimum cost of all travel to an average of \$45 per day.

TRANSPORTATION OF THINGS

Funds in the amount of \$11,000 are requested for this item in 1971, which is an increase of \$2,000 over the allocation for 1970 which will be needed to defray the costs of moving households goods and increased allowances for field employees who are transferred during the year in accordance with P.L. 89-516 and Bureau of the Budget Circular A-56.

RENTS, COMMUNICATIONS AND UTILITIES

Rents and utilities

It is estimated that \$131,000 will be needed for payment to General Services Administration in 1971 for space, which represents no increase over 1970. Space will be required in the field offices as well as in Washington.

In 1971, an additional \$25,000 is requested to provide two disc storage units and to annualize the cost of tape drives installed in 1970. (See Division of Data Processing for detailed justification.)

	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increases, fiscal year 1971
Additional space rental (GSA).....	\$131,000	\$131,000	
ADP equipment rental.....	34,000	59,000	\$25,000
Xerox and printshop equipment rental.....	63,000	63,000	
Total.....	228,000	253,000	25,000

Communication services

Funds in the amount of \$265,000 are requested for communication services in 1971, which represents no increase over 1970. These funds are necessary for telephone, telegraph, and postal services, the installation of additional equipment, and recurring service charges.

PRINTING AND REPRODUCTION

Funds in the amount of \$155,000 are requested for printing of the Commission's volume of Decisions, statutes, court briefs, and miscellaneous administrative printing. This represents an increase of \$15,000 over 1970 for printing an extra volume of Commission Decisions.

OTHER SERVICES

This account includes all items of expenditure not otherwise classified. The increases are principally related to higher costs.

	Allotment, fiscal year 1970	Requested, fiscal year 1971	Increases, fiscal year 1971
Building alterations.....	\$70,000	\$75,000	\$5,000
Repairs to equipment.....	30,000	35,000	5,000
Stenographic reporting services.....	38,000	38,000	
Exhibits and testing.....	66,000	61,000	-5,000
Employee training.....	25,000	28,000	3,000
Miscellaneous expenses.....	5,000	7,000	2,000
Special services—Government agencies:			
BOASI—Corporate statistics.....	6,000	6,000	
Internal revenue—Corporate statistics.....	9,000	9,000	
Total.....	249,000	259,000	10,000

SUPPLIES AND MATERIALS

Funds in the amount of \$234,000 are requested for supplies and materials, representing an increase of \$4,000 over the allocation for 1970. This increase is necessary because of the increased cost of supplies and materials.

Included in this request is the cost of the annual library order for subscriptions and publications amounting to approximately \$60,000.

EQUIPMENT

Funds in the amount of \$246,000 are requested for new equipment in 1971, which represents an increase of \$5,000 over 1970 to provide the following items:

Cigarette laboratory and scientific equipment.....	\$70,000
Desks, chairs, typewriters, etc. for new clerical employees.....	22,000
Furniture for new professional employees.....	16,000
Additional multilith machines.....	9,000
Replacement of worn out, obsolete equipment consisting of typewriters, other office machines, furniture, and print shop equipment	103,000
Purchase of duplicating equipment now on rental.....	26,000
Total	246,000

I. THE AMERICAN BAR ASSOCIATION STUDY

QUESTIONS

I. The American Bar Association Study

A. What are your views on the specific criticisms of the ABA study in the following areas?

(1) *Delay in handling case workloads.*—In regard to handling case workloads, the ABA study is accurate in stating that this has always been a problem at the Commission. I recognized this and when I was appointed Chairman, I instituted various changes in our rules and practices which have been successful in eliminating much delay in the disposition of matters. These changes were: (1) a new consent settlement procedure, where, rather than having cases go to hearing examiners with the option for consent settlement any time during the formal procedures, consents had to be taken prior to the beginning of formal procedures. This eliminated much delay on formal adjudicative casework; (2) adoption of a rule requiring that hearings be held in one place and continue until completed. Here again the adjudicative process was speeded up; and (3) obtaining voluntary assurances where such were applicable rather than the issuance of formal complaints cut down on unnecessary investigative work.

The appearance of delay on Commission investigations is caused by lack of adequate manpower to completely carry out investigations expeditiously while at the same time our investigative staff works on special projects for the Commission.

At one time during this past fiscal year 85 of our 105 field attorneys were engaged on special projects required by this Commission and case work had to be held up pending completion of these special studies. (See statements from C. R. Moore, October 14, 1969; W. L. Tinley, October 9, 1969, transmitting memorandum from C. G. Miles, July 28, 1969; and Frank C. Hale, September 24, 1969.)

MEMORANDUM

OCTOBER 14, 1969.

To: John N. Wheelock, Executive Director.

From: Chas. R. Moore, Acting Director, Bureau of Field Operations.

Subject: 1971 Budget Hearing October 17, 1969.

In answer to the questionnaire furnished, the Bureau of Field Operations submits the following information—

I. A. With respect to the ABA study criticism of the delay in handling case workload, insofar as the field investigations are concerned, the criticism is unjustified. During fiscal 1969 and up to the present time, this Bureau has made a concerted drive to reduce the caseload and particularly the number of old cases.

The caseload has been reviewed repeatedly with the view to giving priority handling to the most important investigations outstanding and to see that available manpower is most effectively utilized in rapidly disposing of all cases.

Much has been accomplished in this regard notwithstanding the many special assignments and projects which were also assigned to the field offices. These special projects took away manpower from the regular case work in proportions not experienced since the last general mobilization of the economy for war. During the last quarter of 1969, there were at least 85 investigating attorneys out of a force of 150 field attorneys who had to be taken off their regular assignments, including older cases, for extended periods of time for special projects such as truth-in-lending magazine salesmen, auto sticker (Monroney) pricing, etc. Notwithstanding this, substantial progress is being made in the elimination of all old cases.

(1267)

Further, about 40 new field attorneys have recently been recruited for the field offices. These new additions should greatly facilitate the handling of field investigation of cases, special projects, etc., as soon as they receive the necessary training.

FEDERAL TRADE COMMISSION

TRANSMITTAL SLIP

To: John A. Delaney
Re Budget Question
I A (1)—Delay in
Handling Case Workloads.

For:

- ☐ Approval.
- ☐ Signature.
- ☐ Recommendation.
- ☐ Remark.
- ☐ Information.
- ☐ To check.
- ☐ Previous papers.
- ☐ File.
- ☐ Prepare reply.
- ☐ See me.
- ☐ Necessary action.
- ☐ Note and return.
- ☐ For Analysis.

From: Wilmer L. Tinley
Date October 9, 1969.

Remarks: This is the memorandum I referred to yesterday which I think will be helpful to the Chairman in the Budget hearing on October 17, 1969 in responding to Question I A (1) concerning criticisms with respect to delay in handling case workloads.

In addition to the procedures in the attached memorandum, the Chairman may also desire to refer to the Commission's publication in the Federal Register on 8-11-69 delegating authority to Bureau Directors and Assistants to issue investigational subpoenas, which was essentially for the purpose of reducing delays in investigations.

He may also desire to note that on 6-4-69 the Commission referred to the General Counsel suggestions by several hearing examiners (in response to Commission Minute of 2-26-69) for reducing delays in trials; and that the General Counsel referred this to the Rules Committee which now has under consideration specific proposals of this sort to submit to the Commission.

MEMORANDUM

JULY 28, 1969.

To: John N. Wheelock, Executive Director.

From: Cecil G. Miles, Director, Bureau of Restraint of Trade.

Subject: Commission Minute Dated June 11, 1969, Relative to Delay of Cases, Particularly of Type of Delay in File No. 631 0235, Gabriel Co., Closed by Commission Minute of Same Date.

By Minute date June 11, 1969, the Commission directed the Bureaus of Restraint of Trade and Field Operations to inform the Commission of procedures which can be adopted to eliminate the type of delay which occurred in File No. 631 0235.

The investigation in this matter was initiated in 1963. On May 13, 1963, the file was forwarded to the Bureau of Field Operations: on May 3, 1968, the Bureau of Field Operations forwarded the investigational files to this Bureau; and, on March 12, 1969, this Bureau forwarded the files, with recommendation for closing, to the Commission. (The Bureau of Field Operations is submitting a separate memorandum which deals with the history of assignments in the field offices to date of completion of the investigation. The assignments and transfers to field offices will not, therefore, be repeated here.)

This Bureau has been dealing with this subject for some time. In an effort to solve, administratively, the joint problems of manpower and delay, this Bureau proposed a Planning and Priorities Program to the Commission by memorandum dated December 24, 1968. I recommend, again, that the Commission consider and approve the pending Planning and Priorities Program as a basis for selection of cases, initiation of investigations, evaluation of pending cases and a system for re-evaluation of cases in relation to manpower and workloads.

The Bureau has made a great effort to adjust its caseload and complete the highest priority assignments of the Commission in relation to its available manpower. With our memorandum of June 13, 1969, we forwarded a list of 109 directives, covering a broad range of Commission directives to the Bureau in a without evaluation as to manpower commitments. However, in adjusting the directives, covering a broad range of Commission directives to the Bureau in a six month period. All Commission directives are accorded the highest priority without evaluation as to manpower commitments. However, in adjusting the special directives to manpower, we are aware that such adjusting displaces another assignment. It does result in cases getting older. Even with the adjustments being made, this Bureau completed over 300 cases which were pending 18 months or more.

The Bureau has developed and is currently using procedures which will head off delays occurring during the various phases of a case. However, these procedures have been developed on an ad hoc basis. In brief, these procedures are as follows:

1. A memorandum of April 18, 1969 by the Director, of this Bureau provides in effect, that proposed complaints submitted by the staff will be forwarded to the Director within 30 days, or that a report will be submitted as to why not. This is intended, of course, to avoid prolonged delays in connection with matters in which staff attorneys have prepared and submitted complaints.

2. A memorandum of June 10, 1969 by the Director of this Bureau provides in effect, that when a 7-digit matter is received from the Bureau of Field Operations, a copy of the history sheet be sent to Mr. Lipsky. This will enable the Director's Office to keep track of such matters and their progress. This is limited to 7-digit matters received from the Bureau of Field Operations. I find no comparable procedure, however, for dealing with 7-digit matters in this Bureau which have not been assigned to the field.

3. In response to a request of January 28, 1969 by the Chief, Compliance Division of this Bureau, the Acting Director of the Bureau of Field Operations, on April 16, 1969, instituted a procedure in the field offices to provide more meaningful progress reports and completion dates, and to provide for regular re-evaluation by the Attorney in Charge for reassignment of cases which are aging unduly.

4. By a notice to the staff of this Bureau, on October 11, 1968, the Acting Director reported a procedure agreed upon with the Bureau of Field Operations to enable the staff to make an informative status or interim report on matters returned to the staff by the Commission. Essentially this procedure provides for inquiry by the responsible attorney in this Bureau to the Bureau of Field Operations concerning the status of the matter at least 10 days before expiration of the time limit. This procedure is designed to deal particularly with matters involving responses to Commission directives.

5. AM 6-051.14D(4) provides for a simplified procedure for submitting acceptable recommendations by the field attorneys for closing 7-digit investigations. This procedure was intended, among other things, to expedite the handling of such matters and to avoid the preparation of extensive memoranda which would do no more than summarize the memoranda of the field attorneys.

6. AM 6-055.4 provides, in effect, that assurances of voluntary compliance shall be forwarded to the Commission within 60 days after they are received from the field or are executed by attorneys in this Bureau, subject to extension by the Division Chief.

7. AM 6-051.15 provides, in effect, for expedition in the handling of this Bureau of recommendations by field offices for complaint. Such recommendations are to be immediately assigned, and within 30 days a time is to be fixed for their submission.

While the foregoing measures suggest steps taken by this Bureau to eliminate problems of delay, they do not provide for the basis of dealing with the overall problem of manpower and expedition of cases. The Bureau of Field Operations and this Bureau make every effort to coordinate work demands in the framework of available manpower.

In specific cases, as they occur, the staff of this Bureau contacts the Bureau of Field Operations. While the Bureaus have coordinated their efforts and have moved particular cases, it is at the expense of other cases.

I recommend, again, that the Commission consider and approve the Planning and Priorities Program, proposed by this Bureau on December 24, 1968.

Respectfully submitted,

CECIL G. MILES,
Director, Bureau of Restraint of Trade.

BUREAU OF THE BUDGET QUESTIONS

(Submitted by Frank C. Hale—1969)

Question I. A (1). Delay in handling case workloads.

You have asked for views on specific criticisms of the ABA study with respect to delay in the handling of case workloads.

The ABA study accurately reports that "the problems of delay have vexed the FTC ever since it was established—". Practically every study made of the Commission, whether by persons outside the Commission or by staff members, has devoted considerable attention to the problem of delay. When I came to the Commission 1961, this was one of the first problems I attempted to deal with. Through various changes in our rules of practices for adjudicative proceedings, we have succeeded in eliminating much of the delay in disposing of matters in which complaints have issued. For example, we have adopted a rule which requires that, wherever practicable, hearings shall be held in one place and continue without suspension until concluded. Our prehearing discovery procedures, were revised, as were procedures for interlocutory appeals. These and other revisions were designed to speed up adjudicative proceedings.

Delay in the handling of investigations can result from (1) lethargy or ineptness on the part of individuals, or (2) from inappropriate or cumbersome procedures, such as, for example, excessive review, or (3) from too large workloads. There is no question but that too large workloads is the principle cause for the delay in the handling of investigations criticized by the ABA commission. We are simply trying to do too much with too little.

Let me cite some statistics about the workload in our Bureau of Deceptive Practices. At the end of Fiscal year 1967, there were 1210 investigations pending. During that year a total of 666 new investigations were open. 1210 investigations are simply too many for the staff to handle. Delays were bound to and did occur. In Fiscal 1968, we began a concentrated effort to reduce the caseload to manageable limits. Since a majority of the Bureaus' resources are committed to required programs such as, Fair Packaging and Labeling, D.C. Consumer Protection, Cigarette Advertising, etc. the only way the workload could be reduced was by not opening new investigations. In Fiscal 1968, only 388 new investigations were initiated and at the end of that year, the caseload had been reduced to 1076 investigations. But this was still too large especially since the Bureau had been given the additional assignment of administering a Truth in Lending Law, as well as, a number of other project-type assignments. The policy of being highly selective in opening new cases was continued through Fiscal 1969, when only 192 investigations were initiated. By the end of Fiscal 1969, the Bureaus caseload had been reduced to 781 investigations.

We are attempting to deal with the problem of delay every way we can think of, including demanding more from the professional staff, streamlining procedures wherever possible, and reducing the workload to manageable limits.

MEMORANDUM

SEPTEMBER 24, 1969.

To: Professional Staff, Bureau of Deceptive Practices.

From: Frank C. Hale, Director, Bureau of Deceptive Practices.

Subject: Field Office Recommendations for Consent Orders or Assurances of Voluntary Compliance.

The Commission has directed that all field office recommendations for consent orders or assurances of voluntary compliance be acted upon by the headquarters staff within 30 days and moved to the Commission or returned to the field within that period of time.

It was further directed that exceptions to this policy should not be made by supervisory personnel except for the most compelling reasons, which should not

include the normal shortage of manpower or pending assignments to "higher priority" matters, and that consent orders and AVC's should themselves be regarded as high priority matters.

FRANK C. HALE

MEMORANDUM

SEPTEMBER 8, 1969.

To: Executive Director.

From: Frank C. Hale, Director, Bureau of Deceptive Practices.

Subject: Proposed Time Limitation on Investigations.

This is in response to your request for comment on the proposal that the Commission direct that "all formal investigations opened by the staff be limited to a maximum authorization of 400 man hours and a maximum duration of six months, unless the Executive Director personally waives the limitation upon a request made personally by the Bureau Director on a showing of good cause".

The objectives of the proposal, as I understand it, are to insure that the staff does not spend an excessive amount of time on cases in which there is little public interest, sometimes characterized as trivia, and to insure that unnecessary delay does not occur in the handling of cases. I certainly do not quarrel with these objectives. Mr. Rogal and I have spent a considerable amount of time during the past 15 months in an effort to accomplish these objectives. We have instituted numerous procedures and controls to deal with the problem and progress has been made, but we recognize that it has not been solved. There are investigations still in the Bureau on which it appears that an excessive number of man hours have been spent and there are investigations which have been pending too long. Everyone of these investigations is being reviewed and action is being and will be taken to clean up our docket.

While I am in complete accord with the objectives of the proposal, I believe that adopting it in its present form would create more problems than it would solve. Among other things, the procedures it would be necessary to establish to comply with such a directive would be unduly burdensome and would require considerable time. For example, suppose a case is being investigated in a field office and the attorney has spent around 350 hours on it. He knows that it is going to take more than 50 hours to complete his work. He would have to take time out and write an explanation and ask for an extension. His request would have to be reviewed by the Attorney-in-Charge of his office, by the Director of Field Operations, by the Director of the cognizant bureau, and by the Executive Director. If an extension should be granted for the investigating attorney to complete his work, I assume the headquarters attorney would have to request another extension when the case reaches him. In short, I think the proposal is impractical and, I would like to think, unnecessary. It is true that we have had cases on which too much time was spent and in which there was too much delay. We have been severely criticized. Other cases like these are going to the Commission and, no doubt, there will be more criticism. These relatively few "horrible examples", in my opinion, should not prompt the Commission to issue impractical directions.

The problem which the proposal seems designed to deal with is a management problem which should be dealt with at the bureau level. The Commission has made it very clear that it does not want the staff to spend its time on trivia (but what is trivia to some is not always trivia to others) and that all unnecessary delay should be eliminated. That should be all the direction bureau and management needs from the Commission.

The proposed limit of 400 man hours on an investigation would be ample for most of the cases originating in the Bureau of Deceptive Practices, but the practical problems mentioned above seem to me to outweigh any advantages from imposing such a limitation. In fiscal 1968, the average number of manhours spent on 477 cases closed was 227; in fiscal 1969 the average was 288 on 451 cases. The six months duration limitation would cause problems. Obviously, if we could assign a matter to an attorney and give him no other assignment, he could complete almost any matter in less than six months. But we simply cannot work that way. Every attorney has a sizeable docket and priorities have to be determined. The Attorneys-in-Charge of field offices and the management of the Washington bureaus must work together in determining priorities. There is need for all attorneys, and particularly the division chiefs, to continuously review their dockets to be sure that investigations are not unduly delayed. This is being done in our Bureau.

Instead of the specific direction which has been proposed, I suggest that consideration be given to directing that a periodic review (possibly at the end of each six months) be made of every investigation which has been pending for a specified period of time (one year for deceptive practice cases is suggested) and that a report setting forth results of the review be submitted to the Commission.

Respectfully submitted,

FRANK C. HALE.

MEMORANDUM

SEPTEMBER 3, 1969.

To: Mr. Frank C. Hale; Mr. Cecil G. Miles, Mr. C. R. Moore.
From John N. Wheelock, Executive Director.

To confirm my telephone conversation with you as of this date, the following motion was presented today at the table:

I move that all formal investigations opened by the staff be limited to a maximum authorization of 400 man hours and a maximum duration of six months, unless the Executive Director personally waives the limitation upon a request made personally by the Bureau Director on a showing of good cause.

Please consider the above in light of the usual manhours required for an investigation and also the time limitation. I believe the consensus of the Commission is that this type of directive should be issued. In other words, they wish to place the responsibility for longer investigations on the Bureau Directors and the Executive Director. Please have in mind alternatives as to specifics.

As indicated, we will meet in Mr. Miles' office at 9:30 A.M. on Friday morning, September 5.

JOHN N. WHELOCK, *Executive Director*.

MEMORANDUM

JUNE 27, 1969.

To: The Professional Staff, Bureau of Deceptive Practices.
From: Assistant Director, Bureau of Deceptive Practices.
Subject: Consent Orders, Requests for Extension of Time.

Until further notice, all requests for extensions of the time in which to negotiate a consent settlement will be filed in the Office of the Chairman. At least three (3) copies of the requests and attachments should be presented.

Requests for an extension should give a clear and concise reason why the requests should be granted and should indicate whether any extensions have been previously granted.

WILLIAM W. ROGAL.

Approved:

FRANK C. HALE, *Director, Bureau of Deceptive Practices*.

MEMORANDUM

MARCH 17, 1969.

To: John N. Wheelock, Executive Director.
From: Frank C. Hale, Director, Bureau of Deceptive Practices.
Subject: Current Procedures to Prevent Delays. File No. 662 3483, Hilco Homes Corporation, et al.

It has been the policy of this Bureau to treat complaint matters on an expedite basis. In some instances, because of manpower shortages, heavy work assignments, resignations, inexperience of new personnel and other uncontrollable factors, we do encounter some delays.

Concentrated efforts have been made to reduce the caseload, which has been unbelievably large. This has been done in a two-prong fashion: (1) by reducing the number of investigations initiated and (2) a mass effort to reduce the investigations pending. For example, a year ago there were almost 1,200 investigations pending in the Bureau and by using every bit of manpower available and by the use of personnel outside the Bureau, we managed to reduce the number of pending cases to approximately 700 pending investigations. In addition, delays

were encountered because of the transition that was taking place resulting from the reorganization and the diversion of manpower to the Special Projects Division, as well as a Legal and Planning Division. We believe the reorganization has now reached a point where the operation of the Bureau is more efficient and the pending caseload for individual attorneys is almost within manageable proportion. It is hopeful that in the near future we will see few, if any, of the delays which have taken place in the past.

In addition, we are utilizing the speed-up procedure of attaching the field report whenever possible to our brief transmittal memorandums to the Commission. Safeguards have also been instituted wherein specific dates are now being set by Division Chiefs within which time each matter must be submitted to the Commission, unless for good cause shown extensions are granted.

It must also be recognized that while we may have a designated number of attorneys within the Bureau, they are of varying degrees of experience and competency. There has been in the last few years a large turn-over of younger attorneys and a loss of staff due to deaths and retirements, all of which necessitates reassignments and training periods for new attorneys. For example, in the Division of General Practices, during the last year approximately nine attorneys were lost because of resignations, retirements, etc. Because of this fact, and in an effort to balance workloads, I understand there were more than 250 reassignments of cases in that Division.

We are still bogged down with an unmerciful number of Congressional inquiries and routine complaints, all of which must be handled with a minimum of delays.

Without going into detail, there is another factor which substantially interferes with the drafting of complaints. This is the present pre-trial procedure which entails endless, time-consuming details such as motions, answers to motions, interlocutory appeals, trial briefs, pre-trial conferences, etc. Getting a case to a hearing requires a Herculean effort and one or more lawyers are lost for weeks on end in accomplishing this.

It distresses us to encounter delays in any kind of case, and we shall continue to do everything in our power to either eliminate or reduce these delays to a minimum.

It is believed that an additional explanation for the delay in the instant case may help the Commission to understand the unusual circumstances in this matter.

The proposed complaint in this matter was forwarded to the Commission on January 3, 1968. By minute of April 24, 1968, this matter was returned to the staff for redrafting the complaint and for re-interviewing customers of proposed respondent using financing by Colonial Mortgage Service Company in order to determine the basis for their patronizing Colonial as well as checking the intra-corporate relationship between proposed respondent and Colonial and the circumstances of the changes adopted in proposed respondent's financing policies after its acquisition by SUNASCO. On April 30, 1968, the file was sent to the field for a supplemental investigation. On June 27, 1968, the file was returned from the field.

The supplemental investigation conducted pursuant to this directive indicated that proposed respondent commenced winding up its affairs in January 1967 and that it had not been in active operation since March 1967. The staff attorney responsible for the matter in a subsequent inquiry was advised by S. Theodore Blumenfeld, Assistant Secretary and a Director of proposed respondent, as well as Executive Vice President of Atlas Financial Corporation, that although proposed respondent had been in a very inactive state since 1967, it maintained a sales office and that over a period of a year thirteen houses manufactured by Presidential Homes, Inc., had been sold. Mr. Blumenfeld also pointed out that Modern Design Homes, Inc., initially named as a proposed respondent, had been sold in 1967. At this juncture, even though confronted with the likelihood that a recommendation for closing would be appropriate in view of the apparent lack of public interest, the staff nevertheless undertook to prepare a consent agreement for execution by proposed respondent with the thought of perhaps realizing something from the time spent on the matter. During the course of the supplemental investigation, Mr. Blumenfeld had stated that he would not hesitate to sign a Commission cease and desist order on behalf of proposed respondent but would not do so if Colonial and Atlas were included. In this connection, it should be observed that no evidence was developed which would warrant the naming of Colonial or Atlas in this matter. There was also considered the remote possibility that the rights which proposed respondent had granted to Presidential

Homes, Inc., might be reassigned to it. In a memorandum, dated December 10, 1968, directed to the Bureau of Field Operations, and prepared by the staff attorney, the consent agreement was transmitted for execution by proposed respondent, pursuant to Section 2.14 of the Rules.

During the period from June 27, 1968, until this matter was returned to the field on December 10, 1968, Mr. Ryan took three weeks' annual leave. In addition, during this period of time he had been complaining about not feeling well but continued to carry out his assignments. In the early part of November, he was absent on emergency leave and was subsequently on extended sick leave covering more than a month because of a nervous condition. This necessitated reassignment of the case to Attorney John T. Walker on January 21, 1969.

During the time that the instant matter was under consideration, Mr. Ryan had three matters involving similar enterprises and practices. Complaints and consent agreements were prepared in *Hi-Line, Inc.*, File No. 662 3792; *H. R. Rieger Co., Inc., et al.*, File No. 662 3793; and *Best Homes, a partnership, et al.*, File No. 662 3663. In the first two files, the Commission accepted the executed consent agreements and complaints issued under Docket Nos. C-1447 and C-1482, while the third file has not as yet been returned to this Bureau from the Washington Area Field Office.

In summary, due to the limited public interest that subsequently developed in the case, a leave period, disposition of other matters with greater public interest, and the illness of Attorney Ryan, all combined to delay this matter.

What happened here is similar to the recent Volkswagen cases. Complaints were prepared and submitted to the Commission, only to be returned for additional investigation. Subsequent investigation disclosed proposed respondents were out of business. In the Volkswagen cases, we closed the case; however, in the instant matter we attempted to salvage something but to no avail, since a memorandum is now going forward recommending closing and rejection of a consent agreement signed only by the corporation.

Respectfully submitted,

FRANK C. HALE,
Director, Bureau of Deceptive Practices.

OCTOBER 14, 1968.

NOTICE TO THE PROFESSIONAL STAFF, BUREAU OF DECEPTIVE PRACTICES

Re: Re-submission to the Commission of Matters Returned to the Staff for Further Action and Report (AM 6Z051.26 and AM 6-055.6)

The staff is reminded of the requirement that: "Unless some other specific time limit is set, all matters which the Commission returns to the staff for further investigation, recommendation, or other action, should be re-submitted to the Commission *within 90 days*"; and that: "If the staff action has not been completed at the end of 90 days, the status of the matter will be reported to the Commission."

It is necessary that reports to the Commission concerning the status of matters not completed within the designated time limits, contain brief but informative explanations of the reasons for delay. It is not enough to report, for example, that a matter is pending in a particular field office.

For the purpose of enabling the staff to make an informative status or interim report to the Commission with respect to any such matter pending in the Bureau of Field Operations, the attorney in this Bureau responsible for such matter is directed to inquire, in person or by telephone through the office of the Director of the Bureau of Field Operations, at least 10 days before the expiration of the designated time limit, concerning the status, the reasons for delay, and the prospective completion date of such matter. We have been assured by the Acting Director of the Bureau of Field Operations that we will receive the full cooperation of that Bureau in assisting us to make an informative and timely report to the Commission.

FRANK C. HALE,
Director, Bureau of Deceptive Practices.

FEDERAL TRADE COMMISSION,
Washington, D.C., June 25, 1968.

Memorandum for :

Frank C. Hale, Director, Bureau of Deceptive Practices.

Cecil G. Miles, Director, Bureau of Restraint of Trade.

Henry D. Stringer, Director, Bureau of Textiles and Furs.

Re Delays in Obtaining Compliance with Commission Orders.

The Commission has noted (Minute dated May 20, 1968) with concern that negotiations seeking compliance with Commission orders are sometimes protracted over long periods of time. One factor apparently contributing to such delays is the use of the mails in an effort to clarify confusion or misunderstanding. In order to reduce this time lag, the Divisions of Compliance of the Bureaus of Restraint of Trade and Deceptive Practices and the Division of Enforcement of the Bureau of Textiles and Furs, in appropriate instances, should telephone officials of respondent companies to clarify matters or invite them to Washington for consultation. When the respondent is a small businessman and a trip to Washington would be an undue burden, consideration should be given to referring the file to the Bureau of Field Operations for expeditious discussion to assist respondent in complying. The intent of this instruction is that the Divisions responsible for compliance, depending upon the facts in the particular case, employ procedures which will avoid the delays which result from lengthy exchange of correspondence.

Please arrange to have copies of this memorandum distributed to all attorneys on your respective staffs concerned with this subject matter.

JOHN N. WHELOCK,
Executive Director.

MEMORANDUM

MAY 19, 1969.

To: The Professional Staff, Bureau of Deceptive Practices.

From: Director, Bureau of Deceptive Practices.

Subject: Applications for Complaint Forwarded by Field Offices.

My contacts with the various field offices located around the country have revealed some dissatisfaction with the manner in which we are handling their applications for complaint. As you know, applications from a field office can be broken down into two general categories: (1) those in which the field office merely forwards an application received from the public; and (2) those in which the field office actually recommends that an investigation be docketed. The problem arises with respect to the latter category. There is a feeling that field office recommendations are not handled with sufficient dispatch, and the recommendations are frequently overruled or ignored without explanation.

To insure future good relations with these offices, the following procedures will be instituted immediately:

1. Applications for complaint accompanied by a positive field-office recommendation that an investigation be undertaken will be processed on an "Expedite" basis; and

2. If the field office recommendation is not followed, the originating office will be briefly informed, in writing, of the reason for our decision.

The foregoing instructions do not supplant, but are to be considered as supplementary to, the instructions contained in the Executive Director's memorandum of March 12, 1965 (copy attached).

FRANK C. HALE.

FEDERAL TRADE COMMISSION,
Washington, D.C., March 12, 1965.

Memorandum to :

Director, Bureau of Deceptive Practices;

Director, Bureau of Industry Guidance;

Director, Bureau of Restraint of Trade;

Director, Bureau of Textiles and Furs.

From: John N. Wheelock, Executive Director.

Re Applications for Complaint.

As you know, the Field Offices transmit applications for complaint which are received from local applicants to the Washington Office by Form 6-5. Please instruct your staff to provide a carbon copy of the response to the applicant to be

attached to the form when it is returned, via the Correspondence Unit, to the Field Office. This procedure will provide the Field Offices with information as to the kind of disposition made of the application, the reason therefor, and the identity of the staff member responsible.

It has come to my attention that the 60-day goal for the disposition of application is loosely observed. Please bring this matter to the attention of your staff.

JOHN N. WHEELOCK,
Executive Director.

1971 FEDERAL TRADE COMMISSION BUDGET—BOB HEARING—OCTOBER 17,
1969—Continued

(2) *Policy planning*

Policy planning is essential for adequate accomplishment of the missions of any Agency. In my memorandum to the Commission dated August 29, 1969, I set forth my proposals for immediate action in regard to policy planning. (Memorandum attached.)

MEMORANDUM

AUGUST 29, 1969.

To: The Commission.

From: Paul Rand Dixon, Chairman.

Subject: Commission Minutes of January 24, 1969, respecting policy planning.

In Commissioner Nicholson's memorandum of August 11, 1969, to the Commission on policy planning, he discusses eight topics:

- (1) Trivia;
- (2) Overdependence on Mailbag;
- (3) Delay;
- (4) No evaluation of past experience;
- (5) Inability to bail out of losing causes;
- (6) Inadequate role of Economist in Planning;
- (7) The lack of a rational overall agency view in budgeting; and
- (8) Conclusions.

The first six topics are discussed in general terms with ample quotes from prior reports together with a few selected statistics and case histories. The seventh item on budgeting has been written with a lack of understanding of the budget process and a constructed table that is factually inaccurate.

It would be impossible to evaluate the overall factual content of this memorandum without in-depth studies, aside from the obviously misleading section on budgeting. However, the sections on "Delay," and "Overdependence on the Mailbag," give impressions of uncontrolled activity and a lazy and incompetent staff that are not true. Before dealing with budgeting it seems necessary to present facts that contradict these impressions.

In discussing "Overdependence on the Mailbag," the statement is made on page 8 that:

The overwhelming bulk of Commission activities is generated from "application for complaint" made by the public.

The figures cited after this statement only prove that legal casework is primarily generated by the public.

Actually, the major legal work of the Commission is not its individual cases and our legal personnel spend more time on special projects and studies, rules and regulations, guides, advisory opinions, etc. than on casework.

For example, special studies originated by the Commission in fiscal 1969, such as those on long-term leasing of tires; reciprocal patronage and dealings between industrial firms; advertising rate structure of newspapers; deceptive and fraudulent practices perpetrated in the sale of home improvements, importation of used and reconditioned foreign cars sold as new, survey of automobile sticker prices, etc. took up more professional time of the legal personnel in our field offices than did individual casework.

A cursory review of functional legal activity would provide information that casework, although important, takes up less time of our legal personnel than non-casework and that it is not the sole vehicle for accomplishing this Commission's missions. Advisory Opinions, Guides, Rules of Practice, Truth in Lending interpretations and educational activity, developing regulations under the Packaging Act, special projects on auto warranties; general consumer problems, etc. etc. etc., are more time consuming than casework.

On page 17 in footnote 20 statistics are given for casework in the FTC field offices with a concluding statement:

This does not suggest hundreds of attorneys "swamped" with work. I know of no other evidence that staff attorneys are overworked. There is no excuse for huge backlogs.

In fiscal 1969, at one time out of a field staff of 150 attorneys nearly 90 were engaged on special investigations and projects under Commission directives and as discussed above this is not an unusual situation.

On page 18, the statement is made:

Pleas by management personnel about manpower shortages are hard to take seriously when these are the very people leading the 4:45-5:00 exodus from the garage—and, when, with certain exceptions, these are the people whose cars are rarely to be found in the garage on Saturday.

A quick observation of the garage at 5:10 p.m. on Monday and Tuesday, August 25 and 26, showed that of 58 parking spaces 43 were still occupied on August 25, and 45 on August 26. Does this show a quick rush to leave before our 5 p.m. quitting time?

A count of those signing into the FTC building on Saturday, July 26 shows that 92 employees, or more than 10% of the FTC headquarters staff, were in the building that day. This fact would seem to indicate that FTC staffers are among the most dedicated of public servants.

Further proof of this assertion is shown by the fact that 40,487 hours of annual leave were lost by the staff in calendar 1969, or more than 4 days per employee. A large percentage of the lost leave can be credited to our higher level professional and managerial employees whose average loss was more than 11 days each.

Specifically on budgeting the memorandum shows a lack of understanding of the Federal budgetary system, statistics are misused and one inaccurate statistical table has been constructed.

On pages 31 and 32 the memorandum discusses the irrationality of the budget process and attempts to show that budget requests are not based on workload. In the real life situation the final budget of FTC is vitally influenced by Presidential decision making as to programs requiring national precedence. For example, when originally considering needs for funding programs for fiscal 1967 this Commission voted an increase of \$1,748,700 for 242 positions on July 9, 1965. After direction from the Bureau of the Budget that the President would not permit expanded activities, this Commission, on July 22, 1965, voted to reconsider its action of July 9, 1965, and not to request any increase in its budget submittal for fiscal 1967.

For fiscal 1969 this Commission originally approved a \$2,950,000 increase for 286 employees and after receipt of a letter from the Director of the Bureau of the Budget the request submitted was pared to an increase of \$542,000 and 36 additional employees. Knowledge of the factual situations for fiscal years 1967 and 1969 would surely have prevented the statement found on page 33 of the memorandum to the effect that:

The irregularity in the budget increases requested removes any credibility that might be generated by the various fervent budget increase appeals.

On page 37 misunderstanding of the Federal budget process is clearly evident from the statement:

When examining the budgets for fiscal 1966-1969, it can be seen that in both 1967 and 1969 the Commission was allocated more money it requested originally of the Budget Bureau.

and the non-factual constructed table headed "Position Increases 1966-1969."

The true situation is that this Commission determines how much additional funding will be required for a fiscal year and submits its request to the Bureau of the Budget showing how many additional positions will be established if the request is approved. Then the Bureau of the Budget advises the Commission as to total funds it can request in its budget to the Congress and this Commission determines the number of new positions to request of the Congress. Then, after Congressional appropriation, this Commission determines the number of positions it can fund with the money provided. Nowhere in the budget process is there a hard decision by the Bureau of the Budget or the Congress as to the number of new positions this Commission can fund. Position ceilings have in the past been placed on the Commission by the Bureau of the Budget and the Congress (Revenue and Expenditure Control Act of 1968) without regard to funding in order to curtail Federal employment and relieve inflationary pressures.

Also, the statement just quoted and the table give the incorrect impression that this Commission was provided more money and positions by the Congress than approved by the Bureau of the Budget. This is not so. In no year has the Congress provided more money than approved by the Bureau of the Budget. Apparently the initial budget requests to the Congress were compared to final appropriated amounts without the realization that supplementals for pay raises and funding of new programs approved by the Bureau of the Budget accounted for higher final appropriations than the original budget requests to the Congress.

On page 38 the table and discussion attempt to show that this Commission did not prove its needs to the Bureau of the Budget and that Federal austerity was not the reason for low budgets for this Commission. There is no need to elaborate on the budget process; however, a look at the table shows only that in three of the four years covered, FTC did not have favored national non-defense programs and that in the fourth year it acquired funds for a favored program instituted under new legislation (\$200,000 for Truth in Lending), \$100,000 for a new program (FTC/FDA Drug Evaluation), and a pay raise of \$500,000. For continuing programs carried over from fiscal 1968 the increase was only 4.7%.

In "Conclusions" the first sentence in the last paragraph of the memorandum found on page 76 reads:

I am aware of course that the proposal in its present form may be oversimplified, may fail to take account of any number of existing problems, and, perhaps, may be unworkable.

I must agree and do not believe that this memorandum has laid the proper foundation for the recommendations in regard to the functions of an augmented Office of Program Review. Recommendations (b) and (d), on page 75, disturb me particularly because, if adopted, they would superimpose another level of authority over day-to-day operations.

At this time, while we are under investigation by a Commission of the American Bar Association, two Congressional investigations are in the offing and the Chairmanship of the Commission and its makeup are subject to change in the immediate future. I honestly believe that we should not consider these recommendations until at least a temporary period of stability is assured.

If the Commission insists on a consideration of this matter now, I recommend that we revitalize our present Office of Program Review and staff it with a Director, two senior economists and two senior attorneys, together with necessary clerical personnel. At this time I would limit its functions to:

(1) A study of the tools available to accomplish the missions of this Commission—traditional legal casework, guides, rules, advisory opinions, economic reports, positive industry and consumer oriented education activities and any others that could be utilized within the scope of our legislated authority. This study should be geared to evaluating the effectiveness of each tool and recommending the degree to which each should be used; and

(2) A study of potential sources of information relating to the problems occurring in our economy over which we have jurisdiction and the development of a proposed system for collecting and evaluating such information.

If we must vote on permanent functions and organization at this time, I recommend that the Office be constituted as follows:

Director, Office of Program Review, with a grade equal to that of the Executive Director and General Counsel, if possible, but certainly not less than that of bureau directors. The Director's high rank is necessary because the Commission's chief planning officer should have the power to coordinate on-going business of the bureaus with Commission objectives and priorities. The existence of a small, supporting economic and legal staff in the new planning office, and the proposed increased responsibilities of the over-all planning staff, would appear to warrant Civil Service Commission approval of the suggested grade for the planning director.

The primary duties of the central planning staff and the direct responsibilities of its Director follow:

(1) To plan, formulate, and recommend to the Commission, and to the Chairman in those instances where he has the responsibility for the subject matter of the recommendation, programs of work and policies for the most effective functioning of the Commission.

(2) To estimate and project money and personnel requirements to accompany the sets of policy goals, projects and programs.

(3) To guide and work with the Comptroller's Office in the preparation of the annual budget justification and be available to the Chairman in presenting

the Commission's program to the Bureau of the Budget and to the Appropriation Committees of the Congress.

Two senior economists

(Since the Office now has an economist this will require only the transfer to the planning unit of one economist.) Long-range policy planning must be based on sound economic theory. The two economists would have these assignments, among other things:

(1) Assisting the Director, Office of Program Review, in establishing goals, and priorities among goals, in relation to current and future appropriations.

(2) Making resources and requirement analyses for the alternate policy goals devised and presented for the Commission's consideration.

(3) Providing economic justifications for Commission budgets and drafting these budgets.

(4) Making special studies that anticipate and earmark problems ahead with which the Commission must deal, and recommending alternative policies and ways for the Commission to handle such problems before they get out of hand.

Two senior attorneys

The principal function of these attorneys should be to appraise existing Commission caseload, investigations and programs, and, in general to keep informed as to what has been and is being done, and recommending changes for more efficient operations.

Proposed scope of FTC planning

The main job of Commission planning and program review is to ask and find answers to the following questions:

(1) *What are the Commission objectives?*

(2) *What are the alternative ways of achieving these objectives?* For example, should enforcement stress antimonopoly cases in concentrated industries at the expense of deceptive practices actions against companies not among the Nation's 1000 largest?

(3) *What would the various means of achieving the stated Commission goals cost?* How effective would they be? This involves measurement and judgment of the difficulties and distance between the present situation and the desired objectives.

(4) *What does the Commission need to know in order to make a sound choice of means?*

(5) *Finally, what is the program to achieve the Commission goals?* Priorities must be set, specific broad tasks assigned to the Bureaus, and available resources budgeted to reach the objectives of the program. Periodic evaluation and modification of both programs and objectives in the light of experience are also essential elements in the planning process.

Planning usually reduces regimentation by eliminating some of the uncertainties in the situation.

1971 FEDERAL TRADE COMMISSION BUDGET—BOB HEARING—OCTOBER 17,
1969—Continued

(3) Work outputs by bureaus

The ABA report directed its attention to the Bureau of Textiles and Furs, indicating that the four consumer protection laws administered by this bureau have received favored treatment in terms of dollars and proportion of resources allocated to the program and the ABA report indicated that this represented poor planning. I feel that the ABA did not really make an exhaustive study either of the particular cases they cited nor of the time and effort devoted to this bureau's activities. Actually, when you consider that the bureau received only one-fourth the amount of money for operations compared to our other deceptive practices programs last fiscal year and that its accomplishments keep the fur, wool and textile industries relatively free from flagrant consumer deceptions that at one time were strongly prevalent, criticism is totally unfounded.

(4) Concern with "detection and deterrence of relatively technical instances of garment mislabeling" by the Bureau of Textiles and Furs.

Page 26, first full paragraph of the ABA Report: The ABA Commission questions the number of Assurances of Voluntary Compliance of the Bureau of Textiles and Furs. These Assurances of Voluntary Compliance, however, accounted for only 45 out of 263 such Assurances taken by the Federal Trade

Commission in fiscal year 1969. The Assurances of Voluntary Compliance in the Bureau of Textiles and Furs are taken in affidavit form where it appears that there are extenuating circumstances in the case under investigation, and that the affidavit is sufficient to assure compliance with the law in the future, and is taken in lieu of a cease and desist order. See Table VII. Informal corrective actions are generally violations of regulations as to form where there is no evidence of intent to deceive or fraud is observed. These corrective actions are either oral assurances given to the investigators of the Bureau of Textiles and Furs at the time of the inspection or are accomplished by correspondence. It will be noted that the Bureau of Deceptive Practices does not report this type of corrective action, which probably accounts for the top-heavy figures of the Bureau of Textiles and Furs in this category. See Table VIII.

Page 26, second paragraph of the ABA Report: The ABA Commission compares the funds of the Federal Trade Commission spent on the Division of Textiles and Furs in 1959 (9.3% of the FTC budget) against the 1969 budget of the Bureau of Textiles and Furs (11% of the FTC budget). In 1959 the Division of Textiles and Furs was but a part of the Bureau of Investigation and had only three Acts to enforce: the Wool Act, the Fur Act, and the Flammable Fabrics Act. The Textile Act became effective in March 1960. Therefore, only 1.7% of the Commission's budget has been added to the funds of the Bureau of Textiles and Furs to police this multibillion-dollar segment of our economy. It would appear that such an expenditure is a pretty good bargain for the Government.

Page 43, first paragraph of the ABA Report: The ABA Commission unfairly compares the Division of Special Projects in the Bureau of Deceptive Practices with the Bureau of Textiles and Furs. The ABA Report states there are 12 attorneys in the Division of Special Projects whereas there are almost 100 employees in the Bureau of Textiles and Furs. The ABA Report overlooks the fact that the Bureau of Textiles and Furs is a self-sufficient operating Bureau of the Federal Trade Commission sustaining its own field staff, a Compliance Section, a stenographic pool, a file room, together with various other duties, and it would seem most unfair to compare the operation of a Bureau to a Division of 12 attorneys which is a part of a sister operating bureau.

Page 45, third full paragraph of the ABA Report: On pages 36 and 37 of the ABA Report, the FTC is taken to task for not doing enough for the consumer. On page 45 of the Report further states that the Wool Act, Textile Act, and the Fur Act "... are primarily aimed at protecting producers rather than consumers". Footnote 71 cites statements made by opponents of the three Acts in hearings when these statutes were being considered by Congress. May I read the preambles of the three statutes to show what the purpose of these Acts is as set forth by Congress.

The Wool Products Labeling Act of 1939: "An Act to protect producers, manufacturers, distributors, and consumers from the unrevealed presence of substitutes and mixtures in spun, woven, knitted, felted, or otherwise manufactured wool products, and for other purposes."

The Textile Fiber Products Identification Act: "An Act to protect producers and consumers against misbranding and false advertising of the fiber content of textile fiber products."

The Fur Products Labeling Act: "An Act to protect consumers and others against misbranding, false advertising and false invoicing fur products and furs."

Actually the Federal Trade Commission has been closer to the consuming public in enforcing these three Acts than it has in any of its other activities.

Page 46, first full paragraph of the ABA Report: In the *Marcus* case, the ABA Report ridicules the FTC for bringing an action against a blanket distributor because the woolen content of the blankets in question were fractionally lower or higher than the wool content set forth on the labels. The ABA Commission missed the point in this case entirely, as the public record shows that when Commission investigators entered the place of business of the respondent they found the employees of such concern busily engaged in removing manufacturer fiber content labels bearing the designation "90% wool, 10% undetermined manmade fibers" and substituting labels showing "90% wool, 10% nylon". Misrepresentations of other types of blankets were also discovered during the course of the investigation. When blankets of this type were purchased and analyzed, they were found to contain only minor amounts of nylon, together with various other fibers not set forth on the labels. The experience of the Bureau of Textiles and Furs indicates that nylon has a particular appeal to consumers of this type

of blanket in that nylon strengthens the blankets and adds considerable to its wearability. For this reason blankets containing such amounts of nylon would ordinarily command a higher price than blankets containing the same amount of conglomerate fibers. Therefore, the case involved both consumer deception and unfair competition to the competitors of the respondent. And, further, the respondent was unjustly enriched at the expense of his customers and the general public.

Pages 46 and 47 of the ABA Report: In *The Fair* and *Mannis* cases the ABA Report gives the false impression that the only infractions of the law and regulations were hypertechnical charges, such as "nonrequired information on labels", "abbreviations", etc. However, in *The Fair* case the bases of the Federal Trade Commission's action were serious charges of fictitious pricing in the advertising of fur products, although the ABA Commission Report failed to mention this fact. The primary charge involved in one instance was that the products were reduced from "usual" prices when the "usual" prices were fictitious and the bargain in effect was a phony one.

In the *Mannis* case the ABA Report also infers that the only charges were minor infractions of the law and the regulations. However, the facts of the matter are that the respondent was advertising fur products represented as "below cost" and was representing his furs as distress merchandise. Further, the facts in the case show that the respondent was selling second-hand fur coats as new.

In each of these cases we believe there was a serious deception of the consumer and that the public interest was clearly involved. In the past, where it was determined that a serious violation of the Fur Products Labeling Act had occurred which affected the consumer, it has been the practice of the Federal Trade Commission to also correct the minor matters together with the more serious ones. This is not because the minor violations would ever of and in themselves become the basis of an action, but rather such action was intended to educate the respondent and the trade and to encourage some sort of order and uniformity in the labeling process. In the cases above referred to in the ABA Report, the violations of several regulations were included in the complaints for that purpose.

The investigator for the ABA Commission could not have even hurriedly read these cases and overlooked the main thrust of the actions. Why the whole story was not told in the ABA Commission Report is known only to the writer of such Report.

1971 FEDERAL TRADE COMMISSION BUDGET—BOB HEARING—OCTOBER 17,
1969—Continued

(5) *Commission does not establish priorities*

The Commission establishes its broad priorities through the budget process. Funds requested for each activity are approved by the Commission as a whole after reviewing our total group of activities. This is true even though one of our Commissioner's refuses to carry out his responsibility in this functional area.

Throughout a fiscal year the Commission as a whole sets priorities when it requires our operating bureaus to engage in certain projects to be completed within specific time limits.

1. *The American Bar Association Study*

B. What actions does FTC plan to take with regard to the ABA study?

You might be interested in what the Commission has recently done in connection with expediting our investigative case work. We have established a special committee to review all matters pending over 18 months for the Bureau of Restraint of Trade and 12 months for the Bureau of Deceptive Practices with authority to recommend to the Commission the closing of files of marginal importance to enforcement goals and those too old for effective Agency action. (See Commission Minutes of September 30, 1969, and October 7, 1969.)

The Commission has also established controls to evaluate all current cases opened since June 30, 1969, so that excessive time and effort will not be expended. (See Commission Minutes of September 30, 1969. Subject: Formal Investigations Opened by the Staff.)

SEPTEMBER 30, 1969.

Memorandum for :

Executive Director,
 Assistant Executive Director,
 Director, Office of Administration,
 Comptroller,
 Director of Hearing Examiners,
 General Counsel,
 Director, Bureau of Restraint of Trade,
 Director, Bureau of Deceptive Practices,
 Director, Bureau of Textiles and Furs,
 Director, Bureau of Field Operations,
 Director, Bureau of Industry Guidance,
 Director, Bureau of Economics,
 Assistant to the Chairman,
 Program Review Office,
 Legal Advisers to the Commissioners,
 Legal and Public Records,
 Director of Public Information,
 Management Officer,
 Reporting Section :

Status of pending matters—In re: 7-Digit Matters Pending in Bureaus of Deceptive Practices and Restraint of Trade.

Reference is made to memoranda of August 29, 1969 and September 8, 1969 from the Bureaus of Restraint of Trade and Deceptive Practices, respectively, reporting pursuant to action of July 21, 1969 in the Commission's consideration of the proposed budget requests for Fiscal Year 1971, with respect to the status of 7-digit file matters.

In conformity with the recommendations of the American Bar Association Commission (Report, pp. 77-78) the Commission directed that a special committee be established to review the current backlog of pending matters listed in the memoranda of August 29, 1969 from the Bureau of Restraint of Trade, September 8 from the Bureau of Deceptive Practices, and the tabulation attached to memorandum of September 18 from the Assistant Executive Director, to recommend to the Commission the closing of those files that are of marginal importance in terms of a sensible assessment of the agency's enforcement goals, as well as those matters that have been pending so long that effective agency action would be difficult or impossible to achieve. As to those pending matters not closed out, the special committee was directed to impose realistic deadlines and see that they are strictly observed.

It was further directed that the special committee established by the Commission consist of a designee of each of the five members of the Commission, a designee of the General Counsel, plus a designee of the Bureau of Economics, to be formed and begin functioning no later than October 10, 1969, that the Chairman of the special committee be designated by the Chairman of the Commission and report to the Commission no later than November 10, 1969.

Names of the designees to form the special committee are to be submitted expeditiously to the Assistant Executive Director.

By direction of the Commission.

The papers are transmitted to the Assistant Executive Director.

JOSEPH W. SHEA, *Secretary.*

OCTOBER 7, 1969.

Memorandum for :

Executive Director,
 Assistant Executive Director,
 Director, Office of Administration,
 Comptroller,
 Director of Hearing Examiners,
 General Counsel,
 Director, Bureau of Restraint of Trade,
 Director, Bureau of Deceptive Practices,
 Director, Bureau of Textiles and Furs,
 Director, Bureau of Field Operations,
 Director, Bureau of Industry Guidance,

Director, Bureau of Economics,
 Assistant to the Chairman,
 Program Review Office,
 Legal Advisers to the Commissioners,
 Legal and Public Records,
 Director of Public Information,
 Management Officer,
 Reporting Section:

Status of 7-digit Matters Pending in Bureaus of Deceptive Practices and Restraint of Trade—*in re: Special Committee on Case Load Screening*

Pursuant to the action of September 30, 1969 in the above matter, the following members of the Commissioners' staff, General Counsel's Office, and the Bureau of Economics were appointed to serve on the special committee on caseload screening:

Bartley T. Garvey, Committee Chairman
 Gerald T. Thain, Mr. Elmen's staff
 Franklin P. Michels, Mr. MacIntyre's staff¹
 Harry A. Garfield, Miss Jones' staff
 Morton Needleman, Mr. Nicholson's staff
 Robert E. Liedquist, General Counsel's Office
 Harrison F. Houghton, Bureau of Economics

The Directors of the involved Bureaus were instructed to cooperate fully with the special committee, to provide necessary staff support and assistance, and to designate one man in each Bureau to assure that such support will be given.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary.*

II. PROGRAM REVIEW OFFICE

Question II A

What specific resource allocation recommendations or priority determinations were produced by this office in the past fiscal year? What recommendations were put into effect?

Answer to II A

Let me first give you some brief background on the origin and purpose of the program review office. When I was appointed Commission Chairman back in 1961, the Commission did not have an organizational mechanism for planning what should be done. The Commission established the position of Program Review Officer in October 1961, based on a proposal I made to the Commission.

There can be no doubt as to the Commission's continual need for strategic (investigational) planning. Using our resources to best advantage boils down to the problem of almost unlimited Commission horizons and limited Commission funds. The Commission's basic laws are broad in concept and provide wide opportunity for constructive action. But the means to implement such Commission action are limited by the amounts of our annual appropriation.

Periodically, therefore, the Commission must choose from the various alternatives as to the fields in which the Commission's efforts are most needed. This is where our program review office comes into the picture. The role of policy planning is to provide the Commission with more options as to what the Commission can do. I support the strengthening and expansion of our Office of Program Review (which now consists of one economist).

In direct reply to the instant question, I will focus on two principal policy proposals made by the program review office during fiscal 1969 and what was done about them. These recommendations were as follows:

First, on opening up new antitrust investigations, the program review office advised that the main bases should be the level and trend of economic concentration, the size of the industry involved, and the monopoly power of the largest corporations.

¹ Mr. MacIntyre designated Franklin P. Michels to appear at sessions as an observer, and stated that neither he nor Mr. Michels will participate in this matter for the reason that he considers this a management problem and, while he agrees with the objective of closing stale and out-of-season cases, he does not think the Commission should take this responsibility away from management.

To develop significant investigations in the deceptive practices field, the program review staff proposed as primary criteria the volume of advertising expenditures and sales in the relevant industry, size of the proposed respondent and its advertising outlays.

The Commission's Executive Director requested the Bureau Directors to carefully consider the aforesaid basic standards, and if they believed that these principles did not apply to their operations he would discuss the matter with them. Otherwise the bureaus were to implement the necessary planning processes. Increased selectivity in starting investigations has characterized bureau operations this past year.

Second, the Program Review Office has proposed that the Commission and its bureaus make increased use of self-generated industry analysis as the basis for starting investigations. Concurrently the bureaus would develop project alternatives for the Commission's consideration, since planning in essence is making informed choices. I have given my support to this economic approach to program planning.

In my instruction to bureau directors last March on their basic plans for the fiscal 1971 budget, I requested them to submit a planning statement covering their proposed major investigations arranged on an industry basis and in order of priority. I also instructed them to present the next best alternative for each major project they proposed. I asked them to identify any significantly monopolistic, anticompetitive, noncompetitive or deceptive practices which have not been but should be challenged by the Commission. And I think our budget justification reflects this planning effort.

Question II B

Do you feel merely meeting the standards suggested for this office by the Bureau of the Budget report of 1960 accurately reflects the attention that might be given to this office?

Answer to II B

Let us take a close but brief look at what the Budget Bureau report said that a small program review staff (2 attorneys and 2 economists) is supposed to do. This planning unit would, among other functions, "locate the primary 'trouble spots' in the economy in which FTC should apply its efforts." This broad assignment would tax the substantial resources of the Council of Economic Advisers and its large stable of economists.

Under the Budget Bureau recommendation the program review staff would also determine "the appropriate division of effort between antimerger, other anti-monopoly, and antideceptive practices work." There is no rational set of rules by which funds can be allotted as between general trade restraints and mergers, or between discriminatory practices and deceptive practices. If the Budget Bureau staff can come up with a logical set of rules or formula for distributing funds among these mission-oriented programs, I would give such guide lines careful consideration.

I am in general agreement, however, with your suggestions that the program review force should "evaluate competing proposals for project-type investigation" and "develop or approve standards" for initiating Commission investigations. In my view the program review staff would also plan, initially and periodically, an organization of the staff of the Commission to carry out the Commission's basic purposes. The planning function also takes in policy analysis to develop a framework and system for effective program planning and to produce policy position papers on major trade regulation issues.

The recent ABA report recommended three main responsibilities for an expanded program review office. These functions are:

To analyze the Commission's long-range enforcement goals and the efficient means to achieve them

To devise standards for staff decisions on opening and closing investigations and on filing complaints

To "propose to the Commission an agenda of projects that ought to be undertaken by each bureau and division within the FTC and indicate priorities with respect to each."

In the struggle between short-term views and long-term views I back the long-term view. In general I support the dimensions of the program review office drawn by the Budget Bureau staff report and by the ABA proposals.

Question II C

Has any action been taken, or is planned to be taken, on the memorandum of Commissioner Nicholson (as printed in the Committee Report of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee) which suggests several alternative methods of restructuring this office to redefine Commission priorities and standards?

Answer to II C

Commissioner Nicholson submitted his report on policy planning to the Commission in August 1969. At that time he indicated to the Commission that his memorandum was sent to the counsel of the ABA Study Group at counsel's request.

To strengthen the Program Review Office Mr. Nicholson recommended a substantial increase in its professional staff and expanded functions. Under his plan the office would devise a "system of centralized control" over the progress of Commission investigations and track down delays. The augmented office would also propose major investigations, determine priorities for the Commission's operating units, and evaluate the budget allocation process at the Commission.

It appears proper that the Commission consider Mr. Nicholson's report and other assessments of the Commission once the new Commission Chairman takes office. We can then better compare the various proposals for improving Commission performance, including the recommendations that might be made by the Senate Subcommittee on Administrative Practice and Procedure now studying the administrative process.

Question II D

How much contact and interaction takes place between the Office of Program Review and the planning officers in each of the operating bureaus?

Answer to II D

The Program Review Office has gotten across to the bureaus' program officers the value and necessity of thinking in terms of alternatives in presenting proposals to the Commission for major new investigations.

The office has stressed to these planning officers that the relevant cost of the resources required to execute proposed investigations is not just the manpower and money for the particular project but the economic cost. This means considering what else could be done with the money, what investigation is displaced by the particular use of funds, and whether the same funds could be used on something more important.

The Office and the bureaus have exchanged strong views on the relevant kinds of standards for opening investigations. The problem of establishing criteria for action to preserve competition is rooted in the complex nature of competition. Competition has both objective factors (market structure) and subjective elements (the anticipations of price leaders concerning the reactions of their large rivals).

The Program Review Office has emphasized the primacy of industry structure and quantitative standards (industry sales) in deciding what the bureaus should investigate. The bureaus have fired back the limitations of quantitative criteria in initiating legal actions and antideceptive and anticompetitive areas. Competition in ideas among the Commission's planning staff can lead to the production of effective investigations.

III. BUREAU OF ECONOMICS

A. Why has the relationship between the number of professionals on the Commission staff and the number of economists on the staff remained relatively constant in the past few years, despite calls for increases in the number of economists?

The following table shows the number of economists requested by the Bureau of Economics, the number approved by the Commission, and the number approved by the Bureau of the Budget for each of the fiscal years, 1964-1970.

NUMBER OF ECONOMISTS

Year	Recommended by the Bureau of Economics	Approved by the Commission	Approved by the Bureau of the Budget
1964	28	28	8
1965	16	8	0
1966	18	18	5
1967	5	0	0
1968	23	23	6
1969	33	0	0
1970	13	13	0
Total	136	90	19

IV. TRUTH IN LENDING

(A)

Q. In addition to the mailing of over 750,000 copies of the Federal Reserve System publication on Regulation Z, what other specific formal or informal steps are being taken to assure compliance with the Truth-in-Lending law?

A. The Commission's staff has embarked upon the largest educational undertaking in its history for Truth in Lending. Beginning in February 1969 our 11 field offices, supplemented by our headquarters staff, conducted daily seminars and participated in business association meetings in virtually every city in the country. At the same time, our headquarters staff worked feverishly to handle the largest amount of non-consumer mail that we have ever encountered. Well over 10,000 individual responses to creditor questions were prepared by our staff attorneys. At the same time tens of thousands of additional Regulation Z pamphlets were distributed and explained.

Beginning on July 1, the Act's effective date, the staff added to its continuing interpretive function an innovative advertising violations program whereby a form letter, which includes a return form to be completed by the advertiser, is promptly mailed from each of our 11 field offices as soon as any advertising deviation is discovered.

During the first quarter of fiscal 1970 the newly created Division of Consumer Credit and the field support staff has logged in 2211 separate matters requiring legal interpretation or investigation; and has corrected and filed 529 advertising violations. It is projected that the next quarter will see this latter figure doubled.

In addition to using new procedures to correct minor violations, the staff currently has under consideration the disclosure practices of most major national creditors within our jurisdiction. We have issued our first formal complaint containing 13 separate disclosure violations against the largest jewelry chain in the country. I am informed that other formal complaints are presently being prepared.

(B)

Q. Has any formal enforcement strategy been developed to assure maximum exposure of FTC enforcement activities in this field?

A. Yes. For one thing, the staff is taking a highly selective approach to enforcement. When we do formally proceed under this law, we believe that the cases selected will beam the spotlight of publicity where it will have the maximum effect. Further, the Commission has inaugurated a new program for exposing Truth in Lending activities. It is the periodic issuance of Consumer Credit Policy Statements, the first two of which have just been issued (the first deals with advertising of general credit terms such as "Easy Credit" and the second deals with common consumer misconceptions about Truth in Lending—some of which are due to creditors' misstatements about the effect of this new law).

(C)

Q. What has been the public reaction to the implementation of the law?

A. The public reaction has been extremely favorable, although often it has taken the form of reacting with resentment to the disclosures made by open end

(revolving) creditors. Although basically the law requires telling the truth, most consumers are now learning for the first time what the terms of their revolving credit account really are.

The rescission section has had amazing effect. We have reports that some home improvement firms have experienced 50% of all sales rescinded in July and August, and there are reports of radical changes in the make-up of that industry. The volume of reaction is admittedly light because our consumer education program has had to take a back seat to creditor education. As we and others get the word to consumers—and this is now being pursued—the consumer reaction and the benefit should increase tremendously.

V. BUREAU OF TEXTILES AND FURS

A. With respect to Rule 36, has any final decision been reached in the courts? If not, when do you expect a decision in the court and what is your estimate concerning that decision? How much is involved in the 1970 and 1971 budgets for the administration of Rule 36?

A petition for certiorari in this case was filed by the Solicitor General on August 22, 1969, and the answer to the said petition is due or has been filed as of this date. There will probably be a delay of several months before the United States Supreme Court will decide whether or not to hear the matter. If the Court does hear the case, it probably will not issue its decision until sometime in the Spring of 1970. What the decision of the Court will be is pure speculation, but, of course, we hope it will be favorable to the Commission's stand.

There is approximately \$140,000 allotted in the 1970 and 1971 budgets for the administration of Rule 36. In this respect, whether or not the final court decision is favorable to the Commission, there is a serious problem involving misbranded imported woolen fabrics and garments. It is the intention of the Commission to use the funds appropriated for the enforcement of Rule 36 to more closely check these imports in order to protect the American woolen industry from unfair competition and to protect the American consumer from misbranding. This program will be accomplished by checking the import documents now filed by the importers with the Bureau of Customs and by the following down of any questionable goods by investigators of the Bureau of Textiles and Furs to the place of business of the importer in order to obtain samples for testing. This program will require a greater number of investigators and more funds for purchasing exhibits and testing than would be required under Rule 36 as that regulation provided for a spot check of imported goods at the port of entry and required the testing of any questionable goods at the expense of the importer. Without Rule 36, a lesser coverage can be made of imported woolen products than could be made with the assistance of this regulation.

B. Approximately how much is presently spent enforcing the provisions of the Flammable Fabrics Act? What has been accomplished by this program in the past year and what are your expectations for 1970 and 1971?

In fiscal 1969 approximately \$150,000 was spent on the administration and enforcement of the Flammable Fabrics Act. In 1970 and 1971 approximately \$740,000 will be allotted to this function.

During 1969, the Bureau of Textiles and Furs made 6,513 routine inspections of manufacturers, wholesalers, and retail stores, with the Commission's investigators using their expertise developed over the years to spot any questionable fabrics or articles of wearing apparel that might prove to be dangerously flammable. Whenever questionable fabrics or garments were observed by the Commission's investigators, they were sampled and forwarded to the screening laboratory of the Bureau of Textiles and Furs for testing in accordance with the law.

The laboratory of the Bureau of Textiles and Furs during 1969 made 599 flammability tests on samples submitted by the Commission's investigators, the Bureau of Customs, and from fire marshals throughout the country, and others. Out of the 599 tests, 111 were failures and these fabrics and articles of wearing apparel were removed from the channels of trade as soon as possible. The failures covered fabrics intended for use in wearing apparel, scarves, sweat shirts, other woven or knitted garments, nonwoven fabrics and garments, wood fiber chips, and artificial leis and corsages.

Complaints were issued in 12 cases involving dangerously flammable fabrics or wearing apparel, which were concluded with cease and desist orders. How

many painful injuries and deaths the Commission's efforts have prevented over the years in enforcing this Act is not determinable, but it is interesting to note that since the Flammable Fabrics Act became effective in June 1954 there has not been one instance that has come to our attention where a person has been injured by a fabric or an article of wearing apparel which failed to pass the flammable fabrics test.

In 1970 and 1971, the Commission intends—with the additional funds allotted—to increase the inspection work under this Act in order to stop the manufacture and distribution of dangerously flammable fabrics and garments before they reach the consuming public. It is expected that the Secretary of Commerce, in the near future, will determine that additional fabric items are hazardous. This will require the investigators of the Bureau of Textiles and Furs to visit manufacturers and retailers not now covered by the flammable fabrics regulations. In addition, it is the plan of the Commission to carry out an educational program with state and county fire marshals and local fire officials, enlightening them as to the provisions of the Flammable Fabrics Act. Further, the Bureau of Textiles and Furs plans to work more closely with the Bureau of Customs to intercept questionable fabrics and articles of wearing apparel coming into the United States from abroad. These programs will require the additional personnel and funds allotted to the Commission in the 1970 budget and in the proposed budget for 1971.

C. Why isn't this Bureau organized on program lines? How much of the 1970 and 1971 funds are devoted to each of the four programs? Why shouldn't the fur program be substantially reduced? What kinds of sampling techniques are employed to check on manufacturers' violations of the four Acts administered by this Bureau? If no such plan exists, do future Bureau plans call for the development of one?

The Bureau of Textiles and Furs is organized on functional lines rather than along program lines, as the former seems to be a more efficient means of administering the statutes assigned to this Bureau. The Wool and Textile Acts are complementary to each other and the requirements of the Flammable Fabrics Act cover both fabrics and garments subject to the Wool and Textile Acts. The Fur Products Labeling Act covers not only garments made entirely of fur but also garments having fur collars or fur trim and, therefore, woolen garments or nonwoolen garments subject to the Wool Act or to the Textile Act may also be fur products subject to the Fur Act.

It is the exception rather than the rule to inspect a wholesaler or retailer and not find merchandise subject to all four of the Acts administered by the Acts of the Bureau of Textiles and Furs. To break our inspection program down so investigators would check for compliance for one Act and not for the other three would unduly inconvenience or harass industry and be most uneconomical for the Government.

In investigation and trial work it is to the advantage of the Government to be able to adjust cases among all of the investigators or the trial attorneys depending on the work load rather than have investigators or attorneys assigned to work on one type of case where they might be overloaded at times and have insufficient work at other times depending on the circumstances. It might be pointed out that there were only eight trial attorneys in fiscal year 1969 handling all the formal cases arising under these four statutes.

In 1970 it is estimated that the breakdown of funds devoted to each of the four Acts administered by the Bureau of Textiles and Furs will be approximately 18% to Wool, 24% to Fur, 29% to Textile, and 29% to Flammable Fabrics; however, in 1971 there will be a substantial increase in Flammable Fabrics.

The fur industry, from the ranchers down through the auction houses to the dressers and dyers, to manufacturers into the retailers, at present, is sorely beset with troubles. The raising of ranch fur-bearing animals in Europe and Asia is causing severe strains on the ranchers in this country. A new type of dressing of certain pelts has, over the past three years, caused an upheaval in the fur industry greater than anything else in the memory of the leaders in this segment of our economy. As a result of the confusion in the fur industry, serious problems involving misbranding have been rampant.

Such misrepresentations—by labeling, invoicing, and advertising in the fur industry—are most unfair to the legitimate merchant who is trying to abide by the law and, further, such violations of the Fur Act affect the consumer's pocket-book, whether she is a wealthy matron, a struggling secretary, or a mother buying a dress-up coat for her teen-age daughter. If the fur coat or the fur-trimmed

garment is misbranded or misrepresented, the consumer is being fleeced as she is not getting her dollar's worth in the marketplace.

Because of the circumstances over the past few years, the Bureau of Textiles and Furs has devoted more of its energy to the fur trade than it ordinarily would have. But we at the Commission try to concentrate our resources where the problems are, in order to assist industry and to protect the American consumer. The wholesale value of fur products produced in this country is approximately a half-billion dollars a year, involving the livelihood or jobs of thousands of citizens and we feel we should do all within our power to protect this segment of our economy and, at the same time, see that the consumer is receiving what she is paying for.

In the inspection of mills and manufacturers, the Commission's investigators check on the raw stock of the inspected firm. These investigators over the years have developed a knowledge of stock, yarn and fabric and if they observe fibers, yarns or fabrics that do not appear to be properly represented, they take a sample sufficiently large for testing purposes and forward it to Washington for analysis in the laboratory of the Bureau of Textiles and Furs. Usually these samples are obtained at no cost to the Government. The fiber sample is generally taken from various parts of the bale or, if there is more than one bale, the sample is made up of a composite of the several bales. The yarn sample is usually a cone or a part of a cone from a questionable lot; whereas the fabric sample is usually $\frac{1}{3}$ to $\frac{1}{2}$ yard of material across the bolt.

In the inspection of garment wholesalers and retailers with random sampling, if questionable garments are observed and the item is priced at two or three dollars, a sample is obtained at no cost to the Government, where possible, or one of the items is purchased. If the questioned item is a suit, coat or other expensive article, the manufacturer's name or registered identification number is obtained and a call is made at the manufacturer's plant and a piece of the fabric is obtained as set forth in the preceding paragraph. These items are forwarded to Washington and tested in the Bureau's laboratory.

Questionable fabrics or garments under the Flammable Fabrics Act are sampled in the same manner as wool or textile products described in the preceding paragraph. In regard to possible dangerously flammable items, the sampled goods are forwarded to the Bureau of Textiles and Furs in Washington immediately and are given priority in the Commission's testing laboratory.

In the inspection of furriers, or retailers dealing in fur products, hair samples are removed from questioned fur products by the investigator and the hairs are then sent to Washington to be analyzed.

The 1970 and 1971 budgets provided for additional help in the Bureau of Textiles and Furs' screening laboratory. With more personnel available in the laboratory, it is the plan of the Bureau to extend and increase its testing program under all four Acts.

VI. BUREAU OF FIELD OPERATIONS

A. When attorneys are hired for the field offices, allocations are made based on the ratio of the caseload of each field office to the total caseload of the Bureau of Field Operations, with adjustments for the performance record of each office. These ratios and adjustments are made for several past periods and then averaged out in order to eliminate any possible imbalance. The same procedure will be used in allocating the 100 attorneys to the various offices when funds are approved for hiring them.

B. One additional Grade GS-15 has been requested for the Bureau headquarters. This position is included in the 100 additional professionals requested.

C. Cases to be investigated are forwarded by the enforcement bureaus to the Office of the Director, Bureau of Field Operations, where the decision is made as to the field office or field offices to which a matter will be assigned for investigation. Some of the factors considered in this connection are geographic location of the primary sources of information, availability of attorneys at the field offices that are located closest to this geographic area, and experience of particular attorneys in the industry under investigation.

Responsibility for the implementation of the investigation, recommendation as to disposition of the matter, and the negotiation of consent settlement or other tentative disposition, where appropriate, are vested in the Bureau of Field Operations and its field staff.

VII. BUREAU OF DECEPTIVE PRACTICES

A. In the reorganization plan it is proposed that the areas of each Assistant Director will be divided into enforcement and non-enforcement programs. The enforcement area will consist of (1) case work involving the preparation of complaints, investigative and trial functions in cases arising under Section 5 of the Federal Trade Commission Act; (2) Truth-in-Lending; (3) the compliance programs; and (4) packaging and labeling. The Division of Scientific Opinions because of its supportive functions on case work is classified as being in the enforcement area.

The non-enforcement area, tentatively identified as the office of consumer research and development, will include the (1) input programs which supply the FTC with the information needed to plan and conduct consumer protection activities; (2) the consumer education program; (3) Special Projects in consumer protection; (4) consumer relations including the conducting of consumer hearings, seminars, conferences, and liaison with universities, business and consumer groups in the research and development of voluntary and involuntary consumer protection programs.

B. The advertising monitoring program will be in the office of consumer research and development as identified above. It is expected that once reorganization plans are approved procedures will provide for continuing and systematic input to this office from all sources including the field and copy from regional publications.

C. To the extent that resources permit, an aggressive program of consumer advice and guidance to the public is planned. This will include the consultative function with the states, local governments and private groups. It is not planned as a passive program as the words "when so requested" apparently suggest.

NOTE: For lack of a name at this time we have assigned the name of "consumer research and development" to the nonenforcement area of the Bureau of Deceptive Practices.

VIII. BUREAU OF RESTRAINT OF TRADE

A. *With a relatively small workload increase for 1971 (e.g. complaint increase of 25, investigations completed increase of 20, complaints issued increase 1 to 4), what is the justification for a 30% increase in the clerical staff in the Director's office "to meet the increasing workload of the operating divisions"?*

Fifteen additional clerk-stenographers are requested for the central stenographic pool which serves the operating divisions of the Bureau of Restraint of Trade. A substantial workload increase is in fact anticipated in fiscal 1971. This increase is not reflected in the anticipated somewhat larger number of complaints of alleged restraint of trade law violations filed with the Agency. It is reflected, however, in the increased number of complaints which are being filed this fiscal year (F.Y. 1970) over fiscal 1969 (an increase of from 24 to 35 complaints approved for consent order negotiation are expected and an increase from 9 to 24 complaints in litigated cases). This increase, in turn, is shown in the increased number of cases in actual litigation estimated for fiscal 1971 (an increased burden in litigative workload of from 20 to 34 cases at the outset or 70% higher than fiscal 1970). With an anticipated 50% increase also in the number of Docketed Orders disposed of in fiscal 1971, the result is a very substantial work increase (almost half of the total litigative workload carried and more than half of those comprising the "disposed of" figure, represent merger cases). The demands of this expected increase in litigative workload upon the stenographic staff, in terms of memoranda, briefs, motions and other necessary papers, I believe, fully justifies the requested 30% increase in clerical staff.

B. *How do you explain the variance between the estimated investigations to be opened in 1969 (276) and the observed level of activity (189) for this Bureau?*

I assume here you are referring to the estimate of the number of investigations to be "initiated or opened" for fiscal 1969 (276) which was submitted in 1968 in connection with the fiscal 1970 budget justification. I believe the actual "observed" figure which appears in the present budget justification, relating back to fiscal 1969, is "181" rather than "189" investigations initiated or reopened.

The reason for the decrease in the number of new investigations opened in fiscal 1969 as compared with fiscal 1968 (a decrease from 218 to 181) and, if you will note in addition, a very substantial increase in the number of investigations "completed or closed" (an increase in the number of closings to 289 for fiscal 1969

as compared with just 196 in fiscal 1968) was the initiation of a stringent policy of increased selectivity in the initiation of investigations. That policy, which had not been implemented in the Bureau of Restraint of Trade at the time the referenced projection of "276" new investigations was calculated, resulted in a selective and significant cut-back on new investigations. We are currently seeking, in addition, to further weed-out from the older investigations those which appear less urgent or significant than those more recently initiated. We anticipate that, with this clearing of the investigational pipe lines, an increase in the number of new investigations opened will again begin to climb upward in fiscal 1971.

IX. GENERAL

BUREAU OF RESTRAINT OF TRADE

A. Please discuss criteria used in determining which programs should be increased and how magnitude of increase is determined.

Considering for illustration the Bureau of Restraint of Trade, containment of illegal mergers and acquisitions, because of the immediacy of effect on both market and aggregate concentration of economic power, requires an increasing proportion of our antitrust attention. Enforcement of the Clayton Act and of Section 5 of the FTC Act's mandate with respect to unfair methods of competition, is undertaken on a minimum-effective-enforcement basis—and certainly not upon a "total" enforcement basis.

This is true with respect to each of the laws which the Congress has directed this Agency to enforce.

To maintain Robinson-Patman enforcement as a program of any dimension, for example, a certain minimum assignment of manpower is required. Complaints from businessmen concerning inequality in pricing and terms reach us from all levels of the economy. They must at least be sounded out, evaluated and, as may be necessary to maintain enforcement integrity, prosecuted. The broader reaches of Section 5 require a similar basic commitment.

When we are obliged by Congressional mandate to administer a law, therefore, our first responsibility is, or should be, to assign manpower and money sufficient, to at least minimally meet the basic needs for enforcement of that particular law. This, of course, creates a kind of statutory governor upon our ability to precipitously increase enforcement in one area at the expense of another.

With that in mind, the criteria used in determining which programs in the restraint of trade area must, in our view, be increased have, I believe, been disclosed in our justification.

On page 34 of our justification we state :

The rapidly increasing acceleration of the merger movement within the economy critically increases the need for additional attorneys in that statutory area. This does not mean, however, that the rate or significance of trade law violations otherwise are to any extent abating. The problem of increasing industry concentration is not confined to concentration resulting from mergers or other forms of physical integration. Industry concentration by combination or conspiracy and adverse changes in the number and size distribution of competing companies in particular markets as a result of discrimination or other unfair methods of competition also constitute critical aspects of the problem.

The criteria used in connection with anti-merger enforcement are set out on page 40. The specific projected manpower assignments appear on page 44 and disclose the basis on which the 26-attorneys increase for the staff of that Division was arrived at. A small increase is requested for the Division of Accounting. The other increase requested for this Bureau is for the Division of Compliance, which is currently understaffed and faces an ever increasing workload in the merger area. Divestitures must be policed by that Division, as well as oversight of compliance with the often complex prescriptive requirements of Section 7 orders. Bans on future acquisitions for a period of years, without prior Commission approval, for example. We have sought to disclose in detail to the Bureau of the Budget just where needed increases will be applied and why.

BUREAU OF DECEPTIVE PRACTICES

A. Please discuss criteria used in determining which programs should be increased and how magnitude of increase is determined?

This request seems to relate more to decisions made at the Commission level than to those made at the Bureau level. It is believed that the Bureau of the Budget is trying to determine the criteria the Commission uses in deciding how much of its resources will be devoted to deceptive practice work vis-a-vis various other broad programs such as for example, economic studies for mergers. The request may, however, have some relevancy to decisions made at the Bureau level.

The Bureau of Deceptive Practices in determining whether to recommend to the Commission that a broad project or a program of action be initiated considers substantially the same factors for criteria it considers in determining whether to initiate an investigation against an individual firm for a specific violation. A list of these factors is attached. The most important factor in any matter is whether or not health or safety is involved.

Once the Commission directs that a project or program be undertaken, the Bureau has the problem of determining how much of its manpower will be used on the project. This, of course, involves reassignment of personnel and means that projects on which the reassigned personnel are engaged must be deferred. The degree of public interest involved is always the most important factor in determining what projects will be increased or decreased.

FACTORS TO CONSIDER IN DETERMINING THE PUBLIC INTEREST IN OPENING A DECEPTIVE PRACTICE INVESTIGATION

1. Does the practice complained of indicate that there is danger to the public health or safety?
2. What are the indicated numbers of consumers adversely affected?
3. Is there a particular segment of consumer population affected, perhaps deserving a special degree of protection: the poor, the elderly, the retired?
4. What is the materiality of a deceptive statement in the context of the total promotional approach: did the statement, alone or substantially contributorily, actually constitute the real inducement to buy?
5. What is the nature of the deceptive practice: did it constitute an outright fraud or did it concern a worthwhile (albeit misrepresented) product or services?
6. What is the amount or degree of loss suffered by the consumer: is he out of pocket a few cents, or has he mortgaged his home with the potential of foreclosure?
7. What is the economic magnitude of a given industry engaging in a complained or practice?
8. Are there honest competitors to protect?
9. Is there a fair prospect of success if we must litigate: is the alleged unfair practice reasonably clearcut, or does it present a controversial scientific issue?
10. All factors considered, is the matter one to which we can commit manpower and other resources in the light of current priorities?

GENERAL QUESTION C

MEMORANDUM

October 15, 1969.

To: Comptroller.

From: Chalmers B. Yarley, Director, Bureau of Industry Guidance.

Subject: 1971 FTC Bureau of the Budget Hearing.

Reference is made to question number IX C. of the list of questions submitted by the Bureau of the Budget for response by the Commission during the forthcoming budget hearing. This question reads:

How do you determine which industry guides will be published?

A proceeding looking toward the promulgation of industry guides may be commenced on the initiative of the Commission or pursuant to petition filed with the Secretary or upon informal application therefor, filed by any interested person or group, where it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission.

When a proceeding is commenced, proposed guides are developed and released in their proposed form, announcement being made by Notice published in the Federal Register and by news release, for comment in a public record, either in written form or orally at a public hearing. Where a public hearing is conducted, comments may be received in both oral and written form.

At the conclusion of the proceeding, the entire public record is analyzed by the staff and the analysis together with recommendations are transmitted to the Commission for its consideration. After full consideration of all of the view, suggestions and objections to the proposal contained in the public record, the Commission makes a determination as to whether the proposed guides should be adapted and promulgated in final form.

The criteria considered in the selection of proceedings to be initiated include the gravity of the unlawful practices sought to be covered by a guide, the impact of the practice on the consumer and its effect on competitors, the likelihood of interstate commerce, and the indication that the practice will spread unless prompt action is initiated to give guidance.

CHALMERS B. YARLEY,
Director Bureau of Industry Guidance.

D. RESULTS OF STUDIES COMPLETED BY BUREAU OF ECONOMICS

Economic reports by the Bureau of Economics have figured importantly in the Commission's formulation of merger guidelines. The most notable examples concern the reports on cement, food retailing, food manufacturing, and textile mill products.

The report on the cement industry, *Mergers and Vertical Integration in the Cement Industry*, found that vertical acquisitions of ready-mix companies by cement producers were reducing competition in both industries. The Commission formulated guidelines for the cement industry that followed the policy recommendations made in this report.

The Bureau of Economics issued its report *The Structure and Behavior of Food Retailing* in 1966 in response to a long series of complaints and legal actions concerning acquisitions by large grocery chains. On the basis of this report the Federal Trade Commission issued guidelines for merger policy in the food distribution industries.

As a companion study to the report on food retailing the FTC staff prepared *The Structure of Food Manufacturing*, Technical Study No. 8 for the National Commission on Food Marketing. This report pointed out that food manufacturers have utilized product-extension mergers in achieving significant increases in already high levels of industry concentration.

As a result of this report, the Commission established criteria for identifying those product-extension mergers in the food industry which require review.

A *Report on Textile Mill Products*, prepared for internal use of the Commission, formed the basis for the merger guidelines for the textile industry issued in November 1968.

The *Economic Report on the Use of Games of Chance in Food and Gasoline Retailing* formed the basis for the Commission's trade regulation rule in July 1969 concerning promotional games of chance in food and gasoline retailing.

On the basis of the *Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco* (July 1969) the Division of Trade Regulation Rules is presently formulating a proposed rule and notice to the Commission on food retailing. It is expected that this proposed rule will be issued in the near future.

In addition to the above reports, the *Report on Cigarette Advertising and Output* contributed to the Commission's policy on cigarette labeling; the *Automobile Warranties Report* prepared by the legal and economic staff established a basis for the Commission's hearings on the auto warranty problem; and the *Economic Report on Antibiotics Manufacture* assisted the Commission in developing its evidence against the antibiotic manufacturers.

RESPONSE TO QUESTION 6¹

A RÉSUMÉ OF EACH MEMBER OF THE COMMISSION

Paul Rand Dixon—Commissioner and Chairman
A. Everette MacIntyre—Commissioner
Philip Elman—Commissioner
Mary Gardiner Jones—Commissioner
James M. Nicholson—Commissioner

FEDERAL TRADE COMMISSION

JANUARY 1969.

BIOGRAPHY OF PAUL RAND DIXON, COMMISSIONER AND CHAIRMAN

Appointed Commissioner and Chairman of FTC on March 21, 1961, for a term expiring on September 25, 1967. Reappointed on September 25, 1967, for a full seven year term expiring on September 25, 1974. Confirmed by U.S. Senate, September 27, 1967.

Political Affiliation: Democrat.

Born: September 29, 1913, Nashville, Tennessee; son of James David Dixon (deceased) and Sarah Munn Dixon.

Education: Attended public schools in Davidson County, Tennessee; A.B., Vanderbilt University, Nashville, Tenn., 1936; LL. B., University of Florida Law College, Gainesville, Florida, 1938.

Career: Joined the FTC in July 1938 as a Trial Attorney and subsequently engaged in both antimonopoly and antideceptive practice work.

In February 1957, joined the Senate Antitrust and Monopoly Subcommittee as Counsel and Staff Director. Assisted Subcommittee in developing and focusing attention of Congress and public on important problems in the field of restraints of trade, including administered prices in many major industries.

On March 21, 1961, he rejoined the FTC as Commissioner and Chairman.

War Service: Served with the U.S. Navy from 1942 to 1945.

Commissioned a Lieut. (jg) he spent 23 months overseas and participated in the occupation of Africa and the invasion of Sicily.

Entitled to wear three battle stars and is presently Lieut. Cdr. USNR (Ret.).

Affiliations: He is a member of:

President's Committee on Consumer Interests.

Committee of Experts on Restrictive Business Practices of O.E.C.D.

Administrative Conference of the United States.

American and Federal Bar Associations, Washington, D.C.

Council of Section of Antitrust Law, American Bar Association.

Judicial Bars of State of Florida and Tennessee.

National Lawyers Club, Washington, D.C.

Honorary member of Phi Delta Phi, International Legal Fraternity.

George C. Whiting Masonic Lodge No. 22, Washington, D.C.

Alpha Tau Omega, social fraternity.

Board of Directors, Commodore Boosters, Vanderbilt University.

Kenwood Golf and Country Club, Bethesda, Maryland.

Washington Golf & Country Club, Arlington, Va.

Metropolitan Memorial Church, Washington, D.C.

Athletics: Played Quarterback on Vanderbilt University Varsity Football team; Assistant Football Coach at University of Florida while attending Law College.

Martial status: Married to former Doris Busby of Laurel, Mississippi. They have two sons: David Leslie, and Paul Randall, Jr.

Residence: 5911 Carlton Lane, Bethesda, Md. 20016.

² See contents p. XI.

AUGUST 1968.

BIOGRAPHY OF A. EVERETTE MACINTYRE, COMMISSIONER

Appointed to the FTC as Commissioner on September 25, 1961, for a term expiring on September 25, 1968. Reappointed in 1968 for a 7-year term expiring on September 26, 1975.

Political Affiliation: Democrat.

Born: February 3, 1901, Alamance County, North Carolina.

Education: Attended public schools in North Carolina; A.B., University of North Carolina, Chapel Hill, N.C., majored in Economics; LL.B., George Washington University Law School, Washington, D.C.; Graduate studies in Economics and Political Science, George Washington University, Washington, D.C.

Career: Joined the FTC legal staff in 1930, shortly after admission to the bar.

During the next 25 years he served on the FTC legal staff as: Attorney Examiner, Review Attorney, Senior Attorney, Principal Attorney, and Chief of the Division of Antitrust Trials in the Bureau of Litigation until 1954; then as legal adviser on antimonopoly cases until 1955; during this time he also served as member of the FTC Planning Council and as a member of its Administrative Procedure Committee.

In 1955 he resigned from the FTC to accept position of Staff Director and General Counsel of the Select Committee on Small Business, U.S. House of Representatives; in this capacity he directed staff studies for the House Small Business Committee and its sub-committees into a wide range of problems affecting trade and commerce, particularly with reference to the effect of such problems on competition and small business firms.

Earlier in 1935 he served as Chief Counsel (on loan from the FTC) to a special investigating committee of the House of Representatives in the conduct of an investigation of big scale buying and selling; that investigation produced much of the evidence which was considered by the legislative committees in their studies of bills, out of which the *Robinson-Patman Act* developed.

Admitted to bars of North Carolina, District of Columbia, Virginia, and U.S. Supreme Court.

Affiliations: He is a member of:

Federal Bar Association.

American Bar Association; as well as its Antitrust Section.

American Academy of Political and Social Sciences.

Academy of Political Sciences (life member).

National Press Club, Washington, D.C.

National Lawyers Club, Washington, D.C.

Cosmos Club, Washington, D.C.

Congressional Country Club, Washington, D.C.

Marital status: Married to former Reita Jane Lyons of Greensboro, N.C. They have one son: Miles Everette.

Residence: 1564 Colonial Terrace, Arlington, Va. 22209.

BIOGRAPHY OF PHILIP ELMAN, COMMISSIONER

Took oath of office on April 21, 1961, to fill an unexpired term. Reappointed in 1963 for a full seven-year term expiring on Sept. 25, 1970.

Born: March 14, 1918, Paterson, N.J.

Education: Attended public schools in Paterson, New Jersey, and New York City: A.B., College of the City of New York, 1936 (Phi Beta Kappa); LL. B., Harvard University, 1939; At the Harvard Law School he was an editor of the *Harvard Law Review*.

Career: Law Clerk to Judge Calvert Magruder, U.S. Court of Appeals, Boston, Mass., 1939-40.

Attorney, Federal Communications Commission, 1940-41.

Law Clerk to Mr. Justice Felix Frankfurter, U.S. Supreme Court, 1941-43.

Office of Foreign Economic Coordination, Department of State, 1943-44.

Solicitor General's Office, Department of Justice, 1944-45.

Legal Adviser, Office of Military Government, Berlin, Germany, 1945-46.

Assistant to the Solicitor General, Department of Justice, 1946-61.

Argued a large number of cases before the U.S. Supreme Court.

Editor, "*Of Law and Men*" (papers and addresses of Felix Frankfurter).

Admitted to bars of District of Columbia, New York, and U.S. Supreme Court. Recipient, Rockefeller Public Service Award, 1967.

Affiliations:

District of Columbia Bar Association.
American Bar Association.
Federal Bar Association.
American Law Institute.
Harvard Law School Association.

Family: Married to the former Ella M. Shalit of Fargo, N. Dak. They have three sons: Joseph, Peter, and Anthony.

Residence: 6719 Brigadoon Drive, Bethesda, Md. 20034.

BIOGRAPHY OF MARY GARDINER JONES, COMMISSIONER

JUNE 1969.

MARY GARDINER JONES, born on December 10, 1920 in New York City, New York, attended school in New York City and received her BA from Wellesley College, Wellesley, Mass. and her LL. B from Yale Law School, New Haven, Conn. While at Yale she was managing editor of the *Yale Law Journal* and upon graduation was made a member of the Yale Chapter of the Order of the COIF.

Miss Jones taught history for one year at George School, Newton, Pa., 1943-44; and served as research analyst in the Office of Strategic Services, 1944-46.

After graduation from Yale Law School, Miss Jones joined Donovan, Leisure, Newton & Irvine, a New York law firm, where she engaged in general law practice and in addition acted as special assistant to General William J. Donovan. In 1953 she joined the New York office of the Department of Justice, Antitrust Division and was the chief attorney in charge of the trial of *United States v. The Watchmakers of Switzerland Information Center*, an international cartel case. In 1961 she joined the law firm of Webster, Sheffield, Fleischmann, Hitchcock & Chrystie in New York City where she engaged exclusively in trial and antitrust work.

In 1964 she was appointed to the Federal Trade Commission as a Commissioner to fill out an unexpired term, and on September 26, 1966 she was reappointed to the Commission of a full seven-year term.

Miss Jones has contributed several articles to legal periodicals. She is admitted to the bars of New York, the District of Columbia and the United States Supreme Court. She is a member of the American Bar Association and of the Sherman Act Committee and of the Antitrust, Administrative Law, Civil Rights and International Law Sections of the American Bar Association. She is also a member of the Association of the Bar of the City of New York, the Federal Bar Association and the International Law Association and a Panel member (inactive) of the American Arbitration Association. Miss Jones is Vice President of the Yale Law School Association in the District of Columbia; she served as second vice president of the Washington Branch of the American Association of University Women in 1968 and 1969 and she is a consultant to the National Committee Studying the Human Use of Urban Space of the National AAUW organization. She is a member of the Wellesley Club of Washington, D.C. and of the National Committee for Equal Opportunity in Business of the National Business League.

BIOGRAPHY OF JAMES M. NICHOLSON, COMMISSIONER

Nominated by President Johnson as an FTC Commissioner on December 5, 1967. Confirmed by Senate Commerce Committee on December 12, 1967 and by U.S. Senate on December 13, 1967. Sworn in office on January 5, 1968 for a term that expires on September 25, 1969.

Political Affiliation: Democrat.

Born: July 11, 1928 at Oklahoma City, Okla.

Education: Attended public schools in Oklahoma City, Oklahoma; Washington, D.C.; Silver Spring, Md.; Fairhaven, Mass.; Hempstead and Sea Cliff, N.Y. A.B. degree, Knox College, Galesburg, Ill., 1952. LL. B. degree, Law School of the University of Michigan, 1954.

Career: Upon graduation from law school, Commissioner Nicholson began to practice law in Indianapolis, Indiana. From 1958 until his confirmation, he was

a partner in the law firm of Cadick, Burns, Duck & Neighbours in Indianapolis, specializing in corporate law.

Democratic nominee for the U.S. Congress from the Sixth District of Indiana in 1966.

Admitted to bars of Indiana ; Federal District Courts ; Court of Appeals, Sixth Circuit ; and Supreme Court of the United States.

War Service : Enlisted and served on active duty with the U.S. Navy from 1946 to 1948 ; Commissioned in the U.S. Army Reserve from 1950 to 1955.

Affiliations :

Chairman, Advisory Board of the Indiana School of the Deaf.

Indianapolis Bar Association (Past Vice President, Member of Board of Managers).

Indiana State Bar Association (Past member of House of Delegates and former editor, *Res Gestae*).

American Bar Association (member of various Sections of all Associations).

Lawyers Association of Indianapolis (Past Director and Treasurer).

American Judicature Society, Lawyer Club of Indianapolis.

Character and Fitness Committee for the Third Supreme Court Judicial

District of Indiana by appointment of Indiana Supreme Court.

Barristers Society, University of Michigan Law School.

University Club of Indianapolis.

Phi Gamma Delta Fraternity.

Phi Alpha Delta Law Fraternity.

St. Paul's Episcopal Church, Indianapolis, Indiana.

St. Luke's Episcopal Church, Bethesda, Maryland.

Brotherhood of St. Andrew.

Marital status : Married to former Joan Barnes of Garrett, Indiana. They have four sons : James E., 17 ; William C., 15 ; Thomas B., 12 ; and John A., 9.

RESPONSE TO QUESTION SEVEN ¹

I. SPEECHES

1. Price Discrimination and the Sherman Act, Dixon. April 9, 1965.
2. FTC, R-P Act, and their Perennial Critics, Dixon. December 3, 1966.
3. Price Competition under the R-P Act, Dixon. April 25, 1967.
4. Antitrust in an Expanding Economy, Elman. March 5, 1964.
5. Cooperatives and Competition, Elman. May 2, 1966.
6. The R-P Act and Antitrust Policy—A time for Reappraisal, Elman. August 2, 1966.
7. Antitrust Enforcement: Retrospect and Prospect, Elman. March 31, 1967.
8. Some Criteria for Applying Industry-Wide Enforcement Measures under the R-P Act, MacIntyre. September 25, 1965.
9. R-P: Magna Carta or Typhoid Mary, Nicholson. March 13, 1969.
10. An Administrator's Look at Primary Line Price Competition under the R-P Act, Jones. November 9, 1967.
11. Automotive Parts Distribution and FTC, Kintner. February 14, 1961.

II. LAW JOURNAL CITIES

III. SPECIAL MATTER

1. Jones.
 - a. United Aircraft, 651 0090. November 29, 1965.
 - b. Clairol, D. 8647. July 2, 1968.
2. Reilly.
 - a. Irwin, D. 8100. November 16, 1964.
 - b. AMC, 601 0059, October 5, 1964.
3. Elman.
 - a. Salinas, 661 0022. March 6, 1967.
 - b. AMC, 601 0059, October 5, 1964.
4. Nicholson.
 - a. AMC, D. 8651, October 28, 1968.
 - b. United Fruit, 671 0187. November 26, 1968.
5. MacIntyre.
 - a. Salinas, 661 0022. March 2, 1967.
 - b. ATD, D. 8100. October 26, 1964.
 - c. ATD, D. 8100 December 7, 1964.
 - d. ATD, D. 8100. January 6, 1965.

IV. AGENDA MATTER

1. Anderson.
 - a. Macaroni, 601 0176. February 7, 1964.
 - b. Lovable Brassiere, 601 0885. December 16, 1963.
2. Dixon.
 - a. Arrow, D. 8212, April 4, 1969.
 - b. General Railway, 601 0336, September 14, 1964.
3. Elman.
 - a. Sanna, 611 0556. March 22, 1965.
 - b. Michigan Press, 621 0232. May 3, 1965.
 - c. Rheingold, 651 0136. December 15, 1967.
 - d. Allied Supermarkets, 611 0118. August 7, 1968.
 - e. Pacek, 671 0134. June 24, 1969.
 - f. Sylvania, D. 8501. January 4, 1964.
 - g. Arrow, 8212. April 7, 1969.
 - h. ATD, D. 8100. September 26, 1967.
 - i. ATD, D. 8100. March 5, 1969.

¹ See contents p. XI.

- j. ATD, D. 8100. April 14, 1969.
- k. White, D. 7732. March 26, 1964.
- l. Macaroni, 631 0269. March 1, 1965.
- m. Suburban, D. 8672, May 24, 1968.
- n. Macaroni, 631 0269. February 25, 1965.
- o. Fresh Fruits, 681 0040. July 3, 1969.
- 4. Higginbotham.
 - a. Dietetic, D. C-497. December 16, 1963.
- 5. Jones.
 - a. AMC, D. 8651. August 29, 1968.
 - b. Oil Companies, 621 0915. September 20, 1965.
 - c. Liquid Carbonic, 641 0285. June 14, 1965.
 - d. Southern Railway, 631 0214. February 28, 1968.
 - e. Oil Companies, 661 0169. May 17, 1967.
 - f. Universal Joint, 661 0177. October 22, 1968.
 - g. Greenhouse, D. C-1201. June 14, 1968.
- 6. MacIntyre.
 - a. Fadler, 621 0300. March 13, 1964.
 - b. Windsor, D. 5738. February 25, 1964.
 - c. Consolidated, 621 0824. December 16, 1964.
 - d. Dodge, 631 0242. January 22, 1964.
 - e. Safeway, 641 0149. March 6, 1964.
 - f. Thompson, 641 0189. November 25, 1964.
 - g. Southern Railway, 631 0214. December 12, 1967.
 - h. Beet Sugar, 661 0068. April 11, 1968.
 - i. Toy Catalogs, D. 8255. June 13, 1969.
 - j. ATD, D. 8100. September 20, 1967.
 - k. ATD, D. 8100. March 4, 1969.
 - l. ATD, D. 8100. April 11, 1969.
 - m. Weatherhead, 651 0126. September 20, 1968.
 - n. Weatherhead, 651 0126. March 28, 1968.
 - o. Herman Miller, 691 0106. May 19, 1967.
 - p. Jens Risom, 641 0294. May 12, 1967.
 - q. Furniture, 641 0290. May 12, 1967.
 - r. United Fruit, 671 0187. June 23, 1969.
 - s. United Fruit, 671 0187. October 25, 1968.
- 7. Nicholson.
 - a. Piedmont, 661 0052. October 2, 1968.
 - b. Gillette, 681 0145. March 20, 1969.
 - c. Pacek, 671 0134. June 25, 1969.
 - d. Scott, 611 0813. April 10, 1969.
- 8. Reilly.
 - a. Jamco, 611 0198. April 7, 1964.
 - b. Proctor, 621 0290. June 15, 1967.
 - c. Dowel, 621 0842. November 3, 1965.
 - d. Dowel, 621 0842. December 2, 1964.
 - e. Lay, 611 0160. April 29, 1964.
 - f. AMC, 601 0059. September 15, 1964.
 - g. AMC, 601 0059. March 31, 1964.

V. NONAGENDA MATTER

- 1. Dixon.
 - a. Susan, 621 0801. March 10, 1967.
 - b. Ace, D. 8557. April 26, 1966.
- 2. Elman.
 - a. Texaco, 601, 0869. December 27, 1966.
 - b. Red Stick, 621 0284. August 7, 1969.
 - c. Spreckels, 631 0072. December 1, 1966.
 - d. Giant, 661 0153. November 29, 1966.
 - e. Am. News, D. 7396. September 19, 1967.
 - f. Fresh Fruits, 681 0040. February 3, 1969.
- 3. Jones.
 - a. Beatrice, 661 0053. April 12, 1967.
 - b. Pure Carbonic, 641 0289. January 24, 1967.
 - c. General Filters, 641 0722. April 30, 1965.
 - d. Idaho, 641 0260. January 11, 1965.

- e. Sanna, 611 0556. March 19, 1965.
- f. Long Island, 611 0129. January 23, 1967.
- g. Pacific Gamble, D. C-1177. May 19, 1969.
- 4. MacIntyre.
 - a. Abbott, 621 0127. June 23, 1965.
 - b. Holloway, 611 0538. May 28, 1964.
 - c. McKesson, 621 0283. May 28, 1965.
 - d. Corken, 621 0873. October 26, 1964.
 - e. Unnamed Liquor, 621 0873. August 14, 1964.
 - f. Moore, 631 0091. September 14, 1965.
 - g. Dumas, 641 0076. October 14, 1965.
 - h. Am. Radiator, 651.0093, May 28, 1969.
 - i. Armour, 661 0058. June 2, 1969.
 - j. Allied Supermarkets, 661 0118. August 6, 1968.
- 5. Nicholson.
 - a. Interstate Bakeries, 661 0116. January 28, 1969.
 - b. N.Y. Am. Beverage, 671 0159. August 22, 1968.

VI. MISCELLANEOUS

- 1. Dixon.
 - a. Letter to Paul J. Tierney, Chairman, ICC. May 28, 1968. Re: Southern Railway System, 681 0214, et al.
 - b. Letter to Watson Rodgers, President, Natl. Food Brokers Ass'n. February 13, 1963. Re: Brokerage enforcement.
- 2. Elman.
 - a. Memo. to Commission, September 26, 1967. Re: ATD, D. 8100.
- 3. Jones.
 - a. Memo. to Commission, January 22, 1968. Re: LaRosa & Sons, 631 0266.
- 4. Nicholson: various material.

PRICE DISCRIMINATION AND THE SHERMAN ACT

(An address by Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, Before Section on Antitrust Law, American Bar Association, Washington, D.C. April 9, 1965.)

It looks like this is really the year of the "anniversaries" in antitrust. Many of you have just helped us celebrate the 50th anniversary of the Federal Trade Commission. This week, we commemorate the 75th anniversary of the Sherman Act.

I'm delighted to join you in this celebration of that great statute. While the Federal Trade Commission does not—as I was recently reminded—administer the Sherman Act directly, we do have occasion to study it.¹ True, there are those who say we don't seem to have learned much from it, but we do try. That's one of the reasons I'm here today with all of you Sherman Act experts. And, come to think of it, maybe that's one of the reasons I was invited!

Seriously, there's no doubt that the Sherman Act is the real starting point—both chronologically and otherwise—of our national antitrust laws. Men of good will can differ when it comes to applying the Act in particular cases, but few quarrel with its basic objectives. Its two simple prohibitions—concerted arrangements "in restraint of trade" under Section 1, and monopolization, attempts to monopolize, and conspiracies to monopolize under Section 2—are couched, as the Supreme Court once said, in terms comparable to those "found to be desirable in constitutional provisions."² The Court has also called it a "charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."³

Competition is thus the immediate objective of the Sherman Act. But of course commercial "competition" is not sought here for its own sake, as it is in, say, certain sports and games.⁴ Competition is sought and fostered in commerce because

¹ "[T]he language 'unfair methods of competition' in § 5 of the Federal Trade Commission Act [includes] violations of the Sherman Act." *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691 (1948).

² *Appalachian Coals v. United States*, 288 U.S. 344, 359-360 (1933).

³ *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958).

⁴ But see Bazelon, *The Paper Economy* 35 (1959): "The Idea of Competition is one of the most mindless notions ever to dominate the supposed thinking of a society of grown men."

we consider it the most satisfactory means to certain other desired ends, or goals.

One of these end results we seek from competition is simply, as the Court put it in the case I mentioned a moment ago, "economic liberty." Competition, we believe, also yields a host of other desirable economic results, including "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress"⁵ for the nation and the people. I believe most economists agree with the Court's analysis of the economic benefits of competition. Monopoly is generally condemned as not merely an enemy of economic freedom, but as at least a contributing cause to such other ills as misallocation of resources,⁶ a lag in economic growth (and thus a lower standard of living), less than full employment, price instability (that is, inflation and deflation), and a distorted distribution of real income.

In short, most economists, like the rest of us, are against monopoly and for competition.

This brings me to the subject of *price discrimination*. As I understand it, most economists are also agreed that price discrimination—and here I use the word "discrimination" in its economic sense, that is, to describe a price differential that does not reflect differences in cost—is *not a feature of competitive economic theory, but of monopoly economics*. In a perfectly competitive market—one where there are enough buyers and enough sellers that no individual buyer or seller has a large enough share of that market to affect the market price—price discrimination is said to be economically impossible.⁷ Each *buyer* can purchase his full requirements at the going market price; he cannot buy for less, and he need not pay more. Each *seller* can sell his entire output at the full market price; he cannot get more, and he need not accept less. Professor Galbraith gives us an example. He says: "In January, 1949, a Missouri cotton planter made what was believed to be the largest sale of cotton in the history of the Memphis spot market. But the 9400 bales he sold for \$1,400,000 was an almost infinitesimal fraction of the 1949 supply." In Professor Galbraith's colorful prose, this "planter could have gone to heaven with his cotton instead of to Memphis and there would have been no noticeable tremor on any earthly market."⁸ I understand this is also true on the buying side here; if the going price for cotton is 30.6¢ per pound, the largest textile mill—no matter how large an order it might place at one time—couldn't affect that price in the slightest.

We must start, therefore, with a recognition of the fact that price discrimination can only exist when some degree of monopoly power is present. It can be on either the selling side or the buying side (or sometimes a combination of both). When two buyers pay different prices for the same product, and there are no cost differences present, there are two possibilities. First, the seller may be exercising some degree of monopoly power over the buyer paying the high price.⁹ Second, the buyer paying the low price may be exercising some degree of power

⁵ *Northern Pacific*, n. 3, *supra*.

⁶ Some economists have attempted to compute the dollar cost of monopoly, to the country as a whole, in terms of misallocation of resources. See *e.g.*, Kamerschen, "A Critique of the Status Quo Approach to Public Policy," 9 *Antitrust Bulletin* 747, 756 (Nov.-Dec. 1964).

⁷ See, *e.g.*, William Summers Johnson, "Economic Theories of the Robinson-Patman Act," Address before Southern Frozen Food Distributors Association, Atlanta, Georgia (December 6, 1952). See generally, *Hearings, Price Discrimination*, House Select Committee on Small Business, 84th Cong., 1st Sess., Part II (1955), at 615-630 (testimony of Walter Adams, Professor of Economics, Michigan State University); 639-656 (testimony of Professor Vernon A. Mund, University of Washington); 657-666 (testimony of Horace M. Gray, Professor of Economics, University of Illinois); 692-700 (testimony of Almarin Phillips, Assistant Professor of Economics, University of Pennsylvania); 785-792 (testimony of Joel B. Dirlam, Associate Professor of Economics, University of Connecticut); 937-942 (testimony of Dr. Irwin M. Stelzer, Economist, New York University); *id.*, Part III, Appendix 1169-1220 (statement of Rep. Wright Patman).

As Professor Mund put it: "A basic economic principle is that monopoly and price discrimination are Siamese twins." *Id.*, at 644. Professor Phillips explains: "The highest price represents the market in which the seller has the greatest degree of monopoly, and the lower price is where he has a lower degree." *Id.*, at 700. Professor Stelzer says: "there has been a tendency to ignore the fact that price discrimination means a higher as well as a lower price. In recent years many lawyers and economists have overlooked the very obvious fact that a firm which offers a lower price to some of its customers is of necessity receiving a higher price from others." *Id.*, at 937-938.

⁸ Galbraith, *American Capitalism* 15 (1952).

⁹ "In a free, competitive market price discrimination is impossible. . . . If, however, by some artificial contrivance a seller gains a significant degree of control over the market—that is, attains a position of power or strategic advantage—he can practice price discrimination. That is, he can compel certain buyers, who are unable to escape the impact of his market power, to pay a price above the competitive level; other sellers, in the meantime, are deterred by the first seller's market power from undercutting the discriminatory price and alleviating the distress of the victimized buyers." Professor Gray, n. 7, *supra*, at 658.

over the seller.¹⁰ The amount of discrimination varies, of course, depending upon how much power the favored buyer has over the seller, or how much power the seller has over his disadvantaged customer (or both).

Since price discrimination is peculiar to those markets in which some degree of monopoly power is being wielded, it's not surprising that some of the more flagrant instances of price discrimination have shown up in monopoly cases brought under Section 2 of the Sherman Act. Take the old *Standard Oil* case,¹¹ for example. In 1865, Standard was only one of some 25 independent refineries located in Cleveland, Ohio. First it "merged" with several of its competitors. This not only gave it a substantial size advantage over its competitors, but enough power to demand and get discriminatory rate (or price) concessions from the railroads. These are said to have ranged from 25% to 50% of the price competing refiners were paying. Senator Sherman, arguing for the passage of his bill in 1890, estimated that these discriminatory freight "rebates" ultimately totaled more than \$5 million a year. Armed with what we would now call this "2(f) money"—referring, of course to Section 2(f) of the Robinson-Patman amendment to the Clayton Act—Standard used it in two ways. First it lowered prices in "selected segments of the market, those where it had independent competition, making up the loss with high prices where competition had already been eliminated."¹² When a particular competitor had been sufficiently weakened by this discriminatory price cutting on the one hand, and the high freight rates on the other, there would be another "merger."

When the Supreme Court ordered divestiture in 1911, Standard had some 90% of all the business in refined petroleum products in the United States.

I think this case illustrates what I consider a distinct causal relationship between mergers, price discrimination, and monopolization. Price discrimination is, in the first instance, what some call a "symptom" of monopoly power. But it is also a contributing cause of *still more* monopoly power: the receiver of discriminatory concessions builds a treasury at the expense of weak suppliers, a treasury that can then be used by that favored buyer to engage in "selective" price discrimination to destroy its own weaker rivals and, in the end, "merge" them out of existence.

Now this brings me to the Robinson-Patman Act, a much criticized statute. The first criticism is apparently a sociological one: the enactment of the law was urged by, among others, people in the food industry. The argument here, I gather, is that any legislation supported by businessmen as small as the typical food wholesaler, retailer, or broker is bound to have some flaw in it.¹³

The other argument against the Robinson-Patman Act addresses itself directly to this alleged flaw. This argument maintains that the statute is anticompetitive in character, and is therefore in conflict with other antitrust legislation, particularly the Sherman Act.¹⁴

¹⁰ See, e.g., *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (D. Ill. 1946), *aff'd*, 173 F. 2d 79 (7th Cir. 1949).

¹¹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). See also *A&P case*, *supra*; *American Tobacco Co. v. United States*, 328 U.S. 781, 803, 804 (1946); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 325-329 (1953). In the latter case the court observed that "United has the power to discriminate, by wide differentials and over long periods of time, in the rate of return it procures from different machine types," and that, while there was no appropriate remedy for that type of discrimination, "price discrimination has been an evidence of United's monopoly power, a buttress to it, and a cause of its perpetuation. . . ." 110 F. Supp. at 343, 349.

¹² "[Price discrimination] means . . . also the fortification of such power by granting its possessors the right to use the monopolist's favorite weapon of economic warfare—the right to discriminate." Professor Adams, n. 7, *supra*, at 616. Professor Gray says: "The abnormal—that is, noncompetitive—profits that accrue from such price discrimination enable the monopolistic seller to expand his market control, increase the range and intensity of the discrimination, and eventually undermine and destroy the competitive market. . . . Price discrimination, then, is one of the most basic, versatile and deadly weapons of economic aggression. Once sufficient control of the market has been attained to permit its use a monopolist can use a price discrimination to weaken or destroy competition, penetrate new markets, attract additional customers, introduce new products, exploit noncompetitive sectors of the market, strengthen control over production and prices, deter potential competition, and maximize profits." N. 7, *supra*, at 658-659.

¹³ But see, Dirlam, n. 7, *supra*, at 789: "Most people in the food industry feel that the Robinson-Patman Act enables them to turn their attention from negotiating special deals to concentrating on improvement in warehouse and retail efficiency, although price competition is probably just as vigorous at all levels as it ever was."

¹⁴ But see, Dirlam, n. 7, *supra*, at 791: "It seems to me . . . there is no basic conflict between the Robinson-Patman Act and the Sherman Act. It seems pretty clear that when Congress passed the Sherman Act, it was attempting to restrict unfair practices, including price discrimination. And the Clayton Act is generally accepted as being an attempt to spell out in more detail the ultimate objective of the Sherman Act. Similarly, the Robinson-Patman Act is an extension to make more effective Section 2 of the Clayton Act. I do not see any necessary conflict between the Sherman and the Robinson-Patman Acts."

Now the argument here is what my own Bureau of Economics tells me is called "the 'trickle down' theory." This argument says that, while price discrimination would be impossible in a perfectly competitive market, some markets are "incurably imperfect," that, for example, some markets have buyers and sellers in them whose individual transactions are in fact large enough to affect the market price. The larger seller, we're told, may be a "price leader," and the other sellers may be followers of his price. But, say these critics, a *particularly large buyer* may be able to put a crack in this dike of "sticky" prices. He "bar-gains" a price concession on a big order. Then, the industry "grapevine" carries the story of this concession to other buyers. Other buyers start demanding the same low price, not only from this particular seller but from other sellers as well. In time, the price that was originally a discriminatory concession to only *one* favored buyer becomes the general over-all price, available to *all* buyers, both large and small.

In other words, price discrimination is a *self-correcting* mechanism; it carries within it the seed of its own elimination. And in the process it *lowers* the general price level.

Our own Bureau of Economics tells me—with commendable restraint, I think—that it "probably does not work in fact."

Others have been less charitable.¹⁵ For example, a former Commission economist said of this theory in 1952: "I have examined the facts for industries in which sellers had engaged in highly discriminatory pricing practices for at least 20 years. The same buyers who received the price advantages at the beginning of the 20 years were the same buyers who received the advantages at the end of the 20 years. . . . [General] prices were not flexible; they changed rarely and always upward."¹⁶ As a matter of fact, he argued, price discrimination is one of the principal *means* by which "sticky" prices are *maintained* in certain industries. He mentions the situation where sellers who operate over a wide area encounter price competition from small sellers who do business in only small, local segments of the national market. To stop these small firms from competing, the national sellers need only drop their prices for a while in those particular areas, making it up in areas where prices can be kept higher. Seeing the handwriting on the wall, the smaller sellers who had felt the urge to compete on price in their particular markets will abandon the idea, and raise their prices to match the higher prices charged by the "price leaders."

¹⁵ Professor Adams characterizes this "trickle down" theory as "double-think." N. 7, *supra*, at 616. Professor Mund says: "Oligopoly writers have long emphasized that it is the 'fear of retaliation' which restricts a firm in reducing its prices when sellers are few. The right to discriminate, in truth, is a principal factor making for price rigidity, and not the reverse, as the critics of Robinson-Patman contend. . . . I would like to emphasize at the same time that a discriminating firm charges the lower price, which is 'hard' thinking of the lower price. They sort of emphasize, 'well, we will bear down here.' But the idea that the apologists for discrimination, in pleading for 'hard' competition, are competition in their thought, he is charging a higher price elsewhere where competition is nonexistent or under control, you see, and that is 'soft' competition." *Id.*, at 644, 646. Professor Gray observes: "In the lexicon of monopoly economics freedom to discriminate, by a strange inversion of logic, becomes a natural or inalienable right—a sort of categorical imperative based on organic necessity, and hence, beyond the reach of moral and secular law." He calls this "a curious, upside-down semantics; the art of proving that black is white by mere assertion. Price discrimination is not really a tactic of monopoly but rather a manifestation or form of competition: new, modern, dynamic, aggressive, effective, hard, vigorous, and realistic. . . . Thus, by a devious semantic inversion we arrive at the startling conclusion that Congress, the Federal Trade Commission, the Department of Justice and the Supreme Court, through ignorance and inability to comprehend the public interest, are destroying competition while those devoted public servants—the monopolists and oligopolists—are struggling desperately to maintain it by means of price discrimination. This, of course, is arrant nonsense, for which any college sophomore in economics would be flunked. . . ." *Id.*, at 659-660.

Professor Phillips raises another question here: "It is not clear that the price concessions won by the buyers will always be passed on. Neither is it at all certain, given the lower costs obtained by the powerful buyer, that these will not be passed on through selective price discrimination aimed specifically at eliminating competition in the areas in which it is most prevalent." *Id.*, at 694.

¹⁶ Johnson, n. 7, *supra*, at 8-9. Professor Phillips says: "If no discrimination in price is allowed, it is frequently maintained that the firm will stop selling in places where he has competition and just sells where he has a monopoly. I do not think that this necessarily follows. He may say, 'I have a monopoly here, and I have been charging a high price; when somebody stops me from charging two prices, I cannot charge a high price in the more monopolistic market unless I charge it elsewhere. But since I cannot charge a higher price in the more competitive market, I will lower, rather than raise, all my prices.'" *Id.*, at 700.

In other words, price discrimination is the means by which small sellers with a yen for competition are "disciplined" by larger sellers who feel no such urge.¹⁷

Now some have a great deal of difficulty in understanding why price discrimination is such a peculiarly lethal competitive weapon. So for the young and innocent here, let me give a homely illustration one of our lawyers likes to use. He says that a person weighing 100 pounds, walking in shoes with a flat heel 2 inches wide, will exert 25 pounds of pressure per square inch on the sidewalk at the instant in which the full bodyweight is brought down on that single heel (100 pounds distributed over 4 square inches). But, he says, consider what happens when that same 100 pounds is concentrated onto the point of a woman's "spike" heel. If the heel is $\frac{1}{2}$ inch each way, its entire surface is $\frac{1}{4}$ square inch. When the 100 pounds is put on that narrow surface, the *pressure per square inch* is 400 pounds, or 16 times as great as that exerted on the sidewalk when the same weight was distributed over the wider heel.

A seller who does business in 16 towns can use the same principle to stamp out a competitor who does business in only *one* of those towns.¹⁸ The larger seller, even if he lowers his price to the point where he's making no profit at all, will be sacrificing only 1/16th of his total profits. The smaller competitor who does business in that one town only will have lost all, or 100%, of *his* profits. The odds are good that the local man will see the light and raise his price up to whatever level the out-of-town man thinks the price ought to be. The little man has been "punished" for competing; price discrimination has been used as a tool to "fix" prices. Consumers foot the bill, as usual.

Now you will notice here that one of the central virtues of price discrimination—at least from the standpoint of the large seller—is that he need never take the "efficiency test." In the illustration I gave, suppose the small, local seller had in fact been more efficient than his out-of-town rival, turning out the product at, say, a 10% lower cost. The larger seller, if it hadn't been for his ability to lower prices in that one town while keeping them high in the 15 other towns, would have had to either improve his own efficiency so as to get his costs down to that local competitor's, or else take his high-cost goods to some other market.

In short, price discrimination distorts the competitive contest, shifting it from a test of efficiency to one of brute financial power. As the former Commission economist I mentioned a moment ago put it: "It is only by restraining discriminations that a contest of efficiency can be brought into full play. In this regard, then, the Robinson-Patman Act seems not only compatible with the competitive theory; it would seem to accomplish what competition is supposed to accomplish." It does not "reject the notion that competition should drive out the unfit and reward the fit." "On the contrary," he says, "it has set about to make an intelligent determination as to what the standard of fitness should be, and to adopt that standard." That standard, he adds, is the same as that of the competitive theory—namely, "that the . . . high-cost producer will be driven out, and that the low-cost producer will survive and prosper."¹⁹

Professor Mund makes the same point. He says: "Those defending the Clayton and Robinson-Patman Act . . . maintain that, in truth, price discrimination is a "soft" kind of competition (for a monopolistic seller), because it relieves a seller of the need to reduce his prices uniformly to all customers. . . . Each stands for the principle that business survival should be based upon economic efficiency. A dominant firm, with the power to discriminate, can reduce its prices on some sales not because of efficiency, but because it can recoup its losses elsewhere. It is only when discrimination is restrained that business rivalry can operate

¹⁷ "Where a big company found that a local competitor was selling below its national price, it would meet the price in that area, and if the local company did not show signs of going out of business, then the game of raising prices would start. The big company would lower the boom for a while and then raise it again. If the local company failed to raise its price promptly, then the boom would be lowered again. Before long, after a few ups and downs, the local company would catch on to the fact that it had better raise up to the big competitor's price. . . . This is the thing that keeps prices to consumers high: the centralized control over prices which is maintained by discrimination. This is soft competition." Patman, n. 7, *supra*, at 1173.

¹⁸ "Like the short cut-and-thrust sword of the Roman Legion, price discrimination is the basic weapon with which the monopolist hacks his way to power and then, having achieved power, defends and preserves his Imperium. It is an almost indispensable weapon; monopoly can scarcely come to fruition or defend its market dominance without resort to price discrimination. This truth is so universally recognized that one of the basic tenets of all antimonopoly policy is the simple commandment: 'Thou shalt not discriminate.'" Professor Gray, n. 7, *supra*, at 659.

¹⁹ Johnson, n. 7, *supra*, at 6 (emphasis added).

as a "contest of efficiency" in which the more efficient have a chance to succeed."²⁰

Now there is another argument against the Robinson-Patman Act that, while carefully avoided by the more sophisticated critics, seems to be the one the working businessman really has in mind when he tells us what he thinks of the Act. It involves what is called, I understand, the "marginal cost-price theory." Let's say a manufacturer of widgets has 100 customers, each buying 10,000 units per year at \$1.00 per unit. Our seller's gross revenue is therefore \$10,000 per year from each customer, or \$1 million from his 100 customers. At this point, however, let's suppose this manufacturer is approached by a very large customer who is prepared to take 200,000 units per year, or 20% of the seller's present output. There's a catch, though. This large purchase won't pay the \$1.00 price the others are paying: he offers 65¢, take it or leave it.

Our manufacturer calls in his accountants and his economists. The accountants tell him that his average total cost is 90¢ per unit. This is divided into two classifications. First, he has "variable" or out-of-pocket cost of 60¢ in producing each unit. Secondly, he has average "fixed" or overhead costs of 30¢. Producing the additional 200,000 units needed by this new customer would not increase his fixed costs, only his variable cost. Therefore, the only costs he need consider in deciding whether to accept or reject that large order are his variable costs, and these are only 60¢ per unit. Accepting the order at 65¢ per unit will therefore net him 5¢ per unit in additional revenue, or \$1,000. He is advised to accept the order.²¹

Even the most vigorous critics of Robinson-Patman characterize this as "plainly fallacious reasoning as to cost."²² We are told that "there was no difference either in the marginal cost or the average cost of serving this buyer as against all other buyers, for it was an altogether arbitrary act to classify him as 'the' marginal buyer. He might, with equal logic, have been considered the 'first' buyer and have the whole overhead loaded onto him, as to be called [the] 'marginal' buyer and have none of it imputed to him. *There was no saving attributable to his order which was not equally attributable to other orders.*"²³

Another economist puts it this way. He says: "The economist's analysis of price discrimination is not easily made to support a defense of [this marginal pricing] practice. The *price differential that occurs . . . is, for all practical purposes, indefensible* except, perhaps, on the ground that all doubts should be resolved in favor of freedom of contract. The [seller] . . . is not likely to dispute that if the unit costs of selling to two customers are equal, then they are entitled to the same price, and that if these unit costs are different, the price differential should not exceed this cost differential."²⁴

Nevertheless, there's no denying the fact that the law has asked the seller in my hypothetical situation to forego \$1,000 in net profit that he would otherwise have made by accepting the order at the discriminatory price offered by that particular customer. And in a country where the profit motive is relied upon to drive the whole economy forward, the businessman is entitled to a good answer when he asks *why* the law wants him to pass up a profitable transaction. He has a right to know what allegedly larger end is being served by his sacrifice.

The answer was given to him by Congress in Section 2(a) of the Robinson-Patman amendment. Congress had found that price discrimination, a "spiked" heel, could be a lethal weapon in certain situations. A seller is generally free to raise his general prices—his prices to *all* of his customers—up and down as he likes. But when he elects to discriminate—to charge one customer 65c while charging all of his other customers \$1.00—then he must pause to consider the *effects* it's going to have on others. Section 2(a) provides that the seller must not discriminate if its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

Now as I read the economic criticism of the statute, those economists that support antitrust in general find no fault with the first part of this "effects" language—that is, with the part that speaks of "substantially lessening competi-

²⁰ Mund, *Government and Business* 332 (1960). See also Patman, n. 7, *supra*, at 1172: "Efficiency would come into play only if, to meet the local [seller's] price, the big company had to reduce its price everywhere. Then the competition would be on equal terms."

²¹ See Machlup, *The Economics of Sellers' Competition* 62, n. 4 (1952).

²² Adelman, "The Consistency of the Robinson-Patman Act," 6 *Stanford L. Rev.* 3, 21 (Dec. 1953).

²³ *Ibid.* (Emphasis added.)

²⁴ Dewey, *Monopoly in Economics and Law* 199 (1959) (emphasis added).

tion" or "tending to create a monopoly." This is the same terminology that appears in, for example, the merger provision, Section 7 of the Clayton Act. These economists seem to agree that a price discrimination which will probably have an adverse effect on "competition" within some "relevant market" ought to be prevented. In other words, they recognize "competition" as a social value of sufficient public importance to warrant the suppression of offenses against it.

The more serious economic criticism seems to center, therefore, on the remaining language in the "effects" clause of Section 2(a). After dealing with discrimination that may substantially lessen competition or tend to create a monopoly, the statute continues, prohibiting discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discriminations, or with customers of either of them." Here the words of the statute still speak of "competition," but the argument is made that what is really prohibited by this phraseology is a discrimination that injures a *single* "competitor."²⁵ As Professor Bain puts it, "any price discrimination not based on cost differences is illegal if it results in some 'injury' to competition *between any pair of buyers of the discriminating seller (or the customers of the buyer), or between the discriminating seller and any one of his competitors.* . . ."²⁶

Another commentator makes this same point in suggesting that the Robinson-Patman Act incorporates two "sharply different objectives," one of them the protection of "competition," the other an assurance of "equality of opportunity."²⁷

First, let me say that I would feel no urge to apologize for the statute if its *sole* purpose was to preserve "equality of opportunity" in interstate commerce. In my scale of values, competition ranks high. But I'm not prepared to say that it is an altar on which all other values must be sacrificed. I had always supposed that equality of opportunity—including equality of opportunity in the economic matter of building a business and earning a profit—was a basic part of the American scheme of things. If Congress has here gone beyond the protection of competition and sought to preserve "equality of opportunity" as well, it seems to me that this is a further recommendation for the statute, not a valid criticism of it. Price discrimination is certainly an economic injustice. And the Supreme Court has only recently held that a law passed under Congress' commerce power is in no way impaired by the fact it is also directed against "a moral and social wrong."²⁸

We all know, however, that it is through injury to "competitors" that "competition" is generally injured. For example, at the primary level, a discriminatory price that diverts enough business from a competitor will cause his per-unit costs to rise and may actually force him out of the market altogether. At the secondary level, to give one of two competing buyers a price advantage that is substantial in relation to profit margins is to give him the means to destroy that competitor, whether by cutting resale prices, by out-advertising him, or by a host of other techniques. A reduction in the number of competitors, or a sapping of the strength of surviving competitors, seldom fails to result in a "lessening of competition" or a "tendency to monopoly." In this connection, I notice that Article 85 of the Treaty of Rome, in prohibiting practices that may result in injury to "competition," includes price discrimination—which is described as "the application to parties to transactions of *unequal terms* in respect of equivalent supplies, thereby *placing them at a competitive disadvantage.*"²⁹ This sounds suspiciously like "equality of opportunity" to me. And I understand the economists of Europe were well represented when that Treaty was drafted.

But it's not my purpose here to argue these niceties of statutory interpretation. I simply want to make the point that, in my view, price discrimination is more than a "symptom" of anticompetitive market power, that it is a prime, moving force, feeding that power, protecting it from the erosion that would come if competitors had "equality of opportunity." I believe, for example, that it is one

²⁵ Adelman, n. 22, *supra*, at 16.

²⁶ Bain, *Industrial Organization* 618 (1959) (emphasis added).

²⁷ Edwards, *The Price Discrimination Law* 638 (1959). But see Edwards, "Tests of Probable Effect Under the Clayton Act," 9 *Antitrust Bulletin* 369, 375-379 (May-Aug. 1964).

²⁸ *Heart of Atlanta Motel v. United States*, — U.S. — (December 14, 1964), Slip opinion p. 16.

²⁹ Article 85(d) (emphasis added). See Lazerow, "Price Discrimination and the Treaty of Rome: The Jurisdictional Elements," 23 *Federal Bar Journal* 147, 148-149, nn. 15, 16 (Spring 1963).

of the major sources of the funds that launch anticompetitive merger programs, that price discrimination and unlawful acquisitions are in many instances but opposite sides of the same coin, that each is frequently both a cause and a result of the other.

Few have put the *economic* case against price discrimination so succinctly as Professor Gray, an economist at the University of Illinois: "[M]onopoly can scarcely come to fruition," he says, "or defend its market dominance without resort to price discrimination. This truth is so universally recognized that one of the basic tenets of all antimonopoly policy is the simple commandment: 'Thou shalt not discriminate.'"³⁰

THE FEDERAL TRADE COMMISSION, THE ROBINSON-PATMAN ACT, AND THEIR PERENNIAL CRITICS

(An Address by Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, Before Convention of National Food Brokers Association, at New York Hilton Hotel, New York, N.Y., December 3, 1966)

It is good to be back among friends—friends not only of the Federal Trade Commission, but also of the Robinson-Patman Act. I say this because the critics' arrows are again being aimed at both the Commission and the Act, as has been done almost perennially during the thirty-year history of the law. Neither the character of the arrows nor of the bowmen have changed much over the years, but the critics have developed a high degree of resistance to logical reply, largely because they seem to have a philosophical bias that may indicate that they are having difficulty in coming to terms with twentieth century America. Being here among friends of both the Commission and the Robinson-Patman Act, I am persuaded to meet once more some of the allegations against both the Commission and the statute.

Boiled down to their very essences, the charges are that the Robinson-Patman Act is no good and the Commission's administration of it is worse. Charges of this kind against a statute, and against the agency that administers it, are not unique; indeed they are not even unusual; but I, like the heads of other agencies, feel compelled to respond occasionally just to keep the record straight.

First, I shall make some comments about the Federal Trade Commission's administration of the Act. While we would never concede that, among all federal administrative agencies, we are not Number 1, I believe, nevertheless, that we "try harder". To illustrate this assertion I cite some Commission innovations.

The fact now is that firms subject to the Robinson-Patman Act can no longer legitimately complain that they must formulate pricing and promotional policies at their peril. These firms can now have their uncertainties as to such policies laid at rest by asking the Commission for an advisory opinion. Advisory opinions are also now available to remove their uncertainties concerning the legal sufficiency of their proposed compliance with our orders to cease and desist. We do not, of course, want to, nor can we, replace private practitioners, but we certainly can and want to help them in cases of real doubt; and we are doing so more and more.

The use of our industry-wide programs, recently expanded, is also an effort to eliminate doubt and to apply our statutes simultaneously, and therefore fairly. As time goes on other innovations will undoubtedly mature and be put into effect.

A second favorite shot at us is that we are unjustifiably slow. This criticism ignores that sometimes there are inherent in our problems a degree of complexity that not only warrants, but in fact is given, full consideration by each Commissioner and by the Commission as an adjudicative or administrative body. When such complexity is absent, a charge that we drag our feet cannot be supported.

As Chairman I have worked without let-up to expedite all matters before the Commission. Without going into detail about procedural methods we use to speed things up, I believe our efforts, with one exception, have been successful. The exception is when firms against which actions are brought avail themselves, as they have a right to do, of all procedures available to them, whether the ends sought are meritorious or not.

In these exceptional cases, which may seem interminable, it is not the Commission that has difficulty in "unwinding" itself to take action, but rather

³⁰ N. 18, *supra*.

it is the respondents who avail themselves of the fullness and detail of due process; and I do not think that anyone, especially our critics, would advocate any impairment of that concept. Due process has similar repercussions not only in other administrative agencies but also in the courts themselves.

Another favorite jibe of our critics is that we go after the Papa-and-Mama entrepreneurs but that we are afraid of Mr. Big. In answer to this, I think we afford all businesses, large and small, the full protection of the law. The roster of firms against which we have brought Robinson-Patman proceedings lists smaller firms as well as larger ones, including among the latter some of the very largest corporations, both in the economy as a whole or in their industries. When we find law violations, we act, undeterred by considerations of size.

Your association itself can testify that we make an objective application not only of the Robinson-Patman Act but also of the other acts we administer, letting the chips fall where they may.

The allegation that we Commissioners sometimes disagree is admitted. If this were not true, I would think there was something seriously wrong with us. These disagreements reflect the vitality of the Commission—they demonstrate that democracy is at work, that the Commission is a democratic institution.

Using the masculine to include the feminine, since we have a woman Commissioner (our first one and she is most able), I am proud there are no angry men on the Commission—no angry young men, old men, or middle-aged men. They are just men—men who are conscientious and dedicated public servants, men who are steeped in the substance and spirit of the antitrust laws. None of them is infected with any philosophical virus which is inconsistent with competitive capitalism. It may be that Commissioners' points of view are at times at opposite poles. This would not distinguish the Commission from any other multi-member organization. I am sure that the Congress intended that decisions of multi-member, bi-partisan commissions would reflect compromises of divergent views, and also that these decisions would undoubtedly bear the scar tissue of such compromises.

You can see I make no contention the Commission is perfect. I think of the Commission as being, in one respect, like a jury. It is not perfect but no one has yet figured out a better system. I feel much the same way about the Commissioners as individuals. I do not, of course, contend that I am a perfect Commissioner. I am sure my fellow Commissioners also do not feel that they are perfect officials. We Commissioners are elected by the President and confirmed by the Senate. This process of selection, again, may not be perfect but no one has come up with a better way.

I now turn from defending the Commission to answering criticisms of the Robinson-Patman Act, again with the purpose of replacing myths with reality.

Critics would hardly dare contend that price discrimination should be unfettered, but they do assert that the Robinson-Patman Act is sloppily drafted and has improper inclusions and exclusions. The draftsmanship, admittedly, could have been improved. Uninterpreted, some of the provisions were not crystal clear. Its sentence structure leaves something to be desired. Those familiar with legislative process, however, recognize that these are only minor defects, resulting from legislative combat and compromise.

Imperfections of this kind are, as I have said with respect to the basic charges themselves, not unique; they are not even unusual. Similar ones exist perhaps in most if not all legislation that deals with controversial social and business problems. In any event, to the extent that these imperfections in the Robinson-Patman Act have not been remedied already by administration and enforcement, these processes in time will close the gap.

Reappraisal of the statute is a part of these processes of administration and enforcement. We five Commissioners continually reappraise the statute; every time we file a complaint; every time we issue an order; and every time we defend an order before the courts. In these and other reappraisals we give full consideration to what the courts have said and to what thoughtful and scholarly critics have said.

Now I shall answer the critics' claim that, as a result of certain inclusions and exclusions of the Robinson-Patman Act, the statute fosters rather than inhibits monopoly. This criticism amounts to an allegation that the Robinson-Patman Act is inconsistent with the Sherman Act. It implies that price and other discriminations, as well as brokerage, which are prohibited by the Robinson-Patman Act, are practices the Sherman Act is never concerned with.

Both the allegation and its implication are unfounded.¹ The Robinson-Patman Act, which is an amendment to Section 2 of the Clayton Antitrust Act, was intended and designed to supplement the Sherman Act by stopping these practices in their incipency rather than waiting for them, by the infliction of actual and substantial competitive damage, to ripen into Sherman Act violations.

The Robinson-Patman Act thus requires closer adherence to competitive standards at an earlier time than does the Sherman Act. Therefore, the Robinson-Patman Act requires *harder* competition than the Sherman Act. In my opinion, some people who contend that the Robinson-Patman Act fosters "soft" competition may well be apologists for monopolistic power, cloaking their position by calling it "workable competition". One former Commission economist may be in this camp; for he reportedly argues that price discriminations favoring big buyers are perhaps necessary to unstick the sticky prices of large sellers. This argument seems to imply and advocate that those with monopoly power be allowed to use their historic weapon of price discrimination. Certainly this follows, if in fact price discrimination is not only an indication of monopoly power but is also a tool of monopoly; and I am informed that economic theory clearly says it is both of them.

Unless one is looking for a place to hide, it is not now difficult to know what the Robinson-Patman Act says and means. Today the difficulty with those who say they have trouble with the statute is not, it seems to me, that they do not know what it means, but rather that they do not want it to mean what it says.

The statute says in effect that the discriminations with which it deals violate the concept of freedom which is inherent in both our competitive economic system and our democratic political system. It says further that despite this, some of these discriminations are, nevertheless, not prohibited unless their threat of injury to competition specifically appears to be probably, and unless they cannot be justified by bringing them within the scope of certain provisos. I will comment on two of the provisos, the one which deals with meeting in good faith the equally low price of a competitor and the other which is concerned with cost justification.

In influencing the interpretation of the meeting-competition proviso, firms charged with violating the Act have, in one respect, pretty much had their way; for at their insistence the courts have interpreted this proviso (contrary to the Commission's position) to permit price discriminations which not only may injure competitors, but even price discriminations that go so far as to threaten to substantially lessen competition or tend to create monopoly. Therefore, if there is an aspect of the Robinson-Patman Act that can be characterized, in our critics' language, as being "anti-antitrust", it is the meeting-competition proviso as judicially interpreted. A Senate subcommittee tried for years to amend the Act to reverse this judicial construction of the meeting-competition proviso. It was unsuccessful.

Now a comment or two on the cost-justification proviso. The basic criticism of this proviso and its administration is the firm charged with violations have found it impossible to use the proviso successfully. Unsuccessful respondents often say, "You just can't win." Of course, you know the reason for this could be that they just don't have the facts to cost justify. The critics say, however, that the difficulty arises because the Commission has not established a single, uniform method of cost justification, and that each respondent is, therefore, forced to create his own method. The implication seems to be that the Commission should establish such a single, uniform method to be used by butcher, baker, and candlestick maker, regardless of their different methods of doing business. Can't you hear now the violent screams that would accompany an attempt by the Commission to impose a cost-accounting method that could be so readily characterized as a straitjacket?

Next, a word on that part of the Act which concerns you so vitally—the brokerage section. The revolt, in which you so actively participated, against brokerage of the kinds finally prohibited was one of the most important factors leading to the passage of the Act.

The brokerage section, as you know, received our earliest attention. Although its language was initially considered by some to be a little opaque, its legal meaning, as interpreted by the Commission and the courts, is now clear, except, it seems, to our critics. There remains, of course, an occasional need to interpret complicated factual situations so as to be able to apply the section correctly. I believe that we have administered the statute as Congress intended. The courts, for the most part, have agreed. The result is that we have eliminated,

¹ Note, however, my discussion of the meeting-competition proviso.

or made most difficult, the use of prohibited brokerage as an instrument of anti-competitive power. I salute the Robinson-Patman Act as it progresses into its thirty-first year. I venture to suggest that the Congress will not soon impair it; and I assure you that we will continue to administer it forcefully and fairly, making the reappraisals I have told you about.

I have now finished what I wanted to say about the recurrent criticisms of the Robinson-Patman Act and the Commission's administration of it. I have no hope that I've satisfied all of our perennial critics; and so I undoubtedly will have to make another speech about like this one of these days. By cutting off my Robinson-Patman defense here, I'll have time to touch upon a few of the problems now before us that are of particular interest to you.

The Commission has started an investigation to find out what the facts are on the use of promotional schemes, devices, and games now so popular in food marketing. We want to find out whether any of them may substantially curtail price competition and also whether any of them are unlawful games of chance. In addition, we are interested in discovering their cost.

Mrs. Esther Peterson, Special Assistant for Consumer Affairs to President Johnson, suggested an inquiry of this kind, apparently as a result of supermarket boycotts by housewives. Many others also make similar suggestions.

We have called upon food retailers to re-examine their promotional practices in the light of well-established legal principles and to discard voluntarily any of the practices that they find to be legally objectionable. The public interest clearly demands this voluntary action.

In dealing with "cents-off" and similar promotions, the Commission in the future will operate on a case-by-case basis. When brands of coffee are promoted by offers of this kind, we will take action when we have reason to believe that the offers are not genuine, bona fide price reductions. This enforcement policy will also apply to other products being similarly promoted.

Congress has given new jobs under the terms of the recently-enacted Fair Packaging and Labeling Act to both the Commission and to the Department of Health, Education and Welfare. We are now developing plans to carry out this mission.

We believe that this statute will help all consumers make more nearly accurate comparisons of the many products sold in supermarkets and drug stores. We also believe that, by improving methods of packaging and labeling, the Act should benefit those manufacturers that, over the years, have honestly tried to observe high standards, since other manufacturers that have not made similar efforts will have to raise their standards. The statute should thus contribute to fair competition.

Thank you for asking me to come here today. I have enjoyed it, as I always do when I meet with you. I leave, knowing that we will continue to work together in the public interest.

PRICE COMPETITION UNDER THE ROBINSON-PATMAN ACT

(An address by Hon. Paul Rand Dixon, Chairman, Federal Trade Commission, before International AIDA Symposium, at Geneva, Switzerland, on April 25, 1967)

I have been asked to present my views as to "how Americans have conceived the rules of the game for price competition," particularly as they relate to the Robinson-Patman Act, the American anti-price discrimination law. Preliminarily, what I am going to discuss with you now are not so much laws of the United States but laws of human nature. Human nature has demonstrated that man is a trading animal. Although the world is presently divided into many different countries we invariably find that wherever we look, that no matter the dress, that no matter the language, and perhaps no matter the history, there is the desire to make a good bargain, to make a good trade. The common belief is that if prices are cheap, the consumer benefits; but if an article is too cheap, then the sellers are robbed of their profits and rights to participate in the purchase of other articles. We are dealing with the instinct that carried Phoenician sailors in open boats half way around the world, the instinct which carried Columbus to America. It is a long time since Columbus arrived in America, but, as far as trading is concerned, there has been little change in that aspect of human nature.

Sellers wish to sell their merchandise at the highest possible price, while buyers wish to purchase at the lowest possible price. In other words, we still want a

bargain. Some men by offering bargains have become very rich. Some corporations by offering bargains have become very rich. With wealth comes power. Financial power, just like political power or any other type of power, can be exercised sensibly, but it can also be misused: and in both cases the misuse can cause harm to innocent people. The abuse of power has led the Congress of the United States—as you know, Congress is the voice of the American people in enacting legislation—to make laws to curb the harmful use of financial power when by common consent it needs curbing. The purpose of our competitive system is not to produce a competition which destroys stability in an industry, but its purpose is rather to maintain that degree of competition which induces progress and protects the businessman as well as the consumer.

In America we consider practicality a virtue and I think that we are wise in doing so. Our laws governing price competition, our trade regulation laws, were enacted as a practical solution to meet specific problems that arose at specific times in our history.

Any discussion of our anti-price discrimination law, the Robinson-Patman Act, must begin with a little history of the United States during the latter half of the nineteenth century. The American Civil War had ended, and throughout the country little one-man businesses were giving up and great corporations were growing; little shops were closing down and factories were growing bigger; rural communities were becoming stagnant; big cities getting bigger. The process was essentially an adjustment of man to steam. This new-founded power would make man's goods and transport them on rails.¹

With the advent of the railroads the American businessman learned about "rebates." The trick was to pay the same freight rate as your competitor—and then have a portion of the freight charge paid secretly returned. This was a rebate. The advantage to the favored company, the heart-breaking handicap to its competitors, was obvious. Soon corporations with new labor-saving machinery, new processes of manufacture began slashing prices. Competition appeared to threaten corporations with mutual destruction. The formulation of trusts by the large corporations seemed to be the logical answer to destructive competition.² The word "trust" may have derived from the Danish and Swedish word "trost," meaning comfort and consolation. Up to this time the average man understood the word "trust" to mean "true."³ He used the word synonymously with "confidence," "belief," "truth," and "hope." The average man's most frequent use of the word was in a quotation of the 71st Psalm, "O Lord God, thou art my trust from my youth." Now a new meaning was added. Dictionaries subsequent to 1882 defined a trust as a "combination formed for the purpose of controlling or monopolizing a trade, industry or business by doing acts in restraint of trade."⁴

The new trusts permitted former competitors to deliver the stock in their corporation to trustees who would manage all companies as one and distributed the profits pro rata to the stockholders.⁵ Now competition between the companies would not only be eliminated but larger rebates could be exacted from railroads. The trusts arbitrarily fixed high prices and made fat profits. New businesses or new competitors were not permitted to gain a foothold.⁶ The theme seemed to be that "The American Beauty Rose can be produced in all its splendor only by sacrificing the early buds that grow up around it."

Oil having pioneered the trust path to monopoly, it was soon followed by whiskey, sugar, glass, copper, rubber, coal, steel, and a host of other commodities. Americans were greatly concerned about freedom of opportunity and believed that trusts destroyed competition and injured the public generally. Investigations were conducted by various state legislatures, as well as the federal government. In 1888, the trusts were denounced in the platforms of the two political parties. Congress acted. In March 1890, John Sherman of Ohio introduced a bill designed to end all trusts of whatever form. The Sherman Act was passed with only one dissenting vote in the Senate and passed the House of Representatives unanimously.⁷

Section 1 of the Sherman Antitrust Act declared to be illegal every contract, combination, or conspiracy in restraint of trade or commerce among the States.

¹ Thorelli, *The Federal Antitrust Policy*, 54-96 (1954).

² *Id.* at 91-96.

³ Webster's Dictionary, 1858.

⁴ The Oxford Universal Dictionary, 1955.

⁵ Seager and Gulick, *Trust and Corporation Problems*, (1929).

⁶ Clark, *History of Manufacturers in the United States, 1860-1914*, Vol. 1, (1928), 520, 531. See also, Tarbell, *The History of the Standard Oil Company*, Vol. 1 (1904); Montague, *The Rise and Progress of the Standard Oil Company*, (1903).

⁷ Thorelli, *op. cit.*, *supra*, n. 1 at 108-232.

Section 2 made it a crime to monopolize or attempt to monopolize any part of such trade or commerce. Violation of either section was a misdemeanor, and provision was also made for injunctive action to restrain violations. The law also provided for the recovery of triple damages by a civil suit on the part of any injured party. The enforcement of the Sherman Act was committed to the Department of Justice.⁸

It was soon apparent that the processes provided by the Sherman Act were not preventive but could be invoked only *after* restraint had occurred. While there appeared general agreement that further legislation was needed, it was not clear exactly what was called for. There was some pressure for greater investigative and information collecting powers. Some wished the government to be empowered to fix all prices. Some believed the Sherman Act could restore competition in the industries where it had disappeared if only the Act were properly enforced.⁹

However, the debate came to an end after the Department of Justice both won its first truly significant victory in 1911 against the Standard Oil Company¹⁰ and contemporaneously received a setback. For the Supreme Court on the one hand ordered the Standard Oil Company to dissolve and divest itself of its corporate parts, but, on the other hand, a rule of reason was to be read into the Sherman Act. Henceforth, only "unreasonable" restraints of trade were **forbidden**. The decision appeared to say that restraints of trade were valid if they were found to be reasonable. This was widely interpreted as a blow to antimonopoly policy. In the discussion that followed the court's decision the fate of the Standard Oil Company played a minor part compared with the new interpretation the court had given to the new antitrust law. The fact that the nation had been experiencing an economic depression added to the discontent over the decision. Public reaction was such that all three political parties (Democratic, Republican, and Progressive) inserted planks in their platforms condemning the growth of monopoly and calling for new legislation.

Following his election as President, Woodrow Wilson, a name not unfamiliar to Europeans, began work on his domestic program before a great war would intrude. Called the "New Freedom," meaning freedom for the average man against big business and high finance, Wilson addressed Congress on the subject and recommended strengthening the antitrust laws. He specifically advocated the creation of the Federal Trade Commission "as an instrumentality for doing justice to business where the process of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."¹¹ President Wilson viewed business as a contest from which no one should be barred. Nor should anyone be penalized because they were big or small, but they were going to be made to observe the rules of the track and not get in anybody's way except as they could keep ahead by having more vigor and skill.

In response, in 1914 Congress passed the Federal Trade Commission Act,¹² establishing the Commission as an enforcement agency and giving the Commission two great powers: One, to issue orders against unfair methods of competition and, the other, to investigate economic conditions, including among other things, combinations in restraint of trade, unfair practices, and business conditions and to report the same to Congress, the President, the Attorney General, or the public. The FTC was seen as having the duty of illuminating rather than prosecuting. While it has concurrent jurisdiction with the Department of Justice in many areas, the Commission was designed to stop unfair methods of competition before they mature into Sherman Act violations. The Commission does not jail such offenders but does order them to desist from acts found to be unlawful. Such cease-and-desist orders are usually carried for the natural life of the offending party, and any violation thereof can result in fines up to \$5,000 per day for each violation.

At the same time, Congress also passed the Clayton Act¹³ which was the first statute dealing with price discrimination, as well as tying and exclusive dealing contracts and corporate mergers. It was believed that at last the evil "re-bate" system would no longer be used as a monopolistic tool. Wilson, confident

⁸ 26 Stat. 209 (1890), 15 U.S.C. 1 (1964).

⁹ See Thompson, *Highlights in the Evolution of the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 257 (1958); and Butler, *The Federal Trade Commission and the Regulation of Business under the Federal Trade Commission and Clayton Laws*, (1915).

¹⁰ *Standard Oil Company v. United States*, 221 U.S. 1 (1911).

¹¹ 51 Cong. Rec. 1962-1964 (1913).

¹² 38 Stat. 719 (1914), as amended, 15 U.S.C. 45 (1964).

¹³ 38 Stat. 730 (1914).

and serene, was able to say to Congress in his Message of December 8, 1914: "Our program of legislation with respect to business is now virtually complete. . . . The road at last lies clear and firm before business."

The original Clayton Act was concerned with protecting smaller manufacturers or producers operating in limited geographical areas from being injured by larger competitors having the benefit of wide distribution who cut prices in the area where the smaller rival engaged in business. But the road was not yet clear, the Act had two fatal defects. As judicially interpreted, it placed no limit upon price differentials permissible on account of differences in quantity, that is, the amount of the price differences was not required to be reasonably related to the savings resulting to the vendor in supplying the larger quantities. The statute permitted unlimited price differentials in the form of quantity discounts, so that even a minor difference in quantity could support a vast difference in price. The original Clayton Act was also understood to permit all discriminatory price differences made to meet competition, thus, in effect, licensing oppressive retaliation.

The deficiencies in the Act, particularly the lack of protection afforded small buyers, was widely recognized and brought to public attention by the Federal Trade Commission's 1934 report on its investigation of chain stores.¹⁴ Again, the United States was in the grip of a severe depression. The report concluded that the growth of chains and other large concentrations, along with their ability to buy more cheaply, endangered the survival of the small businessman. The lower prices accorded to chains, particularly food chains, were rarely related to the actual quantities purchased, the quality of the goods, or the cost of selling. Moreover, the report indicated that preferential prices were exacted by the chain grocery stores in various concealed forms, such as advertising and promotional allowances and brokerage commissions. The independent grocery stores were thus placed in an unfavorable competitive position. The report engendered broad public support for legislation which would compel suppliers to treat all buyers on a fair and equal basis in order that the small independents would not be prejudiced by their lack of purchasing power.

Thus, in 1936 at the height of President Franklin Delano Roosevelt's "New Deal," the Robinson-Patman Act was passed as an amendment to the original Clayton Act.¹⁵ The goal of the Act was the "restoration of equality of opportunity." The coauthor of the Act, Congressman Patman stated that: "It was designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor." Congressman Patman concluded that his bill simply would "force all chisellers and cheaters to adopt golden rule policies" and sought only to make "a policy of live and let live, and compel the golden rule in business."¹⁶

The Robinson-Patman Act does not seek to fix prices or to dictate the prices manufacturers will charge for their wares—but to eliminate discrimination and achieve equality. As I see it, we have an interest in restraining businessmen from injuring their smaller competitors or customers, but we should leave them free to regulate their own industries and set their own prices. Buyers can still look for a bargain but they cannot, however, extract preferential prices from their suppliers where the effect of such lower price may be to injure competition. We have a strong merger law that prevents corporate mergers that may result in a substantial lessening of competition or tendency toward monopoly. Certainly, we should not permit large business concerns to achieve the same result by combining their purchasing powers to extract price concessions. Vigorously administered, the provisions of the Robinson-Patman Act not only supplement the other antitrust laws but can prevent activity which would eventually lead to violations of those laws.

Before commenting on how Robinson-Patman has worked in the United States, let's take a look at the principal sections with which we are concerned.

Section 2(a), the heart of the Robinson-Patman Act, provides that it shall be illegal to discriminate in price between different purchasers of commodities of like grade and quality sold for use, consumption, or resale within the United States, where the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure,

¹⁴ For an excellent discussion of the legislative origin, see Patman, *Complete Guide To the Robinson-Patman Act* (1936). Also see the FTC's *Final Report on The Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

¹⁵ Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. 13 (1964).

¹⁶ See 79 Cong. Rec. 9078; 79 Cong. Rec. 11573-11576; and 80 Cong. Rec. 7886, 7887 (1936).

destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them."¹⁷

Exception is provided for differentials which make only due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the commodities are sold or delivered. Selection of customers in bona fide transactions and not in restraint of trade is not prohibited. The section, as amended, also specifies exceptions respecting sales necessitated by market conditions, disposition on account of deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. A defense to a charge of discrimination is also specified in regard to sales made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

Thus, in sum, the first subsection initially forbids a seller to "discriminate," i.e., to differentiate in price. It condemns such a discrimination, however, only where those discriminatory prices are embodied in actual sales of the same or similar commodities from the same vendor. And it is important to keep in mind that all discriminations in the pricing of commodities are not barred but only those which are not cost justified and where the effect "may" be "substantially" to lessen "competition" in a line of commerce. Finally, the seller may—without reducing his prices to all customers—lower his prices to particular customers to the extent necessary to meet in good faith a competitor's price.

The remaining provisions of interest relate to practices that result in indirect price discrimination through various hidden methods, such as the granting of brokerage or advertising and promotional allowances to certain favored buyers. These practices constitute a violation of the statute even where there is no effect on competition. Apparently, it was the intent of Congress to encourage sellers who engage in price discrimination to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with alleged cost savings.

Thus, Section 2(c) forbids the payment or acceptance of brokerage by a person engaged in interstate or foreign commerce, in connection with the sale or purchase of merchandise, "either to the other party to such transaction, or to . . . [his] agent, representative, or other intermediary."¹⁸

Sections 2 (d) and (e) are companion sections dealing with promotional allowances. Section 2(d) of the Act relates to payments or allowances by the seller to the buyer for promotional services and requires such payments to be made available on proportionally equal terms to all competing customers. Section 2(e) deals with the furnishing of services by the seller to the buyer, requiring such services to be made available to all competing customers on proportionally equal terms.¹⁹

¹⁷ 49 Stat. 1526 (1936), 15 U.S.C. 13. Section 2(a) in a pertinent part provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where, * * * the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

¹⁸ Section 2(c) of the Clayton Act, as amended, 49 Stat. 1527, 15 U.S.C. 13(c) provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is granted or paid.

¹⁹ Section 2(e) of the Clayton Act, as amended, 49 Stat. 1527, 15 U.S.C. 13(e) provides:

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Section 2(d) of the Clayton Act, as amended, 49 Stat. 1527, 15 U.S.C. 13(d) provides:

That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

The last section of interest relates to buyer liability. Section 2(f) of the Robinson-Patman Act prohibits a buyer from knowingly inducing or receiving a discriminatory price granted by the seller in violation of Section 2(a) of the Act.²⁰ While the buyer may be liable for receiving brokerage or preferential prices under the Act, there is no prohibition against the inducement and receipt of discriminatory advertising and promotional allowances or services and facilities by powerful buyers. However, the FTC and the courts have remedied this omission by holding that the knowing inducement and receipt of discriminatory advertising and promotional allowances by large buyers is an unfair method of competition prohibited by the Federal Trade Commission Act.²¹

Now, I would be less than candid if I didn't admit that we have experienced difficulties at times in interpreting and applying the varying commands of the numerous statutes in this field. But we have always striven to rationalize inconsistency and to resolve ambiguity in favor of competition. The Commission has historically been involved in the food industry. At the present time it is estimated that 20 percent of our appropriation is expended in matters pertaining to the manufacture and distribution of food.

The most common type of price discrimination encountered in the food industry is where the manufacturer charges some purchasers a different price from that offered to others. This may result in injury to competition in two different ways. First, the powerful buyer who demands and receives a price concession that neither his lesser rival can obtain nor the seller could refuse is able to harm competing purchasers either by underselling them or by employing the differential to effectively promote his product. This is termed secondary line injury.

One case that reached the Supreme Court that would probably interest this group involves *Morton Salt*²² which granted various types of discounts to purchasers who were competing in the resale of its salt. The Supreme Court in adopting the Commission's findings stated that "Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability."²³ The court emphasized that "The statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they may have such an effect."²⁴ The court showed a keen understanding of the grocery business in answering the *de minimis* argument pointing out that many articles are carried in a grocery store, and "there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."²⁵

Not as common is injury resulting to a competitor of the seller, or as we say, on the primary line, where, for example, buyers in one market are treated the same, but as between markets there is a difference in price. Thus, the well-financed national seller is able to reduce prices in the area where he is weak and keep prices high in markets where he is strong, often to the serious detriment of his smaller, localized, less financially affluent competitors.

We believe that most food manufacturers and processors are aware of the requirements of the Robinson-Patman Act and make a conscious effort to formulate their pricing policies consistent with the objectives of the Act. Where it is clear that the seller is primarily responsible for injurious price discrimination, complaints have been filed against such sellers. Where it appears that the buyer has knowingly induced the seller to grant an illegal price, the Commission has elected to proceed against the offending buyer under Section 2(f).

Similarly, the Commission has had a series of cases against food manufacturers and processors for granting advertising and promotional allowances to certain favored grocery chains. Usually, these are special promotions, originated by the customer in connection with the store's "Birthday" or "Anniversary," and provide a good vehicle for the store to induce suppliers to make substantial price concessions in the form of promotional allowances. In such cases good

²⁰ Section 2(f) of the Clayton Act, as amended, 49 Stat. 1527, 15 U.S.C. 13(f) provides: That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

²¹ *Giant Food, Inc. v. FTC*, 307 F. 2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); *The Grand Union Co. v. FTC*, 300 F. 2d 92 (2nd Cir. 1962); *R. H. Macy & Co. v. FTC*, 326 F. 2d 445 (2nd Cir. 1964); and *Fred Meyer, Inc. v. FTC*, 359 F. 2d 351 (9th Cir. 1966).

²² *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

²³ *Id.* at 43.

²⁴ *Id.* at 47.

²⁵ *Id.* at 49.

enforcement dictated that proceedings be instituted against these buyers since they obviously knowingly solicited and induced receipt of preferential allowances.²⁶

The practice of large chains setting up dummy brokerage organizations has now been practically eliminated since the Commission successfully filed a Section 2(c) brokerage complaint against the *Great Atlantic & Pacific Tea Company*²⁷ shortly after passage of the Act. Up to that time one of the favorite methods of exacting a preferential price was for the buyer to set up his own brokerage organization and purchase direct from the seller. In such cases the buyer's brokers demanded and received brokerage or a commission from the seller which resulted in a price advantage to the buyer.

Now I want to emphasize that the objectionable features of these arrangements which I have described are not that someone received a low price or other advantage—everyone is in favor of a bargain, including the Federal Trade Commission—but that others, grocery stores that compete with those favored buyers, were having to pay a *higher* price. Some might suggest that we could save ourselves a lot of trouble by having a government agency fix all prices charged by the manufacturer and the distributor, as well as the grocery store. Such price controls have been utilized by the United States during periods of national emergency such as World War II and during the Korean War. They proved to be very unpopular, depriving the country of a free market economy. Besides, the cost of administering a controlled economy involves large sums of money with a proliferation of bureaucracies. We have some experience in this area because the FTC assisted such agencies during these emergencies. Some say that reasonable prices can be fixed. I personally feel that no government or combination of competitors can fix prices which will do justice to all in a free economy. Just prices can only be determined in the marketplace, and this requires two-sided competition.

Today the Federal Trade Commission is staffed by approximately 1140 persons, and we operate on a budget of a little over \$14 million. We estimate that the Commission saves the American public perhaps \$1 billion annually through our efforts to reduce prices. About 60 percent of the total effort of the Federal Trade Commission is devoted toward curbing acts and practices which have a dangerous tendency unduly to hinder competition or create a monopoly. The staff, in addition to administering the trade regulation laws, is directly concerned with false and misleading advertising. We also enforce a number of specific "labeling" statutes designed to protect the public against confusion in the purchase of wool, fur, and textile products. These statutes are designed to inform the buying public as to precisely what they are getting. Similarly, along with the Food and Drug Administration of the Department of Health, Education, and Welfare and the Department of Commerce, we have recently been given the responsibility of administering a fair packaging law intended to help consumers determine how much of a given article they are getting.

We are able to handle these tasks within our limited budget because of our fundamental belief that most businessmen are anxious to observe and follow the law, and we simply don't have the resources to sue everyone. For example, there are about 240,000 retail grocery firms in the United States, with total annual sales of something over \$50 billion. Suppose we should start receiving complaints that a large number—several thousand—of these stores are demanding and getting unlawful promotional allowances from their suppliers. Our previous experience has taught us that where large-scale violations are occurring most persons involved would stop immediately if they could be sure that their competitors would stop also. Therefore, we handle such situations in a variety of ways.

First, we issue "guides," "trade practice conference rules," or "advisory opinions"—all designed to inform the public as to what the law says and means. Next, we simply ask them to stop, and we then accept assurances of discontinuance from the parties involved. As a last resort, we issue complaints and cease-and-desist orders when it is obvious that no amount of persuasion will relieve the situation.

Now we have had the Robinson-Patman Act for thirty-one years. I came to work for the Federal Trade Commission in 1938, two years after the amendment to the original Clayton Act was enacted. I am convinced that the Robinson-Patman Act has succeeded in a great measure in preserving the competitive opportunity of the

²⁶ *Supra*, n. 21.

²⁷ *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667 (3rd Cir. 1939), *cert. denied*, 308 U.S. 624 (1940).

small businessman. Moreover, it has the broad support of American business. Our attorneys, who have daily contact with diverse business firms in different parts of the country, inform us that the Act has been accepted and, on the whole, business people wish to have it strictly enforced.

To be sure, there are those who contend that there is a basic inconsistency between the Robinson-Patman Act and the Sherman Act. The Sherman Act is primarily used to prevent price fixing conspiracies by competing firms. Since the Federal Trade Commission Act was designed to halt incipient Sherman Act violations, it must seriously consider uniformity in price as an indication of an unfair trade practice. Thus, the argument goes, destruction of that uniformity by granting a lower price to certain customers by one of the sellers results in a price discrimination charge. However, what is overlooked is the fact that the seller is not obliged to make selective price cuts that injure customers paying the higher price, and he can and probably should make the lower price available to all of his customers. In addition, where selective price cuts are made, they may fall within the defenses permitted by the Robinson-Patman Act, such as cost justification or meeting competition in good faith. Finally, such price concession may not result in injury to competition as required by the statute before price discrimination becomes unlawful.

But then, the argument is made that where a standard type product is involved having identical manufacturing costs by all sellers, it is virtually impossible for one seller to lower his price. However, this argument will not stand close examination. The fact that prices are uniform, in and of itself, does not constitute price fixing or an unfair method of competition. Price fixing cases are brought, not because prices are uniform, but because the competitors have engaged in a conspiracy to deprive the public of the benefits of price competition. Business firms, in any event, that adopt their own price policy will frequently depart from the price of their competitors depending on a variety of factors. Moreover, competitors that sell standardized or undifferentiated commodities do not necessarily charge the same price. This may be due to the fact that such sellers are located in different parts of the country, have different inventories, and a host of other circumstances. All managements, like all people, are not alike and may appraise the market situation as calling for a different price.

Finally, we are told that where there are only a few large sellers—or as economists put it—in an oligopolistic industry, a little price discrimination is good because it may be the only form of price competition to exist, and it should be encouraged. This seems to imply and advocate that those with monopoly power be allowed to use their historic weapon of price discrimination. Selective price cuts that result in injury to competitors or customers have never fostered healthy competition in the past and there is no reason to believe they will do so in the future. But, as a practical matter, when this criticism is made of the Act, no specific case is mentioned. The reason is clear. No case has come to attention in which the Commission has proceeded against oligopolistic price concessions and thereby strengthened oligopoly. As long as the test of illegality under the price discrimination law is that of injury to competition, the Commission will apply the test in favor of small business and competition.

We have learned a great deal since the industrial revolution gave meaning to the words "rebate" and "trust." We know we must have laws to deal with such practices. We also know that such laws must be applied to each situation arising with the long-range objective of keeping healthy. Healthy small businesses means the long-range objective of keeping healthy. Healthy small business means much facturers or retailers, often force competition in price. Essential to a system of to the fabric of American life. The relatively smaller businesses, whether manuborn and can grow and prosper. We believe the Robinson-Patman Act has contributed much to the system of free enterprise in the United States.

ANTITRUST IN AN EXPANDING ECONOMY

(Remarks of Philip Elman, Federal Trade Commissioner, before the Third Antitrust Conference of the National Industrial Conference Board, New York, N.Y., March 5, 1964)

What is the unfinished business of antitrust in today's expanding economy? Is there a more effective role the Federal Trade Commission could play in the scheme of antitrust? From my standpoint as a member of the Commission, now

in its fiftieth year, these are the critical questions of national policy in the field of trade regulation. Though my concern is with the prospect, not the retrospect, the lessons of the past and present are instructive for the future.

I.

If time permitted, I would discuss in detail one or more of the rules which make up the body of antitrust law, to illustrate a basic process which is at once the strength and the potential weakness of our antitrust policy. It is the process by which a set of highly complex, to some extent unarticulated, and perhaps imperfectly harmonized goals is reduced to a rule simple and straightforward enough to be applied in a lawsuit of manageable dimensions.

For example, the well-established rule that resale-price maintenance is illegal *per se* could be shown to conceal a complex interplay of interests and policies: interbrand versus intrabrand competition; protection of small retailers; the freedom of dealers to set their own prices, and of manufacturers to choose their customers on any grounds they please; and so on. We would see that this, the oldest of the *per se* rules, is difficult to justify in terms of preserving competition unless we answer some hard questions and make some hard choices among competing values and policies.

In speaking of the basic goal of antitrust as preservation of competition, we must bear in mind that competition is a portmanteau word embracing many and varied interests and objectives. To a theoretical economist the idea of competition may be simple. To a lawyer or judge, who must differentiate permissible from impermissible conduct, the standard of competition is complicated and elusive.

At the outset of our antitrust development, the fundamental principles of competitive markets were at best but dimly perceived. Modern economics has taught us to scrutinize more critically the working of the unseen hand about which Adam Smith wrote. The classical model of monopoly and competition posits markets of one and of many sellers of a single, undifferentiated product. Put, while a market of one seller will obviously be non-competitive and a market of a great many sellers of roughly equal size will probably be competitive (absent collusion), in fact most markets are at neither extreme. We now see that markets in which sellers are few (or one or a few sellers disproportionately large), and opportunities for new competition very limited, may be substantially non-competitive. On the other hand, we now realize that perfect competition in the classical sense is a purely abstract, and probably undesirable, state, and that in a modern economy competitive imperfections are to some extent inevitable and ineradicable.

Antitrust policy has not been blind to the facts of economic life. For example, the Robinson-Patman Act seems premised, in part, on recognition that there will always be powerful buyers and that therefore antitrust policy should try to equalize, so far as is practicable, the competitive position of the weak buyers. Robinson-Patman limits business rivalry in the short run in the hope of strengthening competition in the long run. Given an imperfect world, such an approach involves no necessary inconsistency, since the "competition" sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly.

Similarly, reasonable and moderate collective efforts by small businessmen to maintain themselves against the competition of larger rivals—for example, by cooperative price advertising, whereby small retailers seek to enjoy some of the economies of large-scale advertising—should not be prohibited in pursuit of the fantasy of perfect competition, even though there may be some minimal effect on the prices charged by the parties. On the same plane are attempts by small distributors to strengthen their position vis-à-vis larger or more powerful competitors by joint or cooperative buying or distribution activity; it is ironical that such efforts have sometimes been frustrated in the name of the Robinson-Patman Act.

A simplistic view of competition is not only unrealistic and even anti-competitive; in addition, it fails to give due recognition to competing social and economic values. It is, I believe, generally agreed that a certain degree of integration, concentration, and competitive restriction, in one form or another, is probably indispensable to continued economic health and progress, and conversely, that excessive or cutthroat competition may be destructive of these values. And so, in Mr. Justice Frankfurter's words, "That there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, indiscriminating sense that we speak of competition as an ultimate good."

The Justice was speaking with particular reference to those areas subject to direct administrative regulation rather than to the antitrust laws. But should we rigidly compartmentalize the sectors of the economy that have been exempted from the antitrust laws and those sectors that have not, and accept as a working premise that while the policy of competition is greatly qualified in the former, it admits of no qualification whatever in the latter? The fact that an industry has not been exempted from the antitrust laws is not equivalent to a legislative determination that competition alone may be depended upon to protect against the growth of social and economic evils in the industry. We know that the conditions that have moved Congress to place express limits on the policy of free competition in many areas also appear, from time to time, in areas that have not been exempted from the antitrust laws. In the *Chicago Board of Trade* and *Appalachian Coals* decisions, for example, restrictions on competition were upheld in the name of preventing destructive competition.

Indeed, the notion that restrictions of competition may sometimes be justified on extrinsic policy grounds is a pervasive characteristic of antitrust law—even under the Clayton Act, where it is commonly said that the sole test of illegality is whether a challenged practice is substantially anti-competitive. For example, in the recent *Philadelphia Bank* decision, the Supreme Court indicated that a bank merger challenged under Section 7 of the Clayton Act might be defended by showing that the merger was necessary to avert unsound banking conditions.

So far, we have been speaking of competition as a market regulator. But the idea of competition in our antitrust tradition has aspects which transcend a narrow concern with markets. If to the economist competition is a mechanism of market regulation, to Congress and to the people it has more often connoted a certain traditional organization of society—a way of life. Throughout our antitrust development, the tendency has been to translate the problem of competition from the economic to the socio-political level—to view it in terms of preserving freedom, individual entrepreneurship, and equality of opportunity, rather than merely promoting efficiency, growth, and other strictly economic values. These are converging not conflicting, goals. Still, a prime goal of antitrust policy has been to foster a competitive ethic, which is different—in focus and emphasis if not in basic substance—from competition as the economist views it.

Thus, when the Supreme Court recently observed that, "Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy," it might have added that competition as a compendious description of either the goals or standards of antitrust contains a number of built-in complications and qualifications. For a host of reasons, we are for competition, but in enforcing the policy of competition we must seek a reasonable accommodation of the plural interests which that deceptively simple, latently ambiguous, term embraces.

II.

Complicated and elusive as is the basic policy of antitrust, the traditional means of enforcing it has been through litigation, and the result has been some obvious stresses and strains. The drawbacks of antitrust litigation are too well known to require extended discussion. It is an intolerably slow, costly, clumsy, fragmentary and inadequate process for resolving delicate and complex economic issues. It is especially unsuitable for dealing with industry-wide trade regulation problems.

The basic deficiency, as I see it, is that the needs and conditions of litigation exert a constant pressure in the direction of reducing the complex interests involved in the policy of competition to a set of simple, but inevitably somewhat crude, rules of liability. The history of antitrust adjudication reveals a steady trend toward narrowing factual issues, tightening up rules of relevancy and materiality, and streamlining substantive doctrines and principles. Courts of general jurisdiction have rightly suspected that they are not equipped to conduct broad-gauged inquiries into the social and economic justifications of particular restrictive trade practices, although such justifications may be intensely relevant to defining the contours of competition as a goal of public policy.

To be sure, the movement toward simple and easily applied antitrust rules has for the most part been salutary as well as inevitable. Experience has shown that many forms of business conduct are so likely to be pernicious and without redeeming value as to justify abstention from extensive inquiry into their effects in particular cases. But where the social and economic consequences of business conduct are equivocal or unclear, simple rules will not suffice.

To put this another way, relatively simple rules may, on balance, suffice in black-or-white situations, of which price fixing is an example. But what of the gray areas, for example, mergers? These areas chiefly involve problems of what economists call market power and judges and lawyers monopoly power, a condition which may exist independently of collusive, predatory, or otherwise highly restrictive practices, and is, indeed, at the bottom of many such practices. Can simple rules differentiate between reasonable and unreasonable, tolerable and undue, monopoly power? I shall return to this question.

III.

If litigation is not a completely satisfactory method for implementing antitrust policy, one may wonder why other methods have not been used. Part of the answer may lie in the way our antitrust policy developed.

As Mr. Justice Holmes observed in his dissenting opinion in the *Northern Securities* case, the absence of any reference to competition in the Sherman Act is significant. The Act was called forth by a definite and palpable evil, the gross abuse of monopoly power by the trusts. The Sherman Act was not originally conceived as a comprehensive charter of economic regulation, but was directed at the gross perversions of an unregulated, market economy. It was natural that enforcement of such a statute should be entrusted to the courts, especially since doctrinally the Act drew heavily on the common law of torts and contracts.

Misgivings about the ability of the federal judiciary to give the Sherman Act a sufficiently intelligent and sympathetic application were soon felt, however, and were among the principal reasons for the creation of the Federal Trade Commission. Yet, by 1914 the common-law tradition of antitrust enforcement apparently had become so well entrenched that Congress was loath to limit the jurisdiction of the federal courts in antitrust matters. As a result, the jurisdiction of the courts and of the Commission was made to overlap substantially. Moreover, while the Commission received a broad grant of non-judicial, administrative powers, it was not made clear in just what respects a Commission proceeding was intended to differ from an ordinary suit in equity.

The failure to differentiate clearly the role of the Commission from that of the courts in antitrust enforcement seems, in retrospect, most regrettable. For the Commission represented an experiment in trade regulation along promising lines. It reflected a basic shift in emphasis in dealing with the monopoly problem—from punishment and moral opprobrium to regulation, adjustment and correction. The Commission was intended, not to duplicate, but in large measure to supplant the work of the courts and the Department of Justice in antitrust enforcement.

The intended task of the Commission was the distinctive one of identifying and preventing monopolistic practices before monopolies could become entrenched. Equipped with a broad array of flexible administrative powers, the Commission was established to discover, expose and eliminate practices conducive to monopoly and inimical to competition, in situations where the effects of a practice were not sufficiently manifest to come with the judge-made rules of antitrust liability—rules designed for the black-or-white rather than gray areas of competition. The Commission's mandate invited it, and its character as an administrative agency enabled it, to abandon the traditional attack on competitive evils through case-by-case adjudication and to take a positive, comprehensive, flexible and expert approach to trade regulation problems in their full dimensions.

If the Commission did not rise to the challenge, the blame lies more with the vagueness of its mandate, and with the political conditions of the post-World War I period, than with the Commission itself. In any event, the Commission from the first placed virtually exclusive reliance on adjudicative proceedings which have come increasingly to imitate those of the federal courts, so that today there is no basic difference between a Commission case and an equity case in the federal courts. Similarly, from the first the Commission concentrated its enforcement agencies in two areas: hard-core Sherman Act violations; and an assortment of traditionally unfair tactics toward competitors or the public, such as passing off, false disparagement, false advertising, commercial bribery, and other so-called "competitive torts". The intended task of the Commission, which was neither to duplicate enforcement of the Sherman Act nor to administer Marquis of Queensbury (or any other) rules of business ethics, would, to be successful, have required a substantial reorientation in antitrust thinking. It has never been undertaken.

IV.

Let us now return to the questions I put at the outset: what is the unfinished business of antitrust in today's economy, and what should the Federal Trade Commission try to do about it?

Antitrust policy has not yet learned to cope effectively with the gray problem areas of a competitive economy. The antitrust laws have, to be sure, been comparatively successful in deterring or preventing many egregious—and highly effective—anti-competitive practices. But in a number of important, and indeed critical, industries today, there is not enough of the right kind of competition to prevent unduly high prices and poor economic performance generally, and to stimulate growth and innovation. This does not mean that predatory and collusive practices are necessarily rife, but, rather, that antitrust has not been effective in dealing with the oligopoly problem or, more generally, with the problem of limiting market or monopoly power. And this I would blame primarily on the limitations of litigation to perform any but the most tractable tasks of economic regulation.

Despite such failure, I am not yet convinced of the imperative necessity for a thoroughgoing substantive and institutional reform of antitrust, which, in any event, seems hardly likely in the near future. I think we can make better and more effective use of existing tools. But we will not get very far unless we are determined to use them with purpose, understanding and imagination, and, lest past become prologue, with full awareness of the limitations of existing antitrust policy and procedures.

On the substantive side, Section 7 of the Clayton Act offers much promise. It has already been applied in numerous instances to prevent the creation of oligopoly by a merger or by a series of mergers; and it seems to be rather unusual for an oligopoly to come into being without a considerable history of merger activity in the industry.

Section 7 also has a larger and more positive role to play in coping with existing oligopolies. Ours is a dynamic, rapidly changing economy. In an industry characterized by far-reaching technological or demand changes, the power of established firms may rest on shifting and uncertain foundations. Such a firm may find that it cannot prevent erosion of its power to control the market except by merger or other corporate acquisition. It may find it necessary to acquire a competitor, potential competitor, supplier, or customer, or to be acquired by a larger or more powerful firm in a related industry, or to purchase a plant or a valuable trademark from another corporation. Since a merger or acquisition that enables retention of undue monopoly or oligopoly power is no less unlawful under Section 7 than one that enables such power to be obtained in the first place, the transform the American economy in the direction of the goal of effective competition throughout the unregulated sector.

Moreover, Section 7 has the great advantage of attacking a specific structural cause, rather than merely the symptoms, of competitive malfunctioning. Consider the problem of undue power of large buyers, which gave rise to the Robinson-Patman Act. Enforcement of Section 7 against mergers involving retailers or other distributors attacks this problem at its root, and reduces the need for the Commission to become involved in the difficult and unsatisfactory task of supervising the pricing policies of sellers, which enforcement of Robinson-Patman seems to call for.

In connection with the problem of oligopoly, we must not forget that the policy against monopolization embodied in the Sherman Act is relevant in defining the scope of Section 5 of the Federal Trade Commission Act, since the latter was designed to supplement and bolster the Sherman Act and reach less egregious, but still anti-competitive, practices. Can it be argued that the kind of "monopolistic competition" that so often characterizes oligopolistic industries is unfair within the meaning of Section 5 even if no collusion is shown? Are the practices that prevail in many such industries "unfair" insofar as they may lessen competition and promote or entrench monopoly? Are they within the scope of the term as the Supreme Court has defined it, for example in the *Raladam* case, where the Court observed that the test of unlawfulness under Section 5 had been deliberately left open-ended to enable the Commission to reach "that [unfair competition] which must ultimately result in the extinction of rivals and the establishment of monopoly"?

The kind of unfair practices which characterize oligopoly may, as in the case of certain pricing systems, be effectively enjoined. Often they are not, and in

that case it has been suggested the appropriate remedy might take a form comparable to a decree of divestiture, dissolution, or other structural reorganization. At all events, it is now clear that the Commission, no less than a court of equity, has ample power to provide such relief as may be necessary and appropriate, whether under Section 5 or under the Clayton Act.

V.

If Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act are to be enforced in the manner suggested—if, in other words, antitrust policy is to address itself squarely to the problem of identifying those practices which unfairly create or maintain undue market or monopoly power—the means of enforcement must be precise and discriminating. It is one thing to prohibit very stringently particular restrictive practices such as horizontal price fixing, and quite another to attempt, even modestly, structural reform and reorganization.

Strict and arbitrary rules limiting merger activity or forbidding certain levels of market concentration might prove stultifying, and could defeat, rather than promote, the public policy objectives of competition. While we want to discourage merger activity that has the effect of fostering or entrenching monopoly power, at the same time we should not discourage merger activity by small firms aimed at building them up into effective competitors, or mergers and joint ventures that are necessary for new entry into non-competitive markets. To a certain extent, moreover, industrial concentration and market power are unavoidable and even desirable.

Insofar as antitrust may offer hope for dealing sensibly with the problem of unregulated monopoly power, we must find a better way to accommodate the various interests that make up the policy of competition than by elevating one and ignoring the others, which too often has been the approach in the past. Is it completely naive and quixotic to suggest that, unless there is to be a wholesale overhauling of our antitrust laws and institutions, we might approach the unfinished business of antitrust by undertaking, even after fifty years, to fulfill the original conception of the Federal Trade Commission as an institution for dealing administratively with the subtle and complex, and not just the simple and obvious, problems of monopoly and competition?

What I have in mind can best be explained in terms of a hypothetical example. Widgets, let us say, are intricate but inexpensive components of modern armaments. During World War II, the manufacture of widgets is begun by many small entrepreneurs, and by 1946 there are 1,000 independent widget manufacturers. After the war the demand for widgets remains high. Increasingly, however, large defense contractors begin to manufacture them for their own use rather than purchase them from the independents. As a result, though there are few actual failures in the widget industry, times are hard. Small widget manufacturers find themselves unable to invest sufficient capital to obtain the latest quality-control machinery. At the same time, the older widget producers reach the age at which they want to sell their businesses and retire. Because of these factors, a wave of mergers sweeps the industry.

In 1964, the Commission becomes aware of the problem of increasing concentration in the widget industry. Accordingly, a team of economists is organized to conduct a general study of the industry: its market structure, competitive conduct, supplier-customer relationships, cost and price ratios, and other relevant industrial characteristics. When the investigation is completed, the Commission conducts a public rule-making proceeding, at which the economists' study is introduced and all interested persons are invited to submit views, data, and arguments concerning the study and all other matters germane to the problems of concentration and competition in the industry.

All this material is correlated, and the Commission issues its report and promulgates rules or standards that define the lawful limits of merger activity in the industry. Such rules or standards would, for example, (a) specify particular markets in which concentration had reached a critical point and in which further merger activity should be forbidden; (b) identify not only the class of firms which by reason of their size or other characteristics should be forbidden to make further acquisitions, but also the class which should be permitted or even encouraged to engage in merger activity; and (c) in general, define permissible limits of vertical and conglomerate, as well as horizontal, merger activity.

Suppose the report concluded that the widget industry could not support as **many** independent firms as were then active in the industry, that the number

was unstable and bound to be reduced eventually—by bankruptcies if not by mergers. In that event, no further action to arrest the merger wave would be appropriate. But suppose the report concluded that the widget industry should be able to support at least as many firms as were then active, and that a greater degree of concentration would pose a serious threat to competition without resulting in any compensating economies or other advantages. In that event, the rules issued with the report might place strict bounds or conditions on future merger activity. If the rules were not obeyed, the Commission could bring formal proceedings under Section 7, relying on the rules and on the findings made in the rule-making proceeding. Prolonged and complex litigation would thus be obviated.

The procedure I have sketched—which is readily adaptable to other industry-wide antitrust problems besides mergers—has never, to my knowledge, been tried in the anti-trust field, though it seems to me clearly within the Commission's powers. I offer it as an admittedly somewhat novel, but possibly fruitful, approach, in the conviction that much antitrust litigation is merely expensive and futile, and that the time has arrived for experimentation in devising new and more adequate responses to the challenge of antitrust.

The procedure would benefit businessmen as well as the Government. Mergers that pose no threat to competition would not be deterred by fear of subsequent challenge in protracted and costly litigation. Once definite standards of permissible merger activity were established for an industry, the Commission could give immediate, incisive responses to requests for pre-merger clearance. Business stability and desirable growth would thus be encouraged.

Without enlarging the substantive prohibitions of Section 7, this procedure would place enforcement on a more systematic, equitable, and predictable basis. No firm today can engage in substantial merger activity without reckoning with the possibility of government intervention—whether by the Department of Justice or the Federal Trade Commission—under Section 7. But such intervention has tended to be on an episodic, rather than industry-wide, basis. The procedure I have suggested would neither expand the scope nor necessarily step up the pace of government intervention in the area of corporate acquisitions. But it could eliminate much of the uncertainty which now surrounds Section 7 liability; it would avoid unequal treatment of competitors; and it would enable a comprehensive evaluation of the factors determining the lawfulness of merger activity in particular industries.

In suggesting the use of broad-gauged, non-adjudicative proceedings in the gray areas of antitrust, I do not mean to imply either that litigation should not play an important role in antitrust enforcement or that the traditional rules of antitrust should be jettisoned. When resolution of the various interests subsumed in the notion of preserving competition does not present formidable difficulties (and that is true not only in price-fixing and other "conduct" cases but also in many merger and monopolization—"structure"—cases), litigation is an appropriate tool for enforcement. My concern, to repeat, is with the gray areas, involving chiefly the problem of identifying impermissible methods of gaining or retaining monopoly power, where the policy of competition is too complex to be reduced to simple rules. In these areas the need is not for some new, and inherently vague, standard, such as "workable competition", "unworkable oligopoly", or, for that matter, "undue market (or monopoly) power", but for radically new and more useful procedures for obtaining, marshaling, and appraising facts.

In sum, the conception of a federal trade commission, with broad and flexible administrative powers and procedures, was basically responsive to the needs of the monopoly problem, the deficiencies seem to have been chiefly in the execution. It is a fair question whether the unfulfilled promise of antitrust and the unfulfilled promise of the Federal Trade Commission are not intertwined, and to a very large extent are not one and the same thing.

VI.

In venturing to suggest, though only in a general way, some answers to the questions with which I began, I hope above all to stimulate further questioning and discussion of the fundamental issues of antitrust. The main point is that we should never stop asking the hard, searching questions about our anti-trust policy. In what sense or senses is preservation of competition the ultimate objective of trade regulation policy? Does reliance on the criminal law in this area advance or impede progress toward our policy goals? Is the judiciary

equipped to exercise primary responsibility for the progressive and comprehensive development of a body of law in this area? Has the time perhaps come for comprehensive reappraisal and revision of our antitrust policy?

Serious inadequacies in the operation of competition are not only serious in themselves; they challenge the very premise of a free market economy. In the elimination of such inadequacies antitrust has played, and will doubtless continue to play, a relatively modest role. But its capacity for positive service in the attainment of the nation's basic social and economic goals has scarcely been tested. This year, which marks the fiftieth anniversary of the great antitrust statutes of 1914, is, therefore, a time for re-examination and renovation, not complacency or indifference, in antitrust enforcement.

COOPERATIVES AND COMPETITION

(Remarks by Philip Elman, Federal Trade Commissioner, Before the Annual Convention of the Cooperative Food Distributors of America, Miami Beach, Fla., May 2, 1966)

The subject of my remarks today is cooperatives *and* competition. I stress the "and" because, to my mind, the idea of cooperation and the promotion of competition are far from antagonistic. Indeed, they go hand in hand. Through cooperation, efficiency may be increased and economies achieved. And where markets are lethargic, the entry of a cooperative may act as an indispensable spur to competition.

I have not come here to urge that cooperatives be granted any special exemption or dispensation from the operation of the federal antitrust laws. Except as specifically provided in statutes like the Capper-Volstead Act, cooperatives are—and should be—as much subject to the antitrust laws as other forms of business organization. The advantages and benefits of cooperative enterprise are surely not impaired by responsible and even-handed application of the federal antitrust laws. The provisions of these laws, properly construed and applied, constitute no obstacle to the development and growth of the cooperative movement. And, as Assistant Attorney General Donald F. Turner recently pointed out, "as cooperatives grow in size and importance, as they assume more and more of the characteristics of large corporate businesses, it becomes even more important that the essentials of our competitive policy be applied to private businesses and to cooperative businesses without discrimination."¹

The food retailing industry illustrates how cooperatives can advance "the essentials of our competitive policy". As I noted in a recent case, "The industry, far from being dead competitively, is bursting with vitality and energy."² One of the principal forces contributing to the vigor of competition has been the development of retailer-owned cooperatives performing wholesale distribution functions. The significance of this "third force" in food distribution cannot be exaggerated. Many years ago, independent food retailers recognized the need for joining together to carry on a variety of activities for their mutual benefit. Had they not done so, competition in the industry would not be what it is today. Had they not organized cooperatives, many of the independent food retailers of America would most likely have disappeared—surviving only as relics of a bygone era, preserved in a museum of economic history. Instead, they constitute today a strong and viable force for competition in the industry.

But cooperatives can serve more than the private interest of their members; they can also serve the public interest in promoting the essential goals of our antitrust laws. These laws express a basic national consensus that competition in a free-enterprise economy should be both vigorous and fair. An integral part of that general policy is reflected in the Robinson-Patman Act. *Whatever disagreement or dissatisfaction there may be in regard to the textual provisions or specific interpretations of the Act, there should be none as to the validity of the underlying premise on which Congress acted in passing the law.* The Act was not designed to eliminate all differences of size and wealth. Congress recognized that in a free society there will inevitably be some competitors who are larger, richer, and more powerful than others. Such advantages cannot be wiped out by the

¹ Address before National Conference of Fruit & Vegetable Bargaining Cooperatives, Washington, D.C., January 17, 1966.

² *National Tea Company*, F.T.C. Docket No. 7453., decided March 4, 1966 (dissent, p. 20).

stroke of a pen. The "guiding ideal" of the Robinson-Patman Act was, rather, "the preservation of *equality of opportunity* as far as possible to all who are usefully employed in the service of distributions and production. * * * H.R. Rep. No. 2287, 74th Cong., 2d Sess., p. 6 (emphasis added). "In short", as the Supreme Court stated in the *Sun Oil* case (371 U.S. 505, 520), "*Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.*"

The premise and policy of the Robinson-Patman Act—which all should unhesitatingly accept—is rooted in a basic competitive ethics—that unjustifiable price discriminations are not only unfair to competitors but injurious to competition and harmful to the public. But neither now nor when it was enacted thirty years ago could the Robinson-Patman Act be regarded as a panacea or universal solvent for attaining and preserving competitive markets in which small independent buyers would have all of the advantages of their bigger and richer rivals.

Indeed, although it forbids large and powerful buyers to exact discriminatory price concessions, the Robinson-Patman Act leaves entirely untouched other means by which they may obtain decisive competitive advantages. If a buyer can take a seller's entire output at a very low price not available to others, the Act does not stand in the way. Similarly, if a discriminatorily low price can be justified as reflecting cost-savings to the seller, the Robinson-Patman Act is not violated. Moreover, under the Act a seller can defend even the most discriminatory and competitively injurious low price to a large buyer merely by showing that it was made in good faith to meet an equally low price of another seller.

With these and other avenues to competitive disadvantage left open, the Robinson-Patman Act, as Corwin Edwards recently noted, "has been a weak instrument with which to prevent whatever concentration of economic power may result from discrimination. Its principal achievements have been equitable—diminution of various inequalities in the terms of trade available to weak distributors. The degree of this achievement has tended to be greatest in eliminating discriminations that were not very important to corporate empire-builders."³ Professor Edwards also recognized the difficulty and complexity of the problems of Robinson-Patman enforcement: "Discrimination that damages competition has been hard to distinguish from discrimination that merely recognizes and reacts to the varying intensity of competition in imperfect markets. For this reason, the law has handicapped sellers in responding flexibly to varying circumstances and has given rise to enduring controversy about the proper limits of the right to discriminate in order to meet competition. Discrimination that is an incident in the process by which price changes spread has been hard to distinguish from discrimination that creates enduring competitive advantages. For this reason the law has created hazards for those who try to drive hard bargains. * * * Because of the law's inherent ambiguities, businessmen can now vary their selling prices or haggle over buying prices only with caution and under legal guidance. Whether, on balance, the law has maintained more competition than it has impaired is uncertain."⁴

In short, despite the Robinson-Patman Act, advantages of crucial importance in the competitive struggle are still enjoyed by those who are large and strong over those who are small and weak. To the extent that large-scale or integrated organization enables genuine economies or efficiencies in distribution, economic policy favors the translation of these savings into lower prices. The policy of the antitrust laws supporting the maintenance of competitive markets rests on the premise that such markets will produce optimum utilization of economic resources and distribution of goods at the lowest prices. To prohibit buyers from receiving lower prices which reflect real economies of scale or integration runs counter to this public policy. The goal of the antitrust laws is to provide an incentive, not an impediment, to achieving efficiencies in the distribution process. Where size or integration of functions produces significant economics, it stimulates competition by forcing competitors to look for more efficient methods of distribution; and it is the premise of the antitrust laws that, where competition is allowed to operate, savings in the cost of distribution will ultimately be passed on to the consumer in the form of lower prices.

Absent monopolization or unlawful restraint of trade, existing law does not preclude the public from receiving the benefits of such genuine economies and efficiencies in distribution as integration of functions may provide. It is important

³ *Control of the Single Firm: Its Place in Antitrust Policy*, Vol. 30 Law and Contemporary Problems, p. 477 (1965).

⁴ *Id.*, pp. 476-77.

to emphasize that, just as an increase in the size or scale of operations does not necessarily result in an increase in efficiency or reduction of costs, the smallest common denominator is not necessarily the best or most desirable unit of economic performance. To be sure, increased concentration of economic power entails obvious dangers. The antitrust laws reflect a basic concern—which must be recognized and given effect—that market power should not be concentrated in a few large sellers or buyers. But public policy embraces more than economic considerations. At what point does “big” become “too big”? At what point do the social or political objections to “bigness” outweigh the economic benefits—in terms of cost savings and price reductions to the public—that may be achieved by large-scale or integrated organization? Until we know the answers to these perplexing questions, “atomization” will be more a catchword than an effective policy.

In the food industry, as I am sure you will agree, bigness is not to be emulated for its own sake. On the other hand, the preservation and expansion of competition will not be furthered by removing the legitimate advantages and economies of large-scale integrated organization. The challenge is and has been, rather, to find a fair and appropriate means whereby those advantages and economies may be achieved by small and independent retailers, thus enabling them to survive as strong and effective competitors.

One possible way would be through mergers, but from the standpoint of promoting the goals of antitrust, this is surely not a desirable solution. A merger of competitors completely eliminates the rivalry existing between them; it also reduces the number of competitors in the market, and may result in undue concentration.

A far more attractive solution is offered by the cooperative form of organization. A cooperative does not destroy the independent business status of its members. They are joined together only to the limited extent necessary to achieve the economies and cost-savings of centralized operations. In all other respects, the members of the cooperative are left free to carry on their businesses as separate and independent competitors.

Like the Robinson-Patman Act, the objectives of the cooperative movement is to provide the small businessman with equality of economic opportunity, by enabling him to start on an equal footing with his larger rivals, at least so far as the price paid for goods is concerned. But the cooperative does not seek to reduce the strong to the level of the weak. It attempts, rather, to achieve equality of competitive opportunity by raising the weak to the level of the strong. As the benefits and savings of cooperative organization broaden and grow, one may hope and expect that the incidence of unjustifiable price discrimination will lessen. At the same time, the organization of retailers into wholesale-distribution cooperatives offers the prospect of increased competition at every functional level of distribution. It is possible that enhancement of bargaining power on the buying side of the market may operate as a countervailing force to that on the selling side of the market—and, if the market forces are allowed free play, the consumer may benefit by having a wider range of products and brands at lower prices. But here, too, we must be on guard against excessive concentration of market power.

In my view, cooperative organization—in this industry and in others—should be regarded with favor and hope. It holds much promise as a means for achieving the basic goal of antitrust: the preservation and enlargement of competition.

The role of cooperatives in today's economy must be properly understood by all of us who work in the field of antitrust. We cannot afford to lose touch with the realities of modern economic life. We cannot deal with today's cooperatives if we do not appreciate what they are, how and why they came into being, what functions they actually perform, and what benefits and advantages they achieve. Theorizing is no substitute for knowledge of facts; slogans and shibboleths should not replace realistic and dispassionate analysis. As we all know, an antitrust lawyer reacts like Pavlov's dog when he hears such terms as “combination”, “joint enterprise”, or “concerted action”. A businessman's idea of “cooperation” may well be an antitrust lawyer's idea of “conspiracy”. By their very nature, cooperatives involve a substantial degree of joint or collective activity. But it does not mechanically follow that a cooperative is a combination in restraint of trade. Any form of private business organization that possesses economic power—whether it be a cooperative, a corporation, or an individual—has the potential to abuse such power. The acts and practices of cooperative enterprises are neither *per se* legal nor *per se* illegal. Cooperatives do not ask and should not expect favored treatment under the antitrust laws. By the same token, their unique organizational and operational characteristics should not make cooperatives the object of either hostility or suspicion.

Here, as in other areas of antitrust enforcement, it is important that we keep our eyes and minds firmly fixed on what really matters. The fundamental aims of the antitrust laws are to preserve competition; to promote equality of economic opportunity; to provide an incentive for achieving economies and efficiencies in the manufacture and distribution of goods; and thereby to advance the growth of the economy and to enhance the welfare of our people. Nietzsche said that the most common stupidity consists in forgetting what one is trying to do. So long as we do not forget what the antitrust laws are trying to do, there will be little danger that these laws will impede the legitimate and useful activities of cooperatives.

THE ROBINSON-PATMAN ACT AND ANTITRUST POLICY: A TIME FOR REAPPRAISAL

(Remarks by Philip Elman, Federal Trade Commissioner, Before the Trade Regulation Institute, University of Washington Law School, Seattle, Wash., August 2, 1966.)

I.

In the thirty years since its enactment in 1936, the Robinson-Patman Act has been a continuing subject of controversy and concern. Over the years, fundamental questions about the Act and its administration have been asked which remain without satisfactory answers. Is there a basic conflict between the provisions of the Act and broader national antitrust policy? Is there an internal disharmony and confusion of policy goals within the Act itself? Has the Act suffered from weakness or inadequacy in enforcement? The Act was primarily aimed at the exaction by large and powerful buyers of discriminatory price concessions not available to their smaller competitors. To what extent has the Act succeeded or failed in achieving that objective? On balance, has the Act helped more than hurt competition? In the light of thirty years' experience and the results obtained under it, should the provisions of the Act and its present mode of administration be left intact? Or does sound antitrust policy require that changes be made—and, if so, what kinds of changes?

A call for review and reappraisal of the Robinson-Patman Act and its administration has recently come from a most respected source: the National Commission on Food Marketing. In the final report which it submitted in June 1966 to the President and the Congress, the Commission stated:

Price discrimination continues to be a threat in the food industry to fair competition among buyers, and in some cases among sellers. * * * While the Robinson-Patman Act is widely viewed in the food industry as an important and necessary statute, it has shortcomings which endanger its effectiveness. * * * Concepts of competitive injury should be kept abreast of changing business practices, and the enforcement agencies should avoid routine use of statutes without regard to the significance of discrimination.

We conclude, therefore, that a study and reappraisal of the Robinson-Patman Act and its administration is now appropriate, in order to determine needed revisions in light of current economic conditions and overall antitrust policies. (P. 107; italics in original.)

This conclusion was also shared by the minority members, who stated:

We are pleased to agree. The Robinson-Patman Act and other antitrust laws do need early 'study and reappraisal' to determine their responsiveness to national needs. (P. 130.)

The Supreme Court, in the *Automatic Canteen* case (346 U.S. 61, 74), emphasized the need "to reconcile [the Robinson-Patman Act] * * * with the broader antitrust policies that have been laid down by Congress." The Court has also recognized, however, that the task of achieving such reconciliation is too large to be borne solely by the judiciary.¹ The time has come, I submit, for the Federal Trade Commission to heed the strong and insistent pleas, which have come not only from the courts but from distinguished lawyers and economists,² for a searching reexamination of the Robinson-Patman Act and its administration.

From the standpoint of private practitioners like yourselves, engaged in preventive antitrust counselling, the need for reconciling the requirements of the

¹ *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 249; *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 177.

² Edwards, *The Price Discrimination Law* [hereinafter Edwards] 627-57 (1959); Rowe, *Price Discrimination Under the Robinson-Patman Act* [hereinafter Rowe] ix-xiii (1962); Austern, *Isn't Thirty Years Enough*, 30 ABA Antitrust Section Rep. 18 (1966); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 ABA Antitrust Section Rep. 9 (1966).

Robinson-Patman Act with those of the Sherman Act is not an academic question. In a recent issue of the *Harvard Law Review*, an anonymous critic—who described himself only as “an aged and old-fashioned antitrust lawyer and law professor who still believes with Mr. Chief Justice Hughes that the Sherman Act is ‘a charter of freedom’”³—stated that lawyers “compare their job in advising under [the Robinson-Patman Act] to the stability of a dog walking on his hind legs. Other lawyers say it is difficult to explain without using both hands, and often having to remove one shoe, because each new decision creates ‘a new snake pit’ of unsettled problems.”⁴

As the Supreme Court stated in *Socony-Vacuum* (310 U.S. at 224), pricing is “the central nervous system of the economy”. Businessmen who must operate in the pressures of the marketplace should not be forced to make pricing decisions at their peril. The legal standards which must be observed by businessmen in making pricing decisions in the day-to-day conduct of their business should be reasonable, realistic, and easily understood. Respect for law is not promoted if lawyers called upon to give advice in such matters have to throw up their hands in confusion or despair. If a businessman is advised that he can protect himself against a charge of violating the Robinson-Patman Act only by engaging in conduct which may subject him to prosecution under the Sherman Act, he is not the only one that suffers. The public is also the loser. If you must tell your client that he may lower his price to meet a competitor's price only if he can later prove to the satisfaction of the Federal Trade Commission (a) that he only met and did not beat his competitor's price, and (b) that he used “reasonable diligence in verifying the existence” of the competitor's lower price, are you not giving him advice that may land him in jail for illegal price-fixing under the Sherman Act? Thus, nothing could be more urgently needed by lawyers engaged in preventive anti-trust counselling than a comprehensive effort to achieve full harmonization of the Robinson-Patman Act with the other antitrust laws.

The need for such a reexamination of the Robinson-Patman Act is fundamental. The goal of antitrust is compendiously expressed in a single word: competition. As the Supreme Court has stated, “competition is our fundamental national economic policy”.⁵ If, as many charge, the Robinson-Patman Act as administered serves mainly as an obstacle to effective competition, it is surely a matter of great concern. And if, as others charge, the Act has failed to prevent large buyers from obtaining unfair price discriminations which may injure or destroy competition, it is no less cause for concern. To be sure, the concept of “competition” embraces many and varied objectives. It is a means, however imperfect, of regulating markets and allocating resources in the most efficient way. It is a means for maximizing consumer satisfactions. It is also a means for achieving economic growth and progress and preserving and enlarging economic opportunity. How may a price discrimination law operate to help attain these goals? That is the fundamental question. And the answer, in all of its aspects, will come only after a thorough review and reappraisal of the Robinson-Patman Act and its administration in the light of the national antitrust policy favoring competition.

Such a study should be a function of the agency which Congress has charged with primary responsibility for enforcing the Act: the Federal Trade Commission. After thirty years of stewardship of the Act, the Commission should render an accounting to the Congress and the public. It should take inventory of the successes or failures of the Robinson-Patman Act, measured by past and current experience. What is needed is a comprehensive and objective overview in which the forest is not obscured by the trees.

Any such study would involve the full commitment of the resources of the Commission and its staff. But it is also necessary that such a study, and the recommendations based upon it, be entirely free from any suggestion of institutional bias or predisposition. The answers to the difficult and serious questions that have been raised about the Act will not spring full-blown from those of us who are immersed in the day-to-day chores of administration and adjudication of specific cases. If the study is to be of value—if it is to be influential in bringing about change where change is needed—it must merit respect for its impartiality and objectivity. Accordingly, it would seem appropriate that the study at least in its initial phase, be conducted by a special task force consisting of leading economic and legal scholars in the fields of antitrust and industrial organization, who would have the full cooperation, as well as access to the resources and

³ 79 Harv. L. Rev. 921 (1966).

⁴ *Id.*, at 922.

⁵ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 372.

investigating powers, of the Commission. Perhaps the type of task force used by the Securities & Exchange Commission in its recent mutual fund and securities markets studies could be used as a model. At all events, I think it imperative that the Commission begin now the planning and organization of a full-scale review and reappraisal of the Robinson-Patman Act and its administration.

II.

Despite the criticisms that have been made of the Robinson-Patman Act and its administration, there should be none as to the validity of the underlying premise on which Congress acted in passing the law. The Act expressed a basic consensus that business rivalry in a free economy should not be unfair and destructive of the competitive process. It was premised, in part at least, on a recognition that there will always be large buyers who may attempt to abuse their power to the detriment not only of their smaller and weaker rivals but of the process of competition.

It could be said that the Act was intended to limit competition among sellers, in the short run, in the hope of strengthening competition among buyers, in the long run. The "guiding ideal" of Congress in passing the law was "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production." (H.R. Rep. No. 2287, 74th Cong., 2d Sess., p. 6.) As the Supreme Court stated in the *Sun Oil* case (371 U.S. 505, 520), "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." Given an imperfect world, such a design involves no necessary inconsistency with basic antitrust policy, since the "competition" sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly. Thus, the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals.

From its very inception, however, the Act and its administration have fallen under criticism and attack on all sides. Some of the assaults have indeed been extreme and unfair. The one that takes the prize is the indefensible charge that the sentiments giving rise to the Act were "reminiscent of the beginnings of the Nazi movement in Germany, where the same zeal was displayed to protect the small businessman from his large competitors".⁸ I shall not repeat other criticisms, which have been collected elsewhere,⁹ except to note that the obscurities and inconsistencies of its language have invariably evoked unflattering comment. Mr. Justice Harlan was not alone in his recent reference to the Act as "singularly opaque".⁵ What I shall attempt here, rather, is to outline some of the basic questions of antitrust policy which have emerged from thirty years' enforcement of the Act. These questions furnish a departure point for the study and reappraisal which is needed.

Criticism of the Act has come mainly from two directions. On the one hand, it is said that the Act "tends to be a price-fixing statute hiding in the clothes of anti-monopoly and pro-competition symbols."¹⁰ The argument here is that by emphasizing price uniformity, the Act has in effect required the kind of price rigidity which the Sherman Act condemns. Indeed, Professor Adelman has argued that by focusing on discrimination as a *price* difference, the Act is in direct conflict with the economic concept of discrimination and has resulted in the kind of misallocation of resources which characterizes a monopolistic, rather than a competitive, economy.¹⁰

Economic discrimination is not measured by differences in price; it can occur when prices are identical to all buyers. In economic terms, a discrimination is the receipt by a seller of different net returns on sales to different buyers. Thus, if *X*'s costs of selling to buyer *A* are significantly lower than selling to buyer *B*, but *X* charges the same price to both, a serious economic discrimination has been effected against buyer *A* even though there has been no price discrimination.

⁸ Quoted in Levi, *The Robinson-Patman Act—Is It in the Public Interest?* 1 ABA Anti-trust Section Rep. 60 (1952).

⁷ 79 Harv. L. Rev. 921 (1966); Rowe 535, and 1964 Supp. at 168.

⁸ *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 530 (separate opinion).

⁹ Levi, *supra*, n. 6, at 61.

¹⁰ Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. Pa. L. Rev. 222, 223-27 (1955); see also Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U.L. Rev. 173 (1962).

In a competitive economy, Professor Adelman points out, "there would be a strong tendency for the sellers to bid this higher-margin business away from each other, forcing down the margin toward equality with the other customers."¹¹

It is by this process in a competitive economy that resources are channeled to the most efficient methods of doing business and prices are reduced. A law which, in the guise of preventing *price* discrimination, limits the reduction of prices that eliminate *economic* discrimination blocks the proper functioning of the competitive process. The consequence will be that efficiency is not rewarded and prices remain rigidly high. In short, it is asserted, a law which unduly discourages price differences to different customers throws the competitive system out of gear. In the view of many, this has been the actual effect of the Robinson-Patman Act.

On the other hand, many have argued that the Act has failed in its primary objective—to prevent large buyers from gaining decisive advantages over their competitors through the exaction of price concessions. Such criticism has been aimed, in part, at allegedly misguided Commission enforcement policies. It has been contended that the impact of Commission enforcement has fallen mainly on small sellers rather than big buyers, and that it has concerned itself too much with the insignificant or trivial.¹² But the criticisms in this regard have also been directed at the Act itself.

Despite the concern with the exercise of large buying power which motivated its enactment, the central focus of the Act as written is upon the conduct of the seller. It has also been pointed out, and this is a matter which I will come back to, that the good faith defense—which enable sellers to meet the equally low price of their competitors—contains a built-in provision which is favorable to large buyers and increases the likelihood of their obtaining discriminatory price advantages over small competitors.¹³ Some question has also arisen as to whether Section 2(f), the section directed at buyers, imposes too heavy a burden of investigation and proof upon the Commission, thereby discouraging attempts to enforce the law against large and powerful buyers.

Finally, there are a variety of ways in which a large buyer can avoid the Act altogether. A discriminatory price to a large buyer which can be cost-justified is entirely outside the scope of the Act. In addition, a large buyer can get around the Act by taking a seller's entire output at a very low price not available to others. Professor Edwards recently concluded that both camps of critics—those who criticized the Act's anticompetitive tendencies and those who criticized its failure to curb the anticompetitive abuses of buying power—were essentially correct. On the one hand, he pointed out that:

Discrimination that damages competition has been hard to distinguish from competition that merely recognizes and reacts to the varying intensity of competition in imperfect markets. For this reason, the law has handicapped sellers in responding flexibly to varying circumstances and has given rise to enduring controversy about the proper limits of the right to discriminate in order to meet competition. Discrimination that is an incident in the process by which price changes spread has been hard to distinguish from discrimination that creates enduring competitive advantages. For this reason the law has created hazards for those who try to drive hard bargains. Discrimination sometimes produces mixed effects, enhancing competition among oligopolistic sellers while diminishing it among their customers. Under such circumstances, the law condemns the diminution and ignores the enhancement. Because of the law's inherent ambiguities, businessmen can now vary their selling prices or haggle over buying prices only with caution and under legal guidance. Whether, on balance, the law has maintained more competition than it has impaired is uncertain.¹⁴

On the other hand, after enumerating the ways in which a large buyer can avoid the restrictions of the Robinson-Patman Act, he concluded that the Act—

Has been a weak instrument with which to prevent whatever concentration of economic power may result from discrimination. Its principal achievements have been equitable—diminution of various inequalities in the terms of trade available to weak distributors. The degree of this achievement has tended to be greatest in eliminating discriminations that were not very important to corporate empire-builders.¹⁵

¹¹ *Id.* at 234.

¹² Edwards 624-28; Rowe 539-43; Note, *Small Business Before the Federal Trade Commission*, 75 Yale L.J. 487 (1966).

¹³ Edwards 569-71, 580-83.

¹⁴ Edwards, *Control of the Single Firm: Its Place in Antitrust Policy*, 30 Law & Contemp. Prob. 465, 476-77 (1965).

¹⁵ *Id.* at 477.

The source and extent of these criticisms surely demonstrate the need for taking a good long look at how the Robinson-Patman Act is actually working out. Even the severest critics of the Act seem to agree that price discrimination *could* be used as a potent weapon for the destruction of competition, although some doubt has been expressed as to the extent it has actually been used for that purpose in the past.¹⁶ Theoretically at least, a powerful national seller might, out of monopoly profits derived in some markets, subsidize a selective use of lower prices in other markets in order to eliminate or discipline competitors in those markets. Our early antitrust history reflects the belief that such price discriminations were used for predatory purposes by the great trusts.¹⁷ A large buyer might also exploit its power to obtain substantial and significant price concessions enabling it to eliminate or discipline competitors. The belief that such practices were in fact being used by large chains to impair competition in the retail food industry was the premise on which the Robinson-Patman Act was enacted.¹⁸

I think we could all agree that a price discrimination law aimed at practices so destructive to competition is fully consistent with, and complementary to, the goals of our antitrust laws. At the same time, we could also agree that all differences in price cannot be condemned as anticompetitive. First, differences in price which reflect the passing on to a buyer, in the form of lower prices, of savings flowing from its more efficient methods of doing business are essential to the maintenance of a competitive system. Such lower prices are rewards to the efficient; their elimination would remove or lessen the incentive for increasing efficiency and reducing ultimate costs to the consumer.

Second, price differences will naturally arise from the ordinary pressures of everyday bargaining and haggling in a competitive market. A price discrimination law which results in the elimination of such pressures would impair or obstruct the competitive process. Especially in a sellers' market that is oligopolistically structured, the ability of a few buyers to obtain lower prices may be the only way in which a general reduction of prices in such a market can come about.¹⁹ In short, there is a compelling need to distinguish between those discriminations in price which may injure competition and those which reflect active and vigorous pressures of competition and which are a necessary concomitant of a healthy competitive system.

Against the background of these general observations and criticisms that have been made concerning the Act, I should like to turn to some specific problems which reflect the major areas of tension and conflict between antitrust goals and the price discrimination law.

III.

While price discrimination within the meaning of the Act is "merely a price difference,"²⁰ the central prohibition of the Act makes unlawful only those discriminations in price between purchasers of commodities of like grade and quality whose effect may be (a) "substantially to lessen competition or tend to create a monopoly", or which (b) "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with the customers of either of them." The first standard is a familiar Clayton Act standard; the second is a novel definition of injury which was added by the Robinson-Patman amendments to the Clayton Act.

At the secondary line of competition—that is, the buyer's level—a very narrow concept of competitive injury has prevailed. Essentially, any price difference which is substantial in relation to industry profit margins is likely to be held sufficient to establish the competitive injury required by the Act.²¹ There are clear indications that mechanical and dogmatic applications of this standard will not go unchallenged in the courts. In the *Sun Oil* case the Supreme Court admonished that "in appraising the effects of any price cut . . . both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invoca-

¹⁶ See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. Law & Econ. 137 (1958); McGee, *Some Economic Issues in Robinson-Patman Law*, 30 Law & Contemp. Prob. 530, 546-48 (1965); Adelman, *supra*, n. 10, at 232-33.

¹⁷ *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106.

¹⁸ See *Federal Trade Commission Final Report on the Chain Store Investigation*, S. Doc. 4, 74th Cong., 1st Sess. (1935).

¹⁹ Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 204 (1954); *Report of the Attorney General's National Committee to Study the Antitrust Laws* [hereinafter *Attorney General's Report*] 336 (1955); Rowe 25-28.

²⁰ *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549.

²¹ *F.T.C. v. Morton Salt Co.*, 334 U.S. 37.

tion of mechanical word formulas cannot be made to substitute for adequate probative analysis."²² But these judicial expressions appear not as yet to have had any significant impact on the decisional standards applied by the Commission.²³

The application of this formula at the secondary line raises two important questions: The first relates to a so-called "pure" secondary-line case in which the only question is the legality of a price difference extended to buyers who function and compete only at a single level of distribution. The other, which raises more serious questions, relates to the so-called functional discount paid to a vertically integrated buyer who operates at two or more levels of distribution and who competes with unintegrated buyers who sell only at the lower level of distribution.

In the "pure" secondary-line case, the problems of defining injury to competition may not appear at first glance to be important. Where a price concession gives one buyer a substantial price advantage over another, one may ask whether further inquiry is necessary to ascertain if competition in any broad market sense has been injured. I think the question is worth asking and deserves answer. First, the assumption that the cost justification proviso adequately assures buyers the rewards of efficiency must be critically appraised. If it does not, and if it is not feasible to construct a workable cost justification proviso, the definition of competitive injury at the secondary line would assume greater significance. A more flexible definition, permitting greater flexibility in pricing, would tend to assure that a price discrimination law does not promote economic discriminations—creating undue uniformity in the face of differing degrees of efficiency.²⁴ I will presently examine the question of the adequacy of the cost justification proviso. For the moment, I merely wish to indicate the relationship of that question to the determination of the appropriate standards of competitive injury.

There is a second reason for policy concern about the narrow definition of competitive injury in a so-called "pure" secondary-line case. It cannot be too often stressed that a price discrimination cannot be looked upon solely in terms of its effect at the secondary line. A difference in price might confer some transient advantage upon a favored buyer and yet at the same time reflect healthy and vigorous competition at the seller level—the so-called primary line—or the initiation of a much needed price break at the seller level. Moreover, temporary and shifting price discriminations, even of a substantial nature, are not necessarily injurious to competition but may reflect instead the kind of bargaining and haggling which is an essential part of the competitive process. In competitive markets some buyers may obtain a price advantage on one item while others obtain a counterbalancing advantage on another. Where there is no central pattern in these discriminations, or where they are temporary or sporadic, or where they tend to cancel each other out, they are not likely to produce any harmful effect upon the competitive process. To the contrary, they merely reflect varying pressures within a vigorous and healthy competitive market. An inflexible or doctrinaire definition of competitive injury prohibiting price differentials in such circumstances would dampen competitive vigor. It would create too onerous a peril both to the exercise by buyers of the "sturdy bargaining" which a competitive system encourages and to competitive responses by sellers to differing and changing pressures within the market.²⁵

A perhaps more pressing question raised by the present standards of competitive injury applied under the Robinson-Patman Act relates to the treatment of functional discounts—concessions compensating the performance of distribution functions—given to integrated buyers competing at more than one level of the distribution process. Ordinarily, sellers competing at different functional levels in the distributional system do not compete with one another. As a consequence, a lower price to a competitor at a higher functional level in the distribution system could not injure competition. For example, wholesalers ordinarily receive a lower price than retailers; no one is concerned that this raises a problem under the Robinson-Patman Act.²⁶ Vertical integration, however, creates different problems. Where the same firm competes at two separate levels of the distribution system, it will find itself in direct competition with unintegrated sellers

²² *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 527; see also *American Oil Co. v. F.T.C.*, 325 F. 2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954.

²³ See, e.g., *Alhambra Motor Parts*, Docket No. 6889 (decided Dec. 17, 1965).

²⁴ See McGee, *Some Economic Issues in Robinson-Patman Law*, 30 *Law & Contemp. Prob.* 530, 542 (1965).

²⁵ Edwards 540-44, 638-43.

²⁶ But see *Standard Oil Co. (Indiana)*, 41 F.T.C. 263 (1945), modified, 43 F.T.C. 56 (1946), modified, 173 F. 2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231; Rowe 198-205.

competing only at the lower level. The Commission has traditionally treated such an integrated distributor as if it competed at the lower functional level only and has consistently and mechanically applied the *Morton Salt* formula for determining injury in secondary line cases.²⁷ It has wholly ignored the fact that these integrated firms compete at a higher level as well and that the effect of applying such a simplistic definition of competitive injury has been to prevent the integrated firm from competing at the higher level.

As many critics have observed, by imposing a serious risk of law violation upon the charging of lower prices designed to induce and compensate the performance of additional distribution function, the Act tends to discourage experimentation with new systems of marketing which may eliminate or by-pass traditional distributional levels and which may contribute to marketing efficiency and to the overall enchantment of competition.²⁸

I find nothing in the Robinson-Patman Act which indicates that it was intended to prevent a manufacturer from obtaining distribution through as many functionally distinct channels as his business needs require. A legitimate functional price discount is the incentive which a manufacturer offers his distributors to induce them to render distribution services which he may regard as necessary to increase efficiency, lower costs, or expand consumer demand for his product. A thorough reevaluation of the narrow standards of competitive injury applied in this area is vitally needed. As I recently pointed out, "competition, in the antitrust sense, may be truly injured by a policy of law enforcement which preserves intact an inefficient, uneconomical and stratified system of distribution, and prevents the elimination of unnecessary middleman costs. . . ."²⁹

There is a third area in which a reappraisal of standards of competitive injury is urgently needed—the standards to be applied to "area discriminations", i.e., the practice whereby firms operating in a number of geographic markets charge different prices in different markets depending on the local conditions. Such pricing is often essential to, and promotes, competition in local markets, and it should be recognized that an overbroad restriction of area price differences could seriously impair competition.

In a local market dominated by a few firms, the entry of a national seller prepared to lower its price in order to secure a foothold in the market may be the only cure for a rigid price structure characteristic of oligopoly. Such a national seller might be unwilling to lower its price similarly in all the other geographic markets in which it does business. Selective local price cutting may also be a necessary first step in a general lowering of prices. A national seller who might otherwise be reluctant to initiate a uniform price reduction might nevertheless want to experiment with a projected price reduction in one or several local markets before establishing it throughout its entire marketing area. In general, a lack of uniformity in the prices of a national seller, competing in many geographic markets, may simply reflect the seller's flexibility in adjusting price to meet different competitive conditions in different markets. Insistence on price uniformity in such situations could lead to high, rigid prices and thereby hurt competition very seriously.

On the other hand, selective local price cutting by national firms possessing monopoly power in other markets could be used as a weapon for the elimination or disciplining of competitors. The line between area price discrimination which is predatory or destructive of competition and that which promotes or expands competition is obviously difficult to draw. But one thing is certain: it cannot be drawn merely at the point where a price reduction diverts trade from a competitor. "[S]uccessful competition necessarily diverts business from rivals. To make such diversion unlawful is tantamount to a complete prohibition of the tactics of making price reductions or price increases that result in nonuniform prices."³⁰ It is a natural consequence of competition that some competitors will lose business and some will even fall by the wayside.

²⁷ See, e.g., *Puroator Products, Inc. v. F.T.C.*, 352 F. 2d 847 (D.C. Cir. 1965) (pet. for cert. pending); *National Parts Warehouse*, Docket No. 8039 (decided Dec. 16, 1963), aff'd sub. nom. *General Auto Supplies, Inc. v. F.T.C.*, 346 F. 2d 311 (7th Cir. 1965); *Monroe Auto Equipment Co.*, Docket No. 8543 (decided July 29, 1964), aff'd sub. nom. *Monroe Auto Equipment Co. v. F.T.C.*, 347 F. 2d 401 (7th Cir.), cert. denied, 387 U.S. 1009; *Athambra Motor Parts*, Docket No. 6889 (decided Dec. 17, 1965) (appeal pending in Ninth Circuit).

²⁸ Edwards 344-47; Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 132-33 (1954); see Attorney General's Report 207-09.

²⁹ *Athambra Motor Parts*, *supra* (dissenting opinion), p. 15.

³⁰ Edwards 637.

It should be clear, therefore, that a simple test of whether a price reduction results in a diversion of business cannot suffice for determining injury to competition among sellers.³¹ The Federal Trade Commission seems to have begun to move away from any such *per se* approach to area price discrimination.³² Unfortunately, current decisions do not as yet reflect sufficient sensitivity to the difficult problem of drawing a line between area price discrimination which impairs the competitive process and that which promotes and fosters vigorous competition at the primary line.³³ With no clear guide as to whether a particular local price reduction is likely to be adjudged injurious to competition, sellers must proceed at their own risk. An atmosphere of such peril can only inhibit normal competitive responses and injure the process of competition. Area price discrimination is, therefore, a subject with which a reappraisal of the statute should be concerned.

IV.

As the legislative history of the Act shows, Congress sought to assure that the prohibition of price discrimination would not prevent the development of efficient distribution methods or deprive buyers of the rewards of lower prices which are the incentives for seeking more efficient methods. For that purpose, Congress included the cost justification proviso.³⁴ Nevertheless, opinion is almost unanimous that the cost justification proviso has not fulfilled its function and is practically useless to businessmen, accountants and lawyers.³⁵ As the Supreme Court noted, "proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."³⁶

The cost justification proviso as currently enforced has been criticized on a variety of grounds. Some have suggested that the cost factors which it permits to be shown are too limited and that recognition is not given to legitimate efficiencies and savings resulting from sales to large buyers, such as efficiencies which result from the greater utilization of plant capacity.³⁷ The main criticism, however, has been that the failure to develop realistic and clear standards for the determination of cost savings has made it impossible for businessmen or their accountants to make practical use of the cost justification defense in determining pricing policies.

The difficulties confronting a firm seeking to establish a cost justification are many: it must establish that the classes of customers to whom different prices are charged are sufficiently homogeneous with respect to the methods and nature of their buying practices, and it must then make an appropriate allocation of costs to the particular classes. As has been pointed out, ordinarily "a firm's expenditures comprising the differences in cost as between alternative methods of distribution are typically spread among numerous products in varying ways; the breakdown of these 'joint' costs among several components involves largely subjective business judgments in choosing among several equally rational alternative methods of allocation."³⁸ Accordingly, it has been recognized that these elements are "not suitable for periodic entry in a seller's regular books of account,"³⁹ and that the data necessary for a Robinson-Patman cost defense "cannot be obtained from ordinary business records."⁴⁰

There have been repeated calls for clearer guidelines to businessmen which would enable them to make adequate use of the cost justification defense as

³¹ See, e.g., *Borden Co. v. F.T.C.*, 339 F. 2d 953 (7th Cir. 1964); *Anheuser-Busch v. F.T.C.*, 289 F. 2d 835, 840 (7th Cir. 1961); *FTC Policy Toward Geographic Pricing Practices*, 1 CCH Trade Reg. Rep. (10th ed.), pp. 5341, 5348 (Oct. 12, 1948).

³² *Lloyd A. Fry Roofing Co.*, Docket No. 7908 (decided July 23, 1965); *Forster Mfg. Co.*, Docket No. 7207 (decided July 23, 1965); *Dean Milk Co.*, Docket No. 8032 (decided Oct. 22, 1965).

³³ *Dean Milk Co.*, *supra*.

³⁴ "... The bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution. . . . There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and those economies of superior efficiency achieved, nor form which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible."

Remarks of Rep. Utterback, 80 Cong. Rec. 9417 (1936); see also H. Rep. No. 2287, 74th Cong., 2d Sess., p. 17 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5 (1936).

³⁵ See, e.g., Fennelly, *On the Judging of Mince Pies*, 42 Harv. Bus. Rev. 77 (Nov.-Dec. 1964).

³⁶ *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 79.

³⁷ Edwards 613-15; McGee, *Some Economic Issues in Robinson-Patman Land*, 30 Law & Contemp. Prob. 530, 538-42 (1965).

³⁸ Attorney General's Report 174.

³⁹ *Ibid.*

⁴⁰ *Automatic Canteen Co. v. F.T.C.*, *supra*, at 69.

well as recommendations that there be greater flexibility in determining the adequacy of a cost defense. A 1956 study of the cost justification proviso, made at the request of the Commission, urged broader interpretation, greater acceptance of sampling procedures, more leniency for cases in which anticipated costs turned out differently from actual costs because of circumstances beyond the control of the seller, and wider acceptance of approximate cost justifications. But that study failed to come up with adequate specific criticisms or specific suggestions for improvements of the cost defense which would make it more available and better able to serve its essential function of promoting and preserving efficiencies in the distribution process.⁴¹ A reappraisal of the Act would therefore necessarily include a thorough reexamination of the cost justification proviso and its role as a means of assuring that the price discrimination law does not penalize or discourage the development of efficient methods of distribution and that it does not function, as some have charged, as a method of perpetuating economic discrimination.⁴²

V.

No issue has produced more serious collisions between antitrust policy and the Robinson-Patman Act than the determination of the scope and availability of the meeting competition defense. Professor Edwards has said that the good faith defense has been "criticized as too narrow and as too broad, as insufficient and excessive, and as a curb on competition both in its narrowness and its breadth. These apparently contradictory sets of appraisals are both *substantially correct*."⁴³ The conflict between antitrust policy and a law aimed at curbing excessive buying power which may be used to impair competition at the buyers level is readily perceived in this context. Sound antitrust policy would dictate that sellers be free to price their goods flexibly in response to competitive pressures. In the Supreme Court's view, the maintenance of such freedom to meet competition is essential if we are to avoid the conclusion that Congress in the Robinson-Patman Act sought "to abolish competition" and to undermine the very premises of the Sherman Act.⁴⁴

At the same time, the maintenance of competition among sellers may have little relevance to the maintenance of competition among buyers. Indeed the two may be in direct and open conflict. For while the right to meet a competitor's price is essential to the survival of a seller, such meeting of competition may also reflect the securing of substantial price advantages by large buyers. In many ways the meeting competition defense may actually operate to favor the big buyer over the small buyer and to assure that the impact of the Act will fall most heavily on the small buyer. It is most often the large buyer whose quantity buying and buying methods permit at least some sellers to realize savings in cost. Even if only one seller realizes such savings entitling it to charge a lower price to a particularly large buyer, the meeting competition defense permits all other competing sellers to meet that lower price regardless of whether they can cost justify. Similarly, a large buyer can frequently buy the entire output of a single seller—and this frequently does occur in the food industry. The price charged by a seller in such a case is not limited in any way by the restrictions of the Robinson-Patman Act. Again, all other sellers may meet this price even if it does not reflect any savings in cost. Finally, it is the large buyer who can frequently exert sufficient pressure to get somebody to give him a price concession. Other sellers may respond on an industry-wide basis to meet such a concession. Thereafter it may be impossible to determine which of the sellers was the initiator and which were merely responding defensively.⁴⁵

In each of these situations, regardless of whether the sellers' lower prices are good faith responses to a competitor's price and regardless of whether such responses are essential to the maintenance of competition at the seller level, competition at the buyer level may be very seriously impaired. Dissatisfaction with these results has led to unsuccessful legislative efforts to revise the meeting competition defense so as to qualify its use in those cases where there is a substantial impairment of competition in the traditionally broader Clayton Act

⁴¹ Edwards 608-16; Taggart, *Cost Justification* 543-49 (1959).

⁴² Adelman, *Price Discrimination As Treated in the Attorney General's Report*, 104 U. Pa. L. Rev. 222, 235-36 (1955).

⁴³ Edwards 580 (emphasis supplied).

⁴⁴ *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 249-50.

⁴⁵ See *Callaway Mills Co.*, Docket No. 7634 (decided Feb. 10, 1964) (dissenting opinion), rev'd — F. 2d. — (5th Cir. 1966).

sense—that is, where the effect is to substantially lessen competition or tend to create a monopoly.⁴⁶

This conflict between the objectives of maintaining competition at the seller level and at the buyer level may be the explanation for the evolution of a number of doctrines which have, in their turn, significantly impaired the usefulness of the meeting competition defense as a device for protecting competition at the seller level. If the meeting competition defense is to have any practical meaning, it must be given a flexible interpretation enabling sellers to act promptly in response to the exigencies of competition. Sensitivity to the realities of everyday commercial life, not rigid standards imposing unrealistic and impossible duties of inquiry and prediction on businessmen, is essential if the defense is to have any substance.

Pragmatism, not strict logic, must be the keynote to interpretation. The standard of "good faith" must be "simply the standard of the prudent businessman responding fairly to what he believes is a situation of competitive necessity."⁴⁷

Instead, the Act has very often been read to impose unreasonable burdens upon businessmen. Such interpretations appear to some to reflect a basic hostility towards the good faith defense. Despite earlier indications that the Commission might be adopting a more flexible approach, recent actions indicate that the 2(b) defense still does not perform its legitimate role.

The first obstacle to effective use of the defense is the doctrine that a seller is not in good faith if he meets a price which he knows, or has reason to believe, is *unlawful*. Precisely what burden does this impose upon the seller? Where the defense is invoked, must complaint counsel come forward and show circumstances which would have indicated to a reasonable seller that the price he was being asked to meet was unlawful? Or does the burden rest upon the seller invoking the defense to establish that he had reason to believe that the price he was meeting was lawful? Or must he merely show that there were no circumstances which would have reasonably led him to believe that the price he was meeting was unlawful? Surely, any standard which is constructed should give recognition to the fact that a businessman who has no access to his competitor's records can hardly be expected in the ordinary case to be capable of establishing in advance, and midst the hurly-burly of the marketplace, the lawfulness of his competitor's prices, a question which can usually be determined only after extensive inquiry conducted long after the event. As I have said elsewhere:

The law should not be construed as forcing a seller to compete at his peril.

A 'sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge.' A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful.⁴⁸

Moreover, a serious question has been raised as to whether there should be rigid and absolute insistence that the price met must be a lawful one. Commissioner MacIntyre has said that "the right of self-defense long recognized is available only to counteract wrongful and unlawful conduct. . . . This inconsistency between recognized right of self-defense and what has been provided in the way of self-defense under the 'good faith proviso' is left unexplained by the [Supreme] Court and the Commission."⁴⁹

A second obstacle to the meaningful use of the good faith defense is the dogma that a seller must establish that he was meeting a particular price in a specific competitive situation and that he cannot meet so-called pricing systems or general price levels.⁵⁰ It is true that the literal language of the statute permits the defense only to meet the "equally low price of a competitor". However, the courts have traditionally given this language a common-sense reading. The Supreme Court has pointed out that Section 2(b) "does not place an impossible burden upon sellers."⁵¹ and the First Circuit, in reversing a Commission holding

⁴⁶ See, e.g., S. 11, 88th Cong., 1st Sess. (1963). The bills introduced would have made the meeting competition defense an absolute one in those cases where a discrimination merely tended to "injure, destroy, or prevent competition with" the buyer's competitors, but would have permitted the Commission to disregard the meeting competition defense where the effect of the price discriminations was "substantially to lessen competition or tend to create a monopoly". See generally, Rowe 256-64.

⁴⁷ *Continental Baking Co.*, Docket No. 7630 (decided Dec. 31, 1963), p. 2.

⁴⁸ *Tri-Valley Packing Association*, 60 F.T.C. 1134, 1176 (dissenting opinion).

⁴⁹ *Continental Baking Co.*, Docket No. 7630 (decided Dec. 31, 1963) (separate opinion of Commissioner MacIntyre), p. 4.

⁵⁰ E.g., *Callaway Mills Co.*, Docket No. 7634 (decided Feb. 10, 1964), rev'd — F. 2d — (5th Cir. 1966).

⁵¹ *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759.

that a seller must affirmatively show that he knew the exact prices of competitors and the names of the competitors who bid the price that he was meeting, recently said:

We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic.⁵²

The recent *Callaway Mills* decision in the Fifth Circuit, rejecting the Commission's holding that meeting a competitor's discount schedule does not satisfy the good faith defense, is the latest chapter in this story.⁵³

Yet, despite the repeated efforts of the courts to inject a note of realism into the interpretation of the meeting competition defense, the administration of the law appears to remain unaffected. How, for example, can one harmonize with *Forster* and *Callaway Mills* the view that "general" testimony that price discriminations were made to meet competition, "without documentation or specific evidence", is never sufficient to support a good faith defense, and that to establish the defense the respondent must show that it "used reasonable diligence in verifying the existence of a lower price to a competitor"? How does one verify a competitor's price? Suppose that a buyer tells his supplier that he must grant him a 6% discount off list price or lose his business to a competitor. Under the prevailing view, the seller presumably cannot accept the buyer's statement at face value, even though its obvious purport is that a 6% discount is necessary to meet the competitor's price. Would you counsel your client to call his competitor, ask him what price he is charging, and then charge exactly the same price? Or would you be afraid that your advice might lead your client straight to an indictment for illegal price fixing? And just what would be happening to the customer while your client is wandering about making diligent efforts to verify the competitor's price which he has been told either to meet or "get out"?

Suppose too that your client's competitor publishes a new volume discount schedule. Is your client within the good faith defense if, being generally aware that his list prices are similar to his competitor's, he simply adopts the new discount schedule published by his competitor? Or is he meeting a "pricing system"? If so, how else can he practically meet his competitor's new low prices?

Should not "price" in the meeting competition defense receive a flexible interpretation enabling a seller to meet the necessities of competition? The Commission has held, for example, that where a seller's product ordinarily commands a higher price in the marketplace because of consumer preferences, he is beating, not meeting, competition when he lowers his price to equal that of his competitor's product, traditionally selling at a lower price.⁵⁴ Should not a similar principle apply in the converse situation: Where a seller finds that buyers have a preference for a competitor's product resting on other factors than price alone, should he not be permitted to charge a *competitive* price, one capable of overcoming such consumer preferences, even if it means "beating" his competitor's price?

Finally, the good faith defense has been seriously restricted by the doctrine that it can only be used "defensively" to retain old customers rather than "aggressively" to obtain a new customer or in anticipation of pricing practices of a competitor. Aside from the fact that the distinction is practically unworkable,⁵⁵ it does not make economic sense. How can it conceivably be consistent with a competitive philosophy that a seller is prohibited from competing in price with a rival in order to obtain new customers?⁵⁶ This doctrine has already been rejected by one court.⁵⁷ Nevertheless, the Commission apparently continues to adhere to it.

⁵² *Forster Mfg. Co. v. F.T.C.*, 335 F. 2d 47, 55-56 (1st Cir. 1964).

⁵³ *Callaway Mills Co. v. F.T.C.*, — F. 2d — (5th Cir. 1966).

⁵⁴ *Callaway Mills Co.*, Docket No. 7634 (decided Feb. 10, 1964); *American Oil Co.*, 60 F.T.C. 1786, 1810-11; *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302; see *F.T.C. v. Borden Co.*, 383 U.S. 637, 646-47, 657-58.

⁵⁵ Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L. J. 929, 970 (1951); Austern, *Inconsistencies in the Law*, CCH Symposium: Business Practices Under Federal Antitrust Laws 158, 167 (1951).

⁵⁶ "How could any antitrust law be interpreted to mean that you can meet competition to hold an existing customer, but not to get new ones? Is that at all consistent . . . with the Sherman Act which makes it a per se offense to allocate customers or to attempt to monopolize your own customers?" 79 Harv. L. Rev. 921, 924-25 (1966).

⁵⁷ *Sunshine Biscuits, Inc. v. F.T.C.*, 306 F. 2d 48 (7th Cir. 1962).

A real, and fundamental, conflict in public policy does exist with respect to the meeting competition defense. It cannot be resolved by reading unreasonable and inflexible standards into the defense. For the consequence is to deny the defense in situations where it should clearly be available as a means of protecting competition at the seller level. The task is to determine the relative values which we are to assign to the protection of competition at the seller level and to the protection of competition at the buyer level, and to strike an appropriate balance. Professor Edwards has stated the issue very clearly:

The policy of the law should be to reconcile so far as possible two objectives: freedom for businessmen to price their goods flexibly in response to the varying pressures of the market, and curbs on exercise of that freedom in ways that thwart the objectives of the statute as to competition and competitive opportunity. One may describe the reconciliation in different ways by placing primary emphasis on the one objective or the other. Thus, one may say that freedom of business price policy should be limited only for clear reason, or that the law should protect the public against the evils of price discrimination in a way that leaves as much freedom as possible. Under either formulation, what must be sought is a balance that reconciles the liberty of the enterprise with the continuance of liberty in the relationships among their enterprises and among consumers.⁵⁸

It is important that the question be brought out into the open and that a rational and considered choice be made.

VI.

No provision of the Robinson-Patman Act has been subjected to more attack than Section 2(c)—the so-called brokerage section. Enforcement of Section 2(c) has been criticized not only as inconsistent with broad antitrust policies but as irrelevant even to the objectives of a price discrimination law. At one time, enforcement of the Robinson-Patman Act meant principally enforcement of Section 2(c). Those days appear to be over.⁵⁹ And recent decisions by the Commission and the courts indicate that ancient dogmas are beginning to wither.⁶⁰ This may eliminate some of the more astonishing absurdities which were involved in earlier enforcement activities, and make the section a less inviting vehicle for an easy route to a cease and desist order.

Nevertheless, old and cherished doctrines die hard.⁶¹ Anomalies still occur, at least in treble damage actions.⁶² There always exists the possibility that 2(c) may once again play a prominent role in Commission enforcement policy;⁶³ at all events, serious questions are raised about the utility or desirability of an absolute prohibition of this kind in the scheme of a price discrimination law.

Section 2(c) prohibits the payment of brokerage, or allowances "in lieu of brokerage," to the buyer or its agent "except for services rendered." The section was aimed at specific practices which existed in the food retailing industry at the time the Act was passed. In order to avoid the prohibition on price concessions in Section 2 of the original Clayton Act, large chain buyers used a number of devices for obtaining disguised indirect price concessions. One of these was to set up a dummy broker who in fact performed no brokerage services but was merely an agent of the buyer. The buyer would then demand that the seller pay "brokerage" to the dummy. In other circumstances the chain would simply demand that the seller pay it an allowance "in lieu of brokerage" on the pretext that it had saved the seller part or all of its brokerage costs. Again, no brokerage services would be performed, and very often the allowance to the buyer would come out

⁵⁸ Edwards 580.

⁵⁹ See Rowe, *The Robinson-Patman Act—Thirty Years Therafter*, 30 ABA Antitrust Section Rep. 9, 14 (1966).

⁶⁰ Compare *Edward Joseph Hruby*, Docket No. 8068 (decided Dec. 26, 1962), *Central Retailer-Owned Grocers, Inc. v. F.T.C.*, 317 F. 2d 410 (7th Cir. 1963), *F.T.C. v. Henry Brach & Co.*, 263 U.S. 166, 173, *Thomasville Chair Co. v. F.T.C.*, 306 F. 2d 541 (5th Cir. 1962), with *Modern Marketing Service, Inc. v. F.T.C.*, 149 F. 2d 970 (7th Cir. 1945); *Southgate Brokerage Co. v. F.T.C.*, 150 F. 2d 607 (4th Cir. 1945); *Riddle Purchasing Co. v. F.T.C.*, 96 F. 2d 687 (2d Cir. 1938); *F.T.C. v. Herzog*, 150 F. 2d 450 (2d Cir. 1945).

⁶¹ See *Plotill Products, Inc.*, Docket No. 7226 (decided June 26, 1964), rev'd on other grounds unrelated to Section 2(c). — F. 2d — (9th Cir. 1966).

⁶² *Rungen v. Sterling Nelson & Sons*, 351 F. 2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936; *Empire Rayon Yarn Co. v. American Viscose Corp.*, 354 F. 2d 182 (2d Cir. 1966) (rehearing en banc pending).

⁶³ Recently at a public hearing held before the Commission relating to the competitive effects of drop-shipping in the automotive parts replacement market, a proposal was made by one industry group that the Commission enter a new stage of Robinson-Patman enforcement in that industry via Section 2(c).

of the pocket of a legitimate broker who, in such transactions, would receive no brokerage or would be required to share his brokerage with the buyer.⁶⁴

The purpose of the brokerage section was to force these disguised transactions out into the open by imposing upon them an absolute prohibition. With respect to these practices, the Act quickly had the desired effect. Very soon after its passage, chains changed their methods of doing business in an effort to conform to the provisions of Section 2(c).

In fact, the history of enforcement under 2(c) has had very little relation to the practices which it was designed to condemn. It has been frequently noted that the main impact of 2(c) enforcement was not upon large buyers at all; it was felt rather by small sellers and buyers. In one series of cases it was used to cripple the activities of voluntary and cooperative buying groups designed to enable small buyers to compete with the large chains.⁶⁵ Ultimately, the main function of the section was to protect a single type of middleman, the "independent broker," against competition from other channels of distribution.⁶⁶ The Commission became an arbiter, determining which methods of transacting business were "legitimate" according to a standard which bore no relationship to their impact on competition.

This distortion of Section 2(c) came about through the early devitalization of the exception provided for cases in which legitimate services were rendered, as well as through the erection of the dogmas that a "true broker" cannot serve two masters and that a buyer's agent could not perform legitimate services for the seller for which he was entitled to compensation.⁶⁷ In the buying group cases the voluntary wholesaler performed an important function of promoting the seller's private label goods to the members of the voluntary group. Yet, these services were ignored. In the garment industry, distributors in various parts of the country, in order to maintain contact and keep in close touch with fashion and style changes at the center of the garment trade in New York City, find it necessary to maintain arrangements with so-called resident buyers whose offices are located in New York. These resident buyers perform a valuable function both for the seller and the buyer, bringing them together. In some instances the fee of the resident buyer is paid by the distributor, and in others by the seller. The resident buyer is in no sense a dummy; his activities bear no relationship to the activities of the chains which brought about passage of Section 2(c); he in fact performs a valuable marketing and distribution function in the garment industry. There is no reason to believe that payment to the resident buyer by the seller discriminates in favor of large buyers or in fact results in any discrimination at all. There is certainly no evidence that the practice is in any way harmful to competition in the garment industry. Yet, the practice of payment by the seller has been held to be a violation of Section 2(c).⁶⁸

Similarly absurd results occurred in the Commission's cases against "buying brokers"—concededly legitimate and independent brokers who, in acting as intermediaries between small suppliers and small wholesalers, bought for their own account and took title to the goods. Ignoring the realities of the situation, the Commission held that such brokers having taken title to the goods were themselves the buyers and that in receiving "brokerage" had literally violated Section 2(c).⁶⁹ In summarizing the effects of these cases, Professor Edwards concluded that "Viewed as a whole, the brokerage cases appear to include many that did not express the central purposes of the Robinson-Patman Act and that had effects partly inconsistent with those purposes. . . . Several . . . cases have forced voluntary chains and cooperatives to look for their income to other sources than sales commissions and to rely for their usefulness on service functions or co-operative buying rather than on an ambiguous agency relationship to buyers and sellers. This group of cases has done something to weaken the voluntary organizations in their struggle against the corporate chains. Two cases have prevented buyers from continuing to obtain market information at a discount, apparently with no other significant effect. In reducing the fluidity of the activities of buying brokers, several cases have substantially impaired the competitive strength of small wholesalers who are dependent on [less-than-carload

⁶⁴ See *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168-69; *Flotill Products, Inc.*, Docket No. 7226 (decided June 26, 1964) (dissenting opinion pp. 1-7); *F.T.C., Final Report on the Chain Store Investigation*, S. Doc. 4, 74th Cong., 1st Sess. 62-63 (1935); Rowe 332-37.

⁶⁵ *Modern Marketing Service, Inc. v. F.T.C.*, *supra*; *Independent Grocers Alliance Distribution Co. v. F.T.C.*, 203 F. 2d 941 (7th Cir. 1953).

⁶⁶ Attorney General's Report 191.

⁶⁷ See, e.g., *Modern Marketing Service, Inc. v. F.T.C.*, *supra*; *Southgate Brokerage Co. v. F.T.C.*, *supra*; *Briddle Purchasing Co. v. F.T.C.*, *supra*.

⁶⁸ *F.T.C. v. Herzog*, *supra*.

⁶⁹ *Southgate Brokerage Co. v. F.T.C.* *supra*.

lot] purchases and of the brokers who serve them, and probably have also weakened smaller producers in their competition with large producers."⁷⁰ Anomalous results, indeed, for a piece of antitrust legislation whose avowed aim is to protect the small businessman!

As I have already pointed out, the tide may have turned, and greater recognition seems to be accorded the view that a middleman rendering legitimate distribution services is entitled to compensation for those services, and that he should not be deprived of the compensation he has earned by labeling it "brokerage" or a payment "in lieu of brokerage".⁷¹ Is it not time that we also reexamined the view that a buyer, even a large chain buyer, who in fact legitimately reduces the seller's brokerage costs through his methods of buying is not, as has been previously held, receiving an illegal brokerage payment when the price to him is reduced accordingly,⁷² but is in fact receiving a legitimate reduction based on a cost saving to whose benefit both he and the ultimate consumer are entitled? And finally, is it not an appropriate time to reexamine Section 2(c), the unfortunate temptation its *per se* nature has in the past provided for an "easy" route to the entry of an order, and the proper function which a "phony brokerage" prohibition serves in the scheme of antitrust and a price discrimination law?

VII.

Section 2(d) of the Act also raises critical questions of public policy, especially because of the increased enforcement activity under that section in the last few years. That section prohibits a supplier from granting advertising and promotional allowances unless such allowances are made available on proportionally equal terms to all purchasers competing in the resale of its products. Like Section 2(c), it is a *per se* statute for which no proof of injury to competition is required and no cost-justification defense is available. Unlike 2(c), however, the courts have, over the opposition of the Commission, read the meeting competition defense into Section 2(d). However, the adaptation of that defense to the context of promotional allowances has yet to be fully explored.⁷³

There are a number of questions of current importance under Section 2(d), such as whether a supplier who makes advertising allowances available to large direct buying retailer customers must also make them available to its wholesale customers selling to retailers in competition with the direct buying retailers,⁷⁴ or, as I have suggested, to the retailer customers of such wholesalers.⁷⁵ These questions must be examined in the context of the fundamental purpose of 2(d) and the enforcement policy which has evolved under it.

The background of this section is similar to that of Section 2(c). Section 2(d) had its origin in the view that promotional and advertising allowances were forms of disguising price rebates. By making the prohibitions of 2(d) absolute, it was hoped to force such disguised rebates out into the open as price concessions where they could be dealt with under the price discrimination sections.⁷⁶ However, to treat *all* promotional allowances as disguised price rebates obviously conflicts with commercial realities. Cooperative advertising between supplier and distributor is an important and legitimate promotional device. Allowances which are part of such a program are certainly not disguised rebates. They are payments in compensation for legitimate and earned promotional services.

This fact raises two important questions. The first goes to the very heart of Section 2(d) as enacted. Should a supplier be prevented from making maximum effective use of a restricted advertising budget through a selective cooperative advertising program, even where such a program in no way injures the competitive process? Take for example the case of a small dress manufacturer who has a small advertising budget. If he wishes to engage in a cooperative promotional program, the law requires him to make available any allowances on proportionally equal terms to all his customers. If it were not for Section 2(d),

⁷⁰ Edwards 150-51.

⁷¹ *Edward Joseph Hruby v. F.T.C.*, *supra*; *Central Retailer-Owned Grocers, Inc. v. F.T.C.*, *supra*; *Thomasville Chair Co. v. F.T.C.*, *supra*; see *F.T.C. v. Henry Brock & Co.*, *supra*.

⁷² *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 106 F. 2d 667 (2d Cir. 1939).

⁷³ See *Equisite Form Brassiere, Inc. v. F.T.C.*, 301 F. 2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888, and the appeal following remand. Trade Reg. Rep. (1965 Trade Cases) ¶71, 491 (D.C. Cir. 1965).

⁷⁴ See *Fred Meyer, Inc. v. F.T.C.*, — F. 2d — (9th Cir. 1966) (rejecting the Commission's position).

⁷⁵ See *Fred Meyer, Inc.*, Docket No. 7492 (decided March 29, 1963) (dissenting opinion).

⁷⁶ *Simplicity Pattern Co. v. F.T.C.*, 360 U.S. 55, 68-70.

a rational manufacturer in such circumstances would choose those retail outlets with the greatest prestige and confine his advertising to them. Obviously, an important part of the value of cooperative advertising to the manufacturer lies in the desirability of linking one's product with the name of a well-known and reputable retailer. To require him to give advertising allowances to retailers who cannot effectively promote his product, or, worse yet, to those whose public image he positively does not want to link himself with, is to require him to allocate his advertising resources irrationally and uneconomically. Indeed, it also puts him at a disadvantage with his more powerful and larger competitors who may find that because of their superior advertising resources they need not engage in any cooperative advertising program. The rigid requirements of Section 2(d), as currently administered, thus raise serious questions of public policy. Once again, Professor Edwards has put the issue clearly:

The general policy of the law in a free private-enterprise system is to leave buyers free to choose their sources of supply, to buy as much as they want from these sources in such proportions as they wish, and to pay the market value of what they buy. The application of these principles to purchasers of advertising would suggest that it is inappropriate to require a buyer of advertising service to buy it from all his customers if he buys it from any and to buy it from them in stated proportions to which proportionate values are arbitrarily assigned. One might, with similar logic, require a steel manufacturer to buy railroad transportation service from every railroad in proportion, not to his need for service from each, but to the amount of his steel products purchased by each.⁷⁷

I do not suggest that this question of public policy raised by Section 2(d) is simple or easily resolved. If a manufacturer may budget his cooperative advertising program so as to select those purchasers with the greatest prestige, the result may be to confer substantial competitive advantages on large buyers. But, at the present time, Section 2(d) does not require any assessment of competitive impact. It seems to me, therefore, that the issue is drawn as to whether so serious an interference with a supplier's discretion in allocating his advertising resources is justified, in the absence of an inquiry whatsoever as to effect on competition. The utility of a *per se* approach in this area remains highly uncertain, at the very least.

Current enforcement policy under Section 2(d) also raises a second and somewhat related question. In determining whether a program of promotional allowances is "available" on proportionally equal terms, the Commission requires that a program be *functionally* available to all customers. Some customers, because of the low volume of their purchases, might be entitled to allowances so small that they could not be used for certain advertising media, such as newspaper advertising. The Commission has taken an increasingly rigid attitude in this regard, insisting that a supplier, in order to meet the "availability" requirements, must offer his customers alternative promotional programs which would be economically and functionally feasible for all customers.⁷⁸

This means that not only is a supplier not free to select the retailers with whom he will engage in cooperative advertising, but he is not free to choose the advertising media which have value to him. Indeed, as currently interpreted, 2(d) may require the payment of allowances for "promotional" services which are actually useless to the supplier, and, from the standpoint of selling his product, entirely worthless. I have recently pointed out that this approach is not required by the language, policy, or legislative history of Section 2(d).⁷⁹ And, indeed, by requiring a misallocation of economic resources for wasteful or useless advertising, present enforcement policy may bring Section 2(d) into direct conflict with the objectives of antitrust policy. This issue, too, requires thorough reappraisal.

VIII.

Perhaps the most critical question—one whose solution may obviate some of the problems that have been mentioned here—is how to reorient enforcement policy so as to focus on the central evil at which the Robinson-Patman Act was aimed, i.e., the misuse of large buying power. The Robinson-Patman Act was passed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing

⁷⁷ Edwards 158-59.

⁷⁸ *House of Lords, Inc.*, Docket No. 8631 (decided January 18, 1966).

⁷⁹ *House of Lords, Inc.*, *supra* (dissenting opinion), pp. 10-23.

power.”⁸⁰ In the words of its principal draftsman, “buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded.”⁸¹ From its inception, however, enforcement of the Robinson-Patman Act has been directed almost entirely against the seller.

In part, this derives from the failure of the original draftsmen who, although concerned mainly with buying power, constructed the Act to emphasize prohibitions on discrimination by the seller. The heart of the Act is in Section 2(a). Even Section 2(f) which is directed at the buyer, makes his liability turn upon whether the seller has violated Section 2(a). Section 2(d) is perhaps the best illustration of the divergence between the provisions of the statute and its underlying purpose to curb the abuse of concentrated buying power. Although enacted to prevent big buyers from obtaining price rebates disguised as promotional allowances, it is in terms directed solely at the seller, saying nothing whatsoever about the buyer.

The Commission's efforts to remedy the oversight in Section 2(d) may be especially instructive for any refashioning of the price discrimination law. In many instances suppliers are confronted with a uniform demand from a large chain buyer for discriminatory promotional allowances. Where such a demand is made of each of his competitors, and the business of the chain is vital for his survival, the supplier usually has no choice but to go along. But since in such circumstances, each supplier may be meeting competition in good faith, he may have a complete defense to a Section 2(d) charge. The Commission, recognizing both this dilemma and the fundamental objective of the Robinson-Patman Act to curb the abuse of large buying power, announced that the “enforcement policy best calculated to achieve the ends contemplated by Congress”⁸² was one directed at the buyer inducing the discriminatory promotional allowances, through a proceeding under Section 5 of the FTC Act.⁸³

A proceeding under Section 5 against the large and powerful buyer may not only remove the inequity of proceeding against the weak seller who is the buyer's victim. It may also eliminate the paradoxes generated by the meeting competition defense which were discussed earlier. Section 2(b), of course, recognizes a seller's legitimate interest in being free to take appropriate defensive action in a situation of competitive necessity. But where the Commission proceeds under Section 5 against a buyer who, by the exercise of coercive power, is the very source of the competitive necessity to which each seller must respond, is it not anomalous to permit the buyer to invoke the shelter of the seller's good faith defense? And if enforcement of the Act were primarily directed at the buyer, rather than the seller, would that eliminate the policy tensions reflected in existing controversy over the meeting competition defense, namely, whether competition at one level should be protected at the cost of impairing it on another level? Finally, would not a Section 5 approach directed at the abuse of buying power permit a more precise differentiation of those practices which impair competition from those which reflect the legitimate exercise of bargaining pressure upon which a competitive economy thrives?

To be sure, these questions are easier to ask than to answer. Legal rules unduly restricting buyers in exerting pressure for lower prices, especially where such lower prices are justified by efficiencies and economies in methods of buying, would harm competition. The Supreme Court has pointed out the importance of establishing standards which reconcile the objectives of Section 2(f) of the Robinson-Patman Act with broader antitrust policies.⁸⁴ But the appropriate line is hard to draw. Recently the Commission has tried to revivify Section 2(f); in my view, the impact of the actions it has taken has been felt largely in areas outside the central concerns of the Act. The great majority of recent 2(f) cases have attacked the buying practices of relatively small jobbers who have banded together to form buying groups in the automobile repair parts after-market, possibly as a defensive measure against the competition of powerful chain buyers or the competition of the auto manufacturers themselves.⁸⁵ The jobbers

⁸⁰ *F.T.C. v. Henry Brock & Co.*, 363 U.S. 166, 168.

⁸¹ Quoted in *Grand Union Co.*, 57 F.T.C. 382, 420.

⁸² *Moog Industries v. F.T.C.*, 355 U.S. 411, 413.

⁸³ *Mac Factor & Co.*, Docket No. 7717 and *Shulton, Inc.*, Docket No. 7721 (both decided July 22, 1964).

⁸⁴ *Automatic Canteen v. F.T.C.*, 346 U.S. 61.

⁸⁵ *Alhambra Motor Parts*, Docket No. 6889 (decided Dec. 17, 1965) (appeal pending in the Ninth Circuit); *National Parts Warehouse*, Docket No. 8039 (decided Dec. 16, 1963), *aff'd sub. nom. General Auto Supplies, Inc. v. F.T.C.*, 346 F. 2d 311 (7th Cir. 1965); *Mid-State Distributors v. F.T.C.*, 287 F. 2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838; *American Motor Specialties, Inc. v. F.T.C.*, 278 F. 2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884.

involved in these cases are hardly the type of large buyers at whom Section 2(f) was originally directed. This hardly represents the reorientation of enforcement policy directed at large buyers which has been suggested.

IX.

The problems I have discussed do not exhaust the areas in which the Robinson-Patman Act and its administration may come in conflict with broader antitrust policy. But it should be clear, I believe that reexamination of the law is essential. In no field of the law more than in antitrust is there need for periodic review of the adequacy of existing rules and procedures. And no segment of our antitrust laws is more in need of such reappraisal than the Robinson-Patman Act. A dynamic, competitive economy, as Mr. Justice Fortas has recently reminded us, cannot afford a mechanical or sterile antitrust jurisprudence:

"[A]ntitrust . . . is too important to be allowed to function as formula. Its effects upon our life are too profound for us to permit it to operate as mere ritual, without analysis of its impact, without fundamental reappraisal of its effect upon changing institutions, practices and problems, and without direction. There must be more to the administration of antitrust than a handbook on 'how to do it'."

* * * * *

" . . . [O]ne would hope that, by now, it would be possible really to survey the past, to appraise the present and to consider the future in terms of the effect of antitrust policies, theories and practices as they are and as they might be modified. . . ."

* * * * *

"I know that fear is one of the factors inhibiting economic and policy diagnosis and prognosis of antitrust. Everybody is afraid he will be worse off if the realities of antitrust are confronted. . . . [B]ut, after all, democracy is the art of living dangerously, and antitrust is exceedingly democratic. And as I see the vast changes that have taken place in production, distribution and consumption—and the even greater changes that are imminent—I become more convinced than ever that we cannot providently continue to play the game of antitrust-in-the-dark. I hope that if and when light is brought to bear upon the economic and social effects of antitrust, it will disclose that there is no reason to abandon or weaken the fundamental policy of insisting on competition. I should hope, indeed, that it would lead to reexamination of our theory of competition and to the illumination of methods and standards by which that theory can be more effectively—and constructively—applied."⁸⁰

It is in this constructive spirit that a review and reappraisal of the Robinson-Patman Act and its administration should be undertaken.

ANTITRUST ENFORCEMENT: RETROSPECT AND PROSPECT

(Remarks by Philip Elman, Federal Trade Commissioner, Before First New England Antitrust Conference, Sponsored by the Boston Bar Association and the Greater Boston Chamber of Commerce, Boston, Mass., March 31, 1967)

It is a truism that the biggest and best agency of antitrust enforcement is the private bar. When businessmen encounter what they perceive to be an antitrust problem, they usually seek and follow the advice of counsel—and not merely out of some misguided sense of civic duty. They cannot afford not to. Businessmen do well to avoid antitrust litigation like the plague. It is burdensome, time-consuming, and unsettling; and it can be very expensive indeed. So if antitrust could be reduced to a manual of simple do's and don'ts for the guidance of lawyers and their clients, the problems of enforcement would largely disappear.

But, alas—and this explains, too, why working in this area is both so challenging and so frustrating—the elements of antitrust are charged with complexities and contradictions. We begin with statutory provisions which range from the majestic generalities of the Sherman and Federal Trade Commission Acts to the specific rigidities of the Robinson-Patman Act, with its dazzling complex of conditions, provisos, justifications, and defenses. Superimposed upon the statutory provisions, to the point almost of obliterating them from view, is an impressive

⁸⁰ 30 ABA Antitrust Section Rep. 131, 134-35 (address given April 14, 1966).

array of judicially established principles extending from the broad and amorphous Rule of Reason (in capital letters) to the simple, and perhaps oversimplified, *per se* rules. And, most important of all, these principles and rules must be applied to commercial practices and transactions of every type and description which, more often than not, cannot be fitted into nice, neat pigeonholes, because they reflect instead the infinite variations of an extraordinarily dynamic and expanding economy.

At either end of the antitrust spectrum—the black-and-white areas—relatively simple and easily applied rules are not merely sufficient; they are an enforcement necessity. In regard to such practices, for example, as agreements of competitors to fix prices, divide markets or territories, or boycott suppliers, rules and presumptions dispensing with elaborate market analysis are both essential and justified. Where business behavior is demonstrably predatory, unfair, or anticompetitive, it is comparable to traditionally criminal or tortious conduct amenable to correction by traditional judicial remedies. The essence of a *per se* rule is that the practice involved should be condemned outright, whatever the circumstances of its use, because experience has shown that the gains to the public from its absolute prohibition far outweigh any possible losses. In dealing with such conduct, antitrust enforcement has, I think, been quite successful. Here, the use of conventional judicial procedures and remedies, in lawsuits brought in the federal courts by the Antitrust Division and private plaintiffs, has been appropriate and effective.

In the vast and largely unexplored middle of the antitrust spectrum, however, lie the difficult and complex gray problem areas—from which have come such additions to our vocabulary, for example, as conglomerate mergers, oligopoly power and undue concentration, “follow-the-leader” pricing, vertical integration, reciprocity, and dual distribution. With regard to questioned conduct in these areas, moral judgments are usually difficult if not impossible, and generally irrelevant. If such conduct is to be condemned, it should be because of its undesirable economic or social effects—and not because those who engage in it can be found to have acted with evil or predatory motives.

In these gray areas, antitrust cannot be played as a cops-and-robbers game with the “good guys” on one side and the “bad guys” on the other. Here, a determination that certain business conduct ought to be forbidden for reasons of public policy should carry no necessary connotation of unethical or immoral behavior; indeed, it should be made in a proceeding and in an atmosphere where no one is stigmatized as a criminal or wrongdoer. And it is especially in relation to trade practices falling within these gray problem areas, I believe, that a specialized, expert administrative agency, not functioning like a prosecutor or a court of general jurisdiction, is uniquely qualified to make an indispensable contribution to antitrust enforcement.

We have grown so accustomed to litigation in the courts as the process by which the antitrust laws are enforced that we forget that it was dissatisfaction with this process which led Congress in 1914 to establish the Federal Trade Commission. There was a general feeling then that the Sherman Act was ineffective and bred too much uncertainty. Many believed that antitrust enforcement by means of lawsuits brought by the Attorney General had failed to stem a rising tide of monopoly. If full-blown Sherman Act violations were perhaps amenable to judicial correction, other restrictive practices, less palpable but no less harmful to the economy, were continuing unchecked. Congress considered that the prevention of such restraints in their incipency was too big and complex a job for untrained judges, unaided by expert assistants and compelled to work within the limits of traditional adversary litigation. There was widespread agreement upon the need for an independent, expert administrative agency with broad and flexible powers to investigate and resolve trade regulation problems.

It was not contemplated that the Commission would sit, like a court, as a passive arbiter of controversies brought to it fortuitously. Its role was to be positive and constructive, to adopt and actively pursue planned programs and policies to effectuate the basic goals of the antitrust laws. Unlike a court or prosecutor, the Commission's job would be to conduct general economic studies and investigations; to spot problem areas and probe for practices and trends threatening free and fair competition; and to identify acts and practices which, if unchecked, might lead to full-blown monopolies or unreasonable restraints of trade. The Commission was to be a reservoir of information on the structure

and functioning of the economy and specific industries and markets—information which could be drawn upon not only by the Commission but by the Congress, the President, and other agencies of government in developing sound policies and programs in the field of business regulation.

As the legislative history of the Clayton and Federal Trade Commission Acts shows, the Congress of 1914 intended the Commission to supplement, and not to duplicate, the work of the courts and the Department of Justice in antitrust enforcement. The creation of a commission, equipped with a broad array of flexible powers permitting a comprehensive approach to trade regulation problems in their full dimensions, reflected a basic shift in emphasis: from punishment and moral opprobrium to administrative adjustment, correction, and regulation.

Yet, today, conventional case-by-case litigation in the courts continues to be the principal method of antitrust enforcement, even in those gray problem areas where novel and difficult questions of law and policy are presented that call for extensive investigation and analysis of complex economic facts. Today, no less than in 1914, the ability of courts of general jurisdiction to handle such questions is subject to inherent limitations. The Supreme Court, in particular, should not be expected to act as a High Court of Trade Regulation, making determinations of public policy on economic issues.

The Federal Trade Commission, on the other hand, was intended by Congress to overcome the inadequacies and weaknesses of judicial enforcement. As an instrument for helping make the antitrust laws more certain, more predictable, and more effective, the Commission is what the federal judiciary is not: a single tribunal whose duty is trade regulation. Congress considered that a commission would be able to make reliable predictive judgments regarding the competitive effects of questioned business conduct. An administrative agency has methods of finding facts, and basing judgments of policy on its accumulated knowledge and specialized experience, that courts do not generally have. A judge typically knows about a general economic problem little more than what he can extract from the record of the particular case. A commission, however, can and should draw upon its collective institutional experience and expertise, as well as relevant economic studies and reports. Difficult factual and policy determinations required under the merger statute, for example, are most reliably made by a tribunal constantly immersed in problems of competition and trade regulation, rather than by a tribunal where such matters may be novel and esoteric.

Consider, for example, the problem of conglomerate mergers—where determinations of legality cannot be based on a “nose-counting” of competitors or simple market-share data but may require detailed examination of the structure and behavior of relevant markets or industries. The probable effects of the merger on concentration, on potential competition, and barriers to entry, may be of critical importance in judging its legality. But to obtain, sift, and evaluate such “complex and elusive” economic facts is not a task for which courts of general jurisdiction are well suited. The courts may perhaps—for what of a better alternative—adopt drastically oversimplified tests of illegality. But if the statute is too strictly enforced in the name of simplicity, there is an obvious risk of unduly retarding economic growth and efficiency.

There is essential truth and validity in the cliché that a regulatory agency like the Federal Trade Commission is an “arm” of the Congress. The Commission possesses a great variety of functions and powers: It conducts and publishes economic studies, and industry and market analyses; it proceeds against alleged violations of law; it adjudicates, and issues cease-and-desist orders; and it promulgates general rules, guides, and statements of policy and enforcement intentions. All of its various activities, however, should be directed to a single central objective: the formulation and administration, within the general scope and limits of the Commission’s statutory authority, of a body of subsidiary principles, rules, and policies effectuating the basic regulatory goals established by Congress. In all that it does and should do, the Commission acts as the surrogate of Congress and the delegate of defined and circumscribed Article I, Section 8, legislative power. In this essential and crucial respect the Commission is very different from a prosecuting arm of the Executive.

Almost the first question that a newcomer to antitrust asks is: How do the Antitrust Division and the Federal Trade Commission fit together, and where does the jurisdiction of the one end and the other begin? The answer usually given is that their responsibilities are concurrent and overlapping: that the

Antitrust Division enforces the Sherman Act, the Commission enforces the Federal Trade Commission Act, and they both enforce the Clayton Act. One must quickly add, however, that, as the Supreme Court has held, the Federal Trade Commission Act covers not only all conduct which violates the Sherman Act, but also that which conflicts with the basic policies of the Clayton and Sherman Acts. The area of overlap, on paper at least, is thus very extensive indeed. The next question is: How does "coordination" work out in actual practice? The answer is that there is a very satisfactory liaison arrangement between the two agencies: they are in constant daily communication to make sure that they do not get in each other's way by investigating the same companies at the same time for the same alleged violations.

It seems to me that the time has come to reassess and redefine, in a more meaningful way, the respective functions and responsibilities of the Antitrust Division and the Federal Trade Commission. We should develop a more creative and fruitful relationship between the two agencies. Cooperation should mean more than not competing with each other for the same defendants. What is called for is a merger of the two agencies' respective resources and skills. They should form a joint venture or partnership for antitrust enforcement.

Specifically, I would urge that the Federal Trade Commission should concentrate its resources on fulfilling the role for which it was originally created in 1914. The Commission's role as policeman and prosecutor should be substantially deemphasized. The job of investigating and prosecuting specific violations of law by particular companies can be, and is, handled very well by the Department of Justice; the Commission was not created by Congress to duplicate those functions. The Commission should look to those areas of antitrust enforcement where an administrative agency, with distinctive powers of gathering and analyzing economic data, has special competence. Whether through adjudication, rule-making, issuing reports and guidelines, or otherwise, the Commission's primary and principal job should be to assist in the orderly development of a coherent body of antitrust policies and doctrines, in harmony with economic realities and the basic regulatory goals established by Congress.

In no field of the law is there greater danger that slogans and shibboleths will be substituted for hard, realistic, and dispassionate analysis. A prime function of the Federal Trade Commission should be to prevent the antitrust laws from degenerating into a code of sterile, ritualistic verbal formulas unrelated both to the facts of competition and the needs and realities of our economic system. Especially in regard to the gray problem areas I have described, the Commission can do much to identify and analyze unresolved questions of trade regulation law and policy.

A larger and more creative role for the Federal Trade Commission in the scheme of antitrust enforcement would also imply an expansion, not a diminution, of the responsibilities of the Department of Justice. Specifically, I would favor an expansion of its investigative and prosecutorial functions to cover the whole area of antitrust violations. It is unfortunate that the Antitrust Division has remained relatively aloof from the kinds of unfair and anticompetitive trade practices which the Commission deals with under the Robinson-Patman Act or the Federal Trade Commission Act. As the Supreme Court has stated, there is a great need for harmonizing all of the various antitrust provisions into a cohesive body of law and policy.

Where, after investigation, the Antitrust Division finds a probable violation of *any* of the antitrust laws, it should have a choice of proceeding either in a federal district court or before the Commission, whichever would be the more appropriate tribunal. Especially where the matter falls within an area of demonstrated Commission expertise, the Department may consider it to be the proper tribunal in which to try the case.

This proposal does not necessarily require amendment of existing law, which permits the Attorney General to intervene in Commission proceedings under the Clayton and FTC Acts. (He has never done so.) Nor would it require the Commission to abdicate its important responsibilities for the wise selection of cases to be tried before it. Where cases are recommended to it for complaint by either the Antitrust Division or its own staff, the Commission would still be obliged to assure itself that initiation of a formal proceeding would be in the public interest. This determination could and should be made by the Commission without embroiling itself in the substantive facts and evidentiary details of the investigation. Its inquiry, rather, would be whether the case is of such a nature that trial before the Commission, rather than a district court, would be more appropriate.

The Commission, I repeat, should eschew the role of policeman or prosecutor—a job better left to the Department of Justice. A Commission member who, at the pre-complaint stage, does not review investigative files and avoids making his own assessment of the evidence protects himself against the charge of acting unfairly, by being both prosecutor and judge in the same case. To the extent that the Commission limits its role as policeman and prosecutor, it would enlarge its contributions to the analysis and solution of trade regulation problems. It would thereby improve, also the quality as well as the fairness of agency adjudication.

The failure to differentiate clearly the role of the Federal Trade Commission from that of the Department of Justice in antitrust enforcement seems, in retrospect, most regrettable. As I have already observed, the antitrust laws have been quite successful in outlawing and preventing many egregious and destructive anticompetitive practices. But in some industries today there is serious question whether there exists enough of the right kind of competition. The conception of the Federal Trade Commission was basically responsive to the needs of the monopoly problem; the deficiencies have been chiefly in the execution. It is a fair question whether the unfinished business of antitrust and the unfulfilled promise of the Federal Trade Commission are not intertwined.

Wilson and Brandeis conceived the Commission as a "new device in administrative machinery," whose "purpose in respect to restraints of trade was prevention" and not punishment. They saw the Commission as "an indispensable instrument of information and publicity"; "a clearing house for the facts" by which both the public and businessmen would be guided; "an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate." This should be a time for reexamination and renovation, not complacency or indifference, in antitrust enforcement. We should seek to fulfill the vision of Wilson and Brandeis, and the Congress which enacted the great antitrust acts of 1914.

SOME CRITERIA FOR APPLYING INDUSTRY-WIDE ENFORCEMENT MEASURES UNDER THE ROBINSON-PATMAN ACT

(Statement by Everette MacIntyre, Commissioner, Federal Trade Commission, before the Indiana Continuing Legal Education Forum, University of Notre Dame, South Bend, Ind., September 25, 1965)

The question of where and how industry-wide enforcement measures should be applied under the Robinson-Patman Act¹ is one of the most difficult issues currently facing the Commission. It has been argued, and possibly with some logic, that to be completely fair the Commission should proceed simultaneously against all industry members suspected of violating the price discrimination act. Obviously, this is not possible in all cases where litigation is employed simply because of the Commission's restricted budgetary and manpower resources. The Commission must weigh the desirability of proceeding against all law violators simultaneously in the light of its limited resources, taking into consideration the need for proceeding at least against obvious abuses on the part of the more prominent members of the industry concerned. The solution of where the balance is to be placed is not an easy one. In fact, this dilemma brings to mind Mr. Justice Frankfurter's aphorism in another context that "A confident answer cannot be given; some answer must be given."²

The Commission has considerable discretion in this area, as the Seventh Circuit remarked recently:

"... The Commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected. . . ."³

The very latitude given the Commission in this connection, however, makes it mandatory that such discretion be exercised wisely.

Clearly, the variables facing the Commission in determining whether a situation is ripe for industry-wide enforcement measures include among their number

¹ 49 Stat. 1526 (1936); 15 U.S.C. 5 (1965).

² *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 78 (1953).

³ *United Biscuit Company of America v. Federal Trade Commission*, — F. 2d — (7th Cir. 1965).

the structure of the industry, the nature of the alleged unfair trade practice, and the enforcement tools available to the Commission. Before turning to these, however, it might be helpful to set the mood, so to speak, by referring to the testimony of the Chairman before the Senate Subcommittee of the Committee on Appropriations in the spring of this year.

A few references to that testimony will, I am sure, make it clear that the FTC now has the will and the desire to turn to industry-wide enforcement measures as opposed to individual case-by-case enforcement through litigation whenever possible. For example, the Chairman, speaking for the Commission, advised that it has now "turned a difficult corner in veering from patternless hit-and-miss law enforcement to a guidance role that invites, encourages, and backstops efforts of American business to police itself,"⁴ and that over a three-year period this agency has attempted to change its emphasis in enforcement procedures by minimizing reliance on the case-by-case approach.⁵ Significantly, the enforcement bureaus have been instructed that they are no longer to report to the Commission recommendations on single complaints without further advising as to whether the alleged unfair practice is general in the industry. If the alleged law violation is widespread, then the staff is expected to recommend some program and plan for dealing with the industry-wide nature of the problem.⁶

Before dealing with industry-wide discriminatory practices, the Commission, of course, must be in a position to ascertain the extent of the alleged violation of law. Accordingly, the manner in which Robinson-Patman Act proceedings are initiated at the Commission deserves some consideration. Price discriminations are generally not a matter of public record; rather, they are hidden from view. Under the Robinson-Patman Act, unlike the merger statute, the staff is generally not in a position to spot troublesome areas merely from a reading of available publications. Usually, the first indication of illegal price discriminations comes to the Commission by way of complaint from aggrieved industry members. The result in the past had initially been issuance of complaint with a view toward putting an end to the individual violation found. Frequently the investigation directed to an individual respondent or group of respondents developed other cases and in that manner many proceedings over a period of time developed industry-wide impact. Of necessity many of the proceedings were not undertaken concurrently, giving rise to a cry of unfairness. In view of current policy, the Commission, in the future, will emphasize industry-wide enforcement proceedings more than in the past. This dictates it be furnished with more complete economic data with respect to the pricing practices of those industries under consideration in order to put administration of the Act on a more rational basis. Effective industry-wide proceedings under the Robinson-Patman Act require planning.

Planning, which is essentially another label for research, is, of course, prerequisite to the effective discharge of the regulatory duties of any administrative agency.⁷ In short, it may be necessary to further integrate the activities of the Commission's professional legal and economic staffs in order to facilitate industry-wide proceedings under the Robinson-Patman Act and in other areas. In some proceedings this has already occurred and I hope to see more of it in the future. I think the administration of the Robinson-Patman Act deserves no less. While the structure of an industry will undoubtedly influence competitive behavior, unfair practices such as discriminatory pricing will inevitably influence both the structure of an industry and the viability of competition within that industry. For that reason, if no other, the Commission should actively seek out the areas where broadscale rule making or adjudicatory proceedings will have the widest impact.

Before turning to current and recent industry-wide proceedings under the Robinson-Patman Act and possible future developments along these lines, it may be in order to briefly delineate the investigative, policy making and law enforcement procedures available to the Commission. Industry-wide proceedings under the Robinson-Patman Act and the other statutes entrusted to the Commission for administration may come under three broad categories, namely, investigation or fact finding, rule making, and adjudication. Basic to everything the Commission does, of course, is fact finding. It is the prerequisite for deter-

⁴ Testimony, Paul Rand Dixon, Chairman, Federal Trade Commission, Hearings, Subcommittee of the Committee on Appropriations, United States Senate, Independent Offices Appropriations 1966, 89th Cong., 1st Sess. (1965), p. 323.

⁵ *Id.* at 827.

⁶ *Id.* at 828.

⁷ See Friendly, *The Federal Administrative Agencies—The Need for Better Definition of Standards*, Harv. Univ. Pr. (1962), p. 162, citing Oppenheim, *The National Transportation Policy and Inter-carrier Competitive Rates* (1945), pp. 123-124.

mining whether the Commission should proceed at all and, if so, whether the problems posed are best resolved by rule making, litigation or informal settlement.

In those instances where a preliminary investigation shows that discriminatory practices are widespread, the Commission, in order to effectively investigate the particular industry on a broad scale without dissipating its investigative resources, may require the industry members concerned to file Special Reports under Section 6(b) of the Federal Trade Commission Act⁸ with respect to the alleged violations of law.

Where a broad-scale investigation is to be conducted of an industry composed of many smaller units, conservation of the Commission's investigative resources almost makes the utilization of the Section 6(b) process mandatory. In fact, the Special Reports lend themselves particularly to the investigation of alleged Robinson-Patman Act violations. Especially notable in the exercise of the Commission's powers under this statute have been the Commission's investigation, relating to Section 2(c) of the Robinson-Patman Act, in the citrus fruit industry⁹ and relating to Section 2(d) of the statute in the wearing apparel industry,¹⁰ involving several hundred respondents. These proceedings, which laid the foundation for numerous cease and desist orders in these industries, are classic examples of the Commission's use of the power to insure maximum investigative coverage in the case of a particular industry while insuring that the Commission's investigative manpower would not become bogged down in that proceeding but remain available for other projects.¹¹

The liberal use of the rule making powers of this Agency, of course, at first glance seems to be the ideal vehicle for securing industry-wide compliance with the law. Rule making "is the best procedure we have for allowing large numbers of parties to express what they want with respect to law or policy that will affect them".¹² It is undoubtedly the ideal proceeding for dealing with the conflict between important industry segments over the interpretation of the law.

⁸ Section 6(b) requires:

"To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission." 38 Stat. 721 (1914); 15 U.S.C.A. Sec. 46 (1965).

⁹ In April 1962 orders to file special reports were sent to approximately 92 fresh fruit grower-shippers in Florida and some 32 in Arizona and California. Information supplied by the Department of Agriculture indicated that the 124 order recipients shipped approximately 95% of the fruit consumed fresh in the nation.

The reports provided enough information for the filing of some 84 grower-shipper complaints. In each case the respondent executed a consent agreement. Their acquiescence apparently was brought about by the fact that illegal brokerage payments had further reduced profit margins which had declined sharply because of rising labor costs. The growers could not have agreed among themselves to cease making such payments, because of Sherman Act implications.

The special reports also furnished enough information regarding the receipt of brokerage payments by buyers to enable the issuance of some 40 buyers' complaints. Most of those matters were also resolved by consent.

¹⁰ The Commission opinion in *Abby-Kent Co., et al.*, F.T.C. Docket C-328, *et al.* (1965), pp. 1, 2, gives the following statistics with respect to the Section 6(b) investigation pursued in that industry:

"In early 1961, following the receipt of many complaints from small apparel retailers, small manufacturers and apparel salesmen, the Commission addressed Orders to File Special Reports to some 232 of the nation's leading buying offices and chain department and specialty store complexes. The orders required the buyers to submit, among other things, the names of apparel suppliers who had granted advertising and promotional allowances during a given twelve-month period, together with the amounts and purposes of the payments. . . .

"A tabular sheet for each supplier was prepared from the buyers' Special Reports. They indicated the customers each favored and the amounts paid. In February 1962 the Commission unanimously decided to address Orders to File Special Reports to the 250 sellers who granted the largest amounts of allowances to the greatest number of buyers. Later that year when it was discovered that certain significant sellers had been omitted, some 60 additional orders were transmitted.

"A majority of the Special Reports filed provided sufficient documentation to give the Commission reason to believe that violations of Section 2(d) of the amended Clayton Act existed. . . ."

¹¹ Further examples of the Commission's effort to utilize new methods in order to insure maximum effect from its limited resources in industry-wide proceedings have been fact finding hearings at which industry members appear before the full Commission, as, for example, in the gasoline hearings. See *infra*.

¹² Davis, *Administrative Law*, § 6.13 (1965).

The Commission's most significant procedures in the rule making category are the trade practice and trade regulation rules.¹³ Trade practice rules are designed to eliminate and prevent unlawful trade practices on a voluntary industry-wide basis¹⁴ and have been utilized by the Commission since at least 1919.¹⁵ These rules, generally promulgated at the request of the particular industry, seek to interpret and inform businessmen of the legal requirements applicable to certain practices widespread in the industry and to provide a basis for voluntary and simultaneous abandonment of illegal conduct by industry members.

The newest rule making procedure at the Commission, and possibly the most promising vehicle for securing industry-wide compliance with the law, is the trade regulation rule procedure adopted in 1962. In the case of both the trade regulation rule and trade practice conference procedures, the Commission's rules of practice make ample provision for affording the interested parties an opportunity to be heard prior to promulgation of the rule.¹⁶

The significant difference between the two types of rule making procedures, which are both expressions of Commission policy, is simply that in the case of the trade regulation rule, the latter is accompanied by findings of fact.¹⁷ Accordingly, in an adjudicative proceeding for violation of a trade regulation rule, the Commission may rely not only upon the proposition of law or policy contained in the rule, but also on the underlying factual matters determined in the rule making proceeding.¹⁸

The use of the rule making power in the Robinson-Patman area, however, requires particular caution on the part of the Commission. Too often in the past have rules purporting to interpret this Act in effect debased the process by merely paraphrasing the words of the statute. On the other hand, the Robinson-Patman Act, unlike the Federal Trade Commission Act, is a fairly specific statute. Accordingly, the Commission must exercise considerable care that by its interpretation of the statute it does not in effect amend the Act.

The rule making approach will not be applicable in all instances of price discrimination whether of industry-wide prevalence or not. The value of a rule on an issue in a settled area of the law is debatable. In addition, the issues to which the rule is to address itself should be fairly narrow and capable of specific definition in the context of the industry to which it is addressed. As Professor Davis has noted, the attempt to clarify a whole area through a rule or policy statement would often be foolhardy.¹⁹ In short, a rule purporting to deal with every conceivable problem under the Act might raise as many problems as it seeks to dispel. Accordingly, while the rule making process has a great deal to recommend it when the Commission is faced with widespread practices violative of the price discrimination act, it is a procedure which must be used with discretion.

One approach to industry-wide law enforcement through litigation may be characterized by the attempt to prosecute industry leaders or at least the most flagrant practitioners of price discrimination and to secure industry-wide compliance as a result of the example made. On the other hand, the Commission may proceed against all, or at least a majority, of the industry members involved

¹³ Allied to the FTC's rule making procedures are its administrative interpretations of the law, entitled Guides. Of the Guides currently in effect, only one has application to the Robinson-Patman Act, namely, the Guides for Advertising Allowances and Other Merchandise Payments, adopted May 19, 1960, 1 CCH Trade Reg. Rep. ¶ 3980 (1965). These Guides, however, do not focus on the specific problems of a particular industry. As a result, they do not have the same potential for achieving compliance with the law on an industry-wide basis as do trade practice or trade regulation rules drafted to deal with concrete problems.

¹⁴ An example of one of the more exhaustive recent attempts to codify the requirements of the Robinson-Patman Act for the benefit of an entire industry is the Trades Practice Rules for the Phonograph Records Industry, 16 C.F.R. 67 (1964).

¹⁵ For a discussion of the early development of the trade practice conference procedure, see Blaisdell, *The Federal Trade Commission*, Colum. Univ. Pr. (1932), p. 92.

¹⁶ Section 1.67, Commission's Rules of Practice.

¹⁷ The difference between trade regulation rules and trade practice conference procedures is a difference in degree. "As a practical matter, then, trade practice rules are not merely voluntary and advisory: they are, in many instances, enforceable and enforced." (Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, and Accompanying Statement of Basis and Purpose of the Rule issued June 22, 1964, p. 143.)

¹⁸ The Commission is not obliged to prove anew disputed issues of fact in an adjudicative proceeding against those industry members allegedly violating the rule if findings on such facts had been previously made in the proceeding promulgating the rule. (*Id.* at 146.)

¹⁹ Davis, *supra* note 12.

in the alleged violation of law. The Commission has utilized both approaches and both alternatives have their disadvantages. In the first case, the Commission may be criticized for singling out certain industry members, leaving them at a disadvantage vis-a-vis their competitors, while in the second case it has sometimes been argued that the Commission is harassing business as well as forcing a price uniformity at variance with the general purpose of the antitrust laws.

As in certain other periods of its development, the Commission's enforcement pattern is at present in a transitional stage. Therefore, no hard and fast rules can be laid down as to the industries or types of law violations which will be dealt with in an industry-wide fashion or the investigational or the law enforcement measures which will be applied in a particular instance. A cursory examination of three recent or current proceedings of industry-wide impact, namely, the trade practice conference rules for the fresh fruit and vegetable industry, the gasoline marketing inquiry and the so-called wearing apparel cases may, however, foreshadow future trends in Commission application of law enforcement techniques on an industry-wide basis in the price discrimination area. My discussion here, it should be noted, of course does not pretend to be an exhaustive citation of all current industry-wide proceedings relating to discriminatory pricing.

The trade practice rules for the fresh fruit and vegetable industry, promulgated April 15, 1965,²⁰ are one of the more noteworthy recent examples of the Commission's exercise of its rule making power in the area of price discrimination. This rule making proceeding, interestingly, had its genesis in the investigation and subsequent adjudicatory proceedings brought in the citrus fruits industry. These, of course, resulted in numerous cease and desist orders against growers and buyers, involving more than 100 complaints and orders.²¹ As a result, those industry members not under order and the related fresh fruit and vegetable industry both desired guidance.

Another factor compelling the citrus and fresh fruit and vegetable industries to request a trade practice conference were certain Commission decisions, namely, *Flotill* and *Hruby*,²² which to some extent had unsettled previous judicial construction of the "except for services rendered" proviso in Section 2(c) of the Robinson-Patman Act. This issue, among others troubling the industry, posed the question of whether buyers or their agents could be compensated for brokerage services performed by the buyer. Other important questions relating to the interpretation of Section 2(c) also were involved.

This rule making proceeding is noteworthy, passing over, for the moment, the substantive aspect, because it shows the potential of rule making for settling questions in an uncertain area of the law where important segments of the industry are at odds on the proper interpretation of a statute.²³

Significantly, the hearing on the proposed rules in October of 1964 was held before the full Commission. The increasing number of hearings in which the full Commission hears the views of different industry segments on unfair trade practices and the law enforcement problems facing them is, I believe, a salutary development. The Commission as a whole, as a result of such hearings, is forced to acquaint itself with the problems of the industry being regulated in a manner not possible merely from the reading of a cold record or the report of a single Commissioner or a staff member designated to hold hearings.

²⁰ 20 F.R. 5331 (1965).

²¹ E.g., *Florida Citrus Exchange*, 53 F.T.C. 493 (1956); *Edison Produce Co.*, 60 F.T.C. (1962); *Exchange Distributing Co.*, 61 F.T.C. 1 (1962); *Hruby Distributing Co.*, 61 F.T.C. 1437 (1962).

²² *Flotill Products, Inc., et al.*, Docket No. 7226 (1964); *Hruby*, *supra* note 21.

²³ On the one side of the issue, the proponents of the proposed rules, namely, the United Fresh Fruit and Vegetable Association and the Florida Fresh Citrus Shippers Association, among others, contended that brokerage on the basis of recent Commission decisions should not be forbidden unless no services were rendered by the other party. They argued that if services are performed by a businessman purchasing the goods, he is entitled to be recompensed and Section 2(c) does not apply. On the other side, among others, and this shows the wide impact which the rules were thought to have, was the National Association of Retail Grocers, whose interests are not limited to fresh fruits and vegetables alone, as well as the National Food Brokers Association. Both contended that permitting brokerage payments for services performed by the buyer or his agent would give powerful buyers considerable leverage, helping them to receive unearned price advantages and would in fact have the potential of jeopardizing the whole price discrimination act. In addition, a considerable number of individuals and representatives of associations in the food industry also argued on this issue pro and con.

In many ways the fresh fruit and vegetable rules present a textbook example of the Commission's use of its rule making power to secure compliance with the law on the part of an industry constituted of many businessmen. Further, the central problems dealt with, though of considerable importance, were narrow and readily defined. In short, the issues presented were of the type that lend themselves to the rule making process.

Conceivably, the most significant current industry-wide proceeding connected with Robinson-Patman Act problems is the broad inquiry into gasoline marketing announced on December 30, 1964. To my regret, the Commission, in launching this venture, coupled the inquiry with the dismissal, on administrative grounds, of those adjudicative cases in the gasoline marketing field then awaiting Commission decision. Findings of fact in those proceedings might well have given us a head-start in the current industry-wide proceeding.²⁴ Nevertheless, the current inquiry is an important proceeding and I hope that its outcome will benefit both the industry and the consumers it serves.

The broad inquiry into gasoline marketing and the adjudicative cases preceding it had their genesis in the price wars recurring throughout the nation. This situation impelled the Mid-Continent Independent Refiners Association (MIRA) to petition the Commission for a trade regulation rule under the Robinson-Patman and Federal Trade Commission Acts with apparently the primary purpose of preventing major gasoline companies from using the financial advantage derived from their integrated activities and geographic diversity for the purpose of subsidizing price discriminations and sales below cost to their independent competitors' alleged disadvantage. In effect, MIRA asks the Commission, under the Robinson-Patman Act, to embody in the rule a presumption that brand names will not affect the determination of like grade and quality in the case of gasoline. And, further, MIRA requests that the Commission promulgate a rule that it shall be *prima facie* evidence of injury when a territorial price discrimination results in a reduction of customer price differentials between the seller's gasoline and those gasolines normally selling at a lower price.²⁵

The MIRA proposals, on the surface at least, lend themselves to an industry-wide rule making proceeding. The issues presented by the proposed rule are defined in terms of the oil or gasoline industry. Further, the proposed rule deals with sufficiently narrow issues so that if enacted it would be a meaningful guide and not an amorphous paraphrase of the generalized language of the statute, which itself would later require construction. This is not to say, of course, that an evaluation of all the facts brought to light during this hearing will necessarily support the promulgation of MIRA's proposed rules.

The suggested rules at the hearing before the Commission were the subject of spirited debate on the part of industry members participating in the hearings held in May. The clash of views visibly illustrated to the Commission the varied structure of the industry and the complexities of the problems involved in regulatory efforts to resolve the problems of gasoline price wars.²⁶ In short, the proceeding evidences the Commission's concern to utilize the industry-wide proceeding as a vehicle to equitably deal with the problems of industry members, ranging from the largest corporations in the nation to the service station operator in your own neighborhood. If nothing else, it shows a willingness to engage in industry-wide proceedings on a very ambitious scale, indeed.

As in other industry-wide proceedings dealing with the price discrimination problem, the Commission is again faced with the issue of whether an industry-wide regulatory effort might have the opposite result of that intended. Certainly, one of the crucial arguments in opposition to the rules proposed by MIRA seems to be the objection raised in almost all broad-scale proceedings dealing with the

²⁴ See my dissent in *Pure Oil Company*, Docket No. 6640, *The Texas Company*, Docket No. 6898, *Standard Oil Company (Indiana)*, Docket No. 7567, and *Shell Oil Company*, Docket No. 8537 (December 28, 1964).

²⁵ Under the Federal Trade Commission Act MIRA requests a rule prohibiting sales below cost where the effect may be to lessen or injure competition and setting standards for computing the cost of gasoline.

²⁶ For the purpose of discussion here, the gasoline marketing industry may be classified as falling into three categories: first, the twenty major oil companies which are fully integrated, engaged in production of crude oil and refining and own and/or operate wholesale and retail distribution facilities; secondly, the 140 smaller integrated, partially integrated and nonintegrated independent refining companies; and, finally, 5,000 companies and firms engaged in distribution at the wholesale level. (Petition for Trade Regulation Rules for Gasoline Marketing, National Congress of Petroleum Retailers, Inc., p. 4.) In addition, of course, representatives of service station operators, whose number is legion, also testified.

Robinson-Patman Act—that they would have the tendency to stifle competition and in effect foster price uniformity at variance with the other antitrust laws. One memorandum in opposition²⁷ even suggested that mere participation in a trade regulation rule proceeding, looking toward these rules, might violate the Sherman Act.

In view of the complexity of the problem posed, the Commission will have to mobilize the best of its resources. In this connection, the broad marketing inquiry is significant for having integrated the efforts of the economic and legal staffs in a proceeding involving enforcement of the price discrimination act to an extent unprecedented in recent years.

Finally, it should be noted that the Commission in initiating this proceeding, bound itself only to conduct the hearings. It did not undertake to issue rules but left the result of the current proceeding flexible. As a result, other alternatives are: no action, or the issuance of a fact finding report by either the staff or the Commission. In the latter eventuality, the Commission, in addition to its investigative function, may have engaged at least in a form of embryonic rule making.

The final example of a current industry-wide proceeding which I would like to discuss with you is one cast in a more traditional mold—the so-called wearing apparel cases.²⁸ In the period May 1963 to August 1965 the Commission accepted a total of 298 consent orders from wearing apparel manufacturers prohibiting violation of Section 2(d) of the Clayton Act, as amended. Aside from the number of wearing apparel manufacturers put under order, the case is notable since it is the first Commission decision or public pronouncement delineating the criteria for choosing between the various adjudicatory and rule making procedures available for dealing with discriminatory practices on an industry-wide basis. The rulemaking approach was rejected in this instance since various trade practice conference rules issued for the industry had failed to significantly reduce the payment of discriminatory advertising allowances. A trade regulation rule was not promulgated since that procedure is not practical when the discriminations involved are sporadic and secretive. Selective litigation against certain suppliers and the Commission's Guides had also failed to visibly improve the situation. In short, there was no practical alternative to seeking enforceable cease and desist orders running against all significant industry members engaged in the alleged violations of law.

In summary, the advisory and rule making approach is obviously the ideal medium for dealing with Robinson-Patman Act problems on an expeditious and equitable industry-wide basis if the conditions are right. Just as obviously, the Commission, if it wishes to effectively enforce the law either in individual cases or as to entire industries, must resort to the issuance of complaints and cease and desist orders when, as in the wearing apparel situation, the facts indicate that it is the only viable method in that particular situation. From its earliest years, continuing to the present, litigation on the part of the Commission has been denounced with varying degrees of emotion as wasteful, a source of harassment to business, and even as an instrument of oppression.²⁹ The Commission should, of course, be alert to possible abuses. On the other hand, the Commission should not be forgetful of the statutory scheme which places the cease and desist order at the heart of its enforcement measures. In certain instances, industry-wide problems simply will not respond to the rule making advisory procedures, and litigation, at least as a last resort, must remain among the law enforcement measures available to the Commission when the facts dictate this approach.

²⁷ Cited in Mid-Continent Independent Refiners Association's Amended Petition for Trade Regulation Rules for the Marketing of Gasoline, filed July 16, 1965, p. 4, f.n. 1.

²⁸ *Abby-Kent Co., Inc., et al.*, F.T.C. Docket No. C-328, *et al.* (1965).

²⁹ E.g., Commissioner Humphrey, in one of the more extravagant attacks in this vein, stated, in an address on January 6, 1931, that:

"Under the old policy of litigation it became an instrument of oppression and disturbance and injury instead of a help to business. It harassed and annoyed business instead of assisting it. Business soon regarded the commission with distrust and fear and suspicion—as an enemy. There was no cooperation between the commission and business. Business wanted the commission abolished and the commission regarded business as generally dishonest. [Footnote omitted.]" (Cited in Herring, *Public Administration and the Public Interest* (1936)), p. 125.

ROBINSON-PATMAN: MAGNA CARTA OR TYPHOID MARY?

(Remarks of James M. Nicholson, Commissioner, Federal Trade Commission, Washington, D.C. Before the Pharmaceutical Wholesalers Association, Las Vegas, Nevada, March 13, 1969.)

When I assumed my present seat on the Federal Trade Commission over a year ago, I suppose there was no one of the many laws entrusted to it to administer which I approached with more trepidation and concern than the Robinson-Patman Act. Like many corporate practitioners, I had read much of the literature which forms the Robinson-Patman folklore, and I had no difficulty in deciding that this was one quagmire which my clients should avoid.

It is certainly true, as one writer phrased it, that "The Robinson-Patman Act is sometimes praised, sometimes abused, much interpreted, little understood, and capable of producing instant arguments of infinite variety."¹ It may also be true, as the Supreme Court has observed, that it is a "singularly opaque and illustrative statute"² and that "precision of expression is not an outstanding characteristic of this Act."³ It is small wonder that this law has triggered so much debate and attracted supporters to whom its strictures are closely akin to holy writ, as well as opponents to whom its very name is anathema.

Thus, depending upon the source to which you turn, you might hear the Act described as "the Magna Carta of small business,"⁴ an "absolute essential" to the preservation of small business in this country,⁵ or the "Typhoid Mary"⁶ of antitrust. Its outright repeal has been vigorously urged by leading magazines devoted to business⁷ and even by former employees of the Federal Trade Commission.⁸ Not too long ago, a well-known writer and practitioner in the field almost gleefully observed that he was witnessing a new trend at the Federal Trade Commission, "the quiet chloroforming of Robinson-Patman."⁹

In the face of these widely divergent, even irreconcilable, views, I suppose I can be pardoned if, in advance of my appointment, I did not wonder if it was remotely possible for mortal men to administer such a statute.

Upon my appointment, I decided to fall back on the refuge of siding with my friends. Some of my friends are for Robinson-Patman and some of my friends are against Robinson-Patman, and I'm for my friends. Unfortunately, a newcomer to the Federal Trade Commission soon understands that he cannot be quite that neutral.

One who is foolish or venturesome enough to accept a seat on a modern government regulatory agency soon finds himself confronted with the discouraging but inescapable avalanche of files, each calling for individual attention and each taking up a substantial portion of each day, as well as many nights. I make this observation not to elicit sympathy—most of you could probably lodge the same complaint—but to point to the greatest difficulty encountered by present-day administrators . . . the inability to find the time to examine problems from a broader perspective. In Robinson-Patman the trees are especially numerous and the forest especially hard to define. Yet to administer the Act with intelligence, it is essential that a broader perspective be sought. Although a preoccupation with individual cases is a danger to intelligent administration, it is equally dangerous to determine to obtain an absolute and perfect harmony within an Act in its entirety.

There is something about this Act that tends to make one philosophize. Books are written about it and lawyers and students discuss it in law reviews—and, although I've dwelt on it too long, I eliminated five pages of just such ramblings from my first draft of these remarks. The businessman is not particularly interested in the intellectual exercise of lawyers—and administrators—associated with the Act. The businessman is concerned with the application of the Act within his industry. I think perhaps the Commission is coming around to the

¹ Kintner, "An Antitrust Primer", 1964 Ed., pg. 60.

² *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 530 (separate opinion).

³ *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1953).

⁴ "Small Business Problems In The Drug Industry", Report of the Select Committee On Small Business, 90th Congress, 2d Session, December 31, 1968, pg. 5.

⁵ *Id.*, at 6.

⁶ Bork, "The Place of Antitrust Among National Goals", address before National Industrial Conference Board, pg. 9 (March 3, 1966).

⁷ Editorial, "Antitrust: The Sacred Cow Needs a Vet", November 1962 issue of Fortune.

⁸ Edwards, "The Price Discrimination Law" (1959).

⁹ Rowe, "The Robinson-Patman Act—Thirty Years Thereafter", 30 A.B.A. Antitrust Section 9 (1966).

view that this is more important than either the semantics of Robinson-Patman philosophy, or the technicalities of individual enforcement with which it has been embroiled for years.

I find evidence of this in the Commission's recent handling of the so-called stocking dealer question. When the problem was presented to us last year in the form of a request for an advisory opinion, the Commission divided in its response.¹⁰ A manufacturer had requested an opinion as to the legality of his proposal to grant an extra discount to those wholesalers or distributors who warehoused his products, the discount to do no more than take into account their added expense in so doing. A majority of the Commission was of the opinion that this would be illegal since, under established precedents, the discounts could not be cost justified by the manufacturer and would thus amount to compensating the wholesalers for their own expense of doing business to the injury of those wholesalers who did not or could not stock. Hence, the majority felt that the discounts could only be granted to the extent that they could be reconciled with Section 2(d) of the Act, which would require that they be made available on proportionally equal terms to all competing customers.

Two Commissioners dissented. One felt that the proposed discount would be legal under either 2(a) or 2(d). I could not endorse either view since I did not feel that we had all the necessary facts which would be needed to make the analysis necessary to the proper application of the statute. It seemed to me that the answer to the problem turned upon the question of whether the discount proposed would result in injury to competition. While I was willing to concede that the prior cases dealing with similar problems,¹¹ although not wholly in point, might well have sustained the majority view, I was fearful that an uncritical and mechanical application of the rule derived from those older precedents might be inappropriate to different industries and at different times.

In view of these precedents which existed, this opinion was the surprising occasion for a great deal of controversy. My opinion, that there is in the Commission today an atmosphere conducive to a reassessment of traditional positions, was buttressed by its response to this controversy. In a subsequent request for another opinion on this subject, the Commission declined to express its views pending the study of a rule making proceeding involving this question.¹²

At this point, I might also refer to the fact that this action by the Commission further leads to the conclusion that this Act is not as inflexible as some would have you believe. Congress has not provided that all price discriminations are illegal, but only those which cannot be justified by one of the defenses made available *and* which result in injury to competition as that term has been applied to the practice. Thus Congress has not preempted the field, but has, in this respect, left in the hands of the Agency some latitude to consider pricing practices in the market context in which they take place. That is what the Commission has undertaken to do here.

However, I would not wish these remarks or the Commission's commendable willingness to reassess its traditional position to mislead any of you here or any who might read these comments. The thrust of the precedents, and the view which may prevail, is that the discounts for stocking and other functional services are illegal. Anyone who ignores this fact in reliance upon the hope of future change does so at his peril. Businessmen, like lawyers, should never confuse what the law is with what they think it ought to be or with what they hope it will become.

An even more dramatic example of the present Commission's willingness to restudy and reevaluate its prior stands has just been furnished by the recent release of its revised Guides For Advertising Allowances under Sections 2(d) and (e) of the Act. These two Sections provide that it is illegal for a seller to pay allowances or furnish services to any customer without making such allowances or services available to all competing customers on proportionally equal terms. Our prior Guides in this area were issued in 1960, but much has transpired since that time, both within the Commission and the courts, and the need for a reassessment of the 1960 Guides became evident.

Unquestionably the most notable event in this area was the Supreme Court's own decision in the *Fred Meyer* case.¹³ There the Court made it plain that a

¹⁰ F.T.C. Advisory Opinion Digest No. 263 Trade Reg. Rep. ¶ 18,425 (1968).

¹¹ *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co. v. F.T.C.*, (7th Cir. 1963) 323 F. 2d 44; *National Paris Warehouse v. F.T.C.*, (7th Cir. 1965) 346 F. 2d 311; *Monroe Auto Equipment v. F.T.C.*, (7th Cir. 1965) 347 F. 2d 401; *Purolator Products, Inc. v. F.T.C.*, (7th Cir. 1965) 352 F. 2d 874.

¹² F.T.C. Advisory Opinion Digest No. 333 Trade Reg. Rep. ¶— (1969).

¹³ *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

seller must regard as his customers for purposes of the Act all those retail customers of his wholesalers who competed with direct buying customers to whom he furnished promotional assistance. Thus, in this situation at least, the Court swept away all previous distinctions which might have existed as between direct and indirect buying customers and held that the seller owed a duty to all under existing law. In drafting its opinion, the Court acknowledged the difficulties which a seller might expect to encounter in getting benefits to the many retail customers of his wholesalers and made it clear that nothing barred the seller from utilizing his wholesalers for that purpose under rules and guides promulgated by the Commission.

Since our 1960 Guides were wholly inadequate for this purpose, the Commission immediately set about to issue for public comment a set of proposed revised Guides which represented our own staff's best efforts to bring the Guides into conformity with the *Fred Meyer* decision and the other developments which had taken place in the intervening years.

The proposed guides reflected the rigidity of the 1960 Guides. The public comments received were quite voluminous and, I assure you, carefully studied by the staff and the five Commissioners as well. As a result of this, the Commission has just released its substantially revised Guides, which will take effect in thirty days and has further pledged itself to a further reevaluation of their effectiveness eighteen months hence in the light of further comments received and own experience in their administration. It may well be that even these much more realistic guides will be further amended before their May 1 effective date.

I will not take up your time here with what would be a dull recitation of the many provisions contained in these Guides, but will instead commend them to your careful study. For example, they even contain further elaboration upon what is meant by the elusive term "proportionally equal terms", which always leaves me feeling the way I felt upon encountering an old friend on the street. I asked him how his wife was, and he replied, "Compared to what?" If you are inclined to ask here "Proportional to what?", I trust these Guides will be of some assistance.

Of more immediate concern to this group should be the treatment of a promotional program which a manufacturer delegates for administration through his wholesalers. When you consider a manufacturer-wholesaler administered program, you will find that the Commission has replaced the previous virtually per se Guides with one which will permit a manufacturer to delegate a fair and workable program to his wholesalers for administration. However, the manufacturer must undertake the duty of conducting periodic checks among the various types of retailers involved to see that the wholesalers are actually administering the program in the manner required by law and he must take appropriate corrective action where it is apparent that any wholesaler is not.

The wholesaler, administering promotional assistance programs on behalf of a seller, may find himself in violation of Section 5 of the Federal Trade Commission Act. This could arise if the wholesaler has represented the program to be usable and suitable and it is not, or if the program was not offered to all of the manufacturers' competing customers, or was otherwise administered in a discriminatory manner.

To those of you who have concern with allowances which your sources make for advertising, promotion or display of their products, you should study the proposed final guides with care, and should let us know whether they relate realistically to your industry.

These new approaches to Robinson-Patman enforcement by the Commission will, I am certain, carry over into its consideration of the recently completed hearings before Congressman Dingell's Subcommittee to study Small Business Problems In The Drug Industry and the Subcommittee's Report published December 31, 1968. As you know, the Subcommittee made several recommendations affecting the Commission. First, it recommended that we hold appropriate proceedings to determine the area of competition between hospital pharmacies and small privately owned community pharmacies and take such further action as may be necessary to define the area of the "own use" exemption of the Non-Profit Institution Act of 1938.

Second, it recommended that we proceed on a case-by-case basis to investigate the apparent violations shown by the testimony received during the course of the hearings and take appropriate and vigorous action where such violations could be proven. Finally, it was recommended that we report, on or before January 15, 1970, actions taken with respect to the other two recommendations.

I might add here, certainly without intending any disrespect for the Subcommittee or its Chairman, that the word "recommended" as used by the Subcommittee can be regarded as something in the nature of a Congressional euphemism. We will make the necessary inquiries and we will file the recommended report on or before the deadline set.

However, this will not be allowed to affect the outcome of any individual matters which might be investigated and subsequently considered by the Commission. Such matters will be considered on their merits and decided on the basis of the facts developed. In that posture, I am sure you will understand my inability to comment in detail at this time on cases now under investigation which the Commission will later be called upon to decide on their merits. Despite the fact that we know problems exist in the industry, we must approach them with an open mind.

The Subcommittee recognized that the practices in this industry, particularly under the Non-Profit Institution Act, raise a number of problems in a grey area which have never been adequately investigated or resolved in litigated cases. That Act exempts from the coverage of the Robinson-Patman Act sales to non-profit hospitals for their own use. Our previous experience and the testimony at the hearings demonstrate that a variety of factual situations can arise: the hospital may sell to in-patients; the hospital may sell to out-patients of staff physicians or clinics located on the hospital premises; the hospital pharmacy may sell to the general public, or to other retailers, without regard to whether the demand results from hospitalization or treatment on the hospital premises.

The sale of drugs to out-patients of staff physicians or clinics located on hospital premises constitutes one of the grey areas involved, where it is not clear how the law would or should apply. It is possible that, after examination, it will be found that such sales are not within the exemption. On the other hand, we cannot be sure that the Commission would find, or that a court would uphold, a finding to this effect due to the vagueness of the phrase "for their own use" and the absence of a clear indication as to what Congress meant when it used it in the law.

From what I have been told by our staff and from what I have learned reading the transcript of the hearings, the legal result is not at all certain even where sales at lower prices are made to profit-making hospitals, where such sales are for their own use. Here again we encounter the requirement that a sale at a lower price does not violate the Robinson-Patman Act unless such sale results in injury to competition even though it is clear that it enjoys no exemption. If it is true that retail pharmacies are in no position to compete for the business of patients confined in hospitals, difficulty might be encountered in establishing the requisite injury.

A problem analogous to the traditional dual distribution situations we have encountered in other industries is raised by the recurring reports that some hospitals are diverting a portion of their purchases to outside retailers. Where sales are made by manufacturers to hospitals with full knowledge that this is taking place, if that is the fact, and where such resales are being made by hospital employees with the full knowledge of the hospitals, if that also is the fact, culpability under the Act would seem to be involved and no grey area question would seem to be presented. But where this is being done without the knowledge of the manufacturer in the one case, or the hospital in the other, I have some difficulty with a mechanical application of the sanctions of the law even though the law does not require knowledge as an essential element of a violation thereof. To establish a technical violation under these circumstances would appear to be possible but of very doubtful utility.

These are just some of the complex problems of which I have become aware and I trust that my focus of attention upon the difficulties will not lead you to believe that the Commission is taking a negative approach to your difficulties. Far from it. We have been concerned with the problems of this industry for some time and, as our own Chairman advised the Subcommittee back in June, we plan to attack the hitherto unchallenged unfair drug distribution practices and discriminations with novel applications of laws administered by the Commission. The challenge has been placed in our hands and the industry must judge for itself how well we are able to meet it in the future.

On the other hand, I would caution you again not to expect more than the law can deliver. The Robinson-Patman Act, nor any other statute now on the books, can, or should, protect you from the effects of hard competition, so long as that competition is fair. The law cannot guarantee that you will not be

adversely affected by changing market conditions and new methods of distribution, for that law is not designed to preserve the status quo or impede progress. Change is the essence of a dynamic and progressive economy and the businessman, at whatever level of distribution he might do business, who cannot keep abreast of these changes must suffer the fate which then befalls him.

The wholesaler has been charged by some to be an anachronism. In many industries he has been eliminated or has become a vestigial appendage to the primary flow of goods and products from the manufacturer. Many manufacturers count their wholly-owned distribution systems as one of their most valuable assets . . . a means for introduction of new products, a source of customer information, the device for assuring service, and the most direct and sure means of utilizing their advertising and promotional funds. You are all aware of the methodology of wholesaler elimination . . . merger, vertical forward integration and the withering technique of picking off the larger customers for direct sales, leaving fewer and fewer of the smaller and smaller customers to be handled by the wholesaler.

What then is the future of this functional level and what are, or may be, the influences of the law on that future?

First of all, there is an underlying policy, in my opinion, which favors and will continue to favor any means of distribution which will get products from the manufacturer to the ultimate consumers in the most reliable manner and with the least increment to price. Next, there is no policy today which protects against or forbids growth by internal expansion. While the law may put brakes upon similar growth by means of mergers, manufacturers may grow by setting up their own distribution systems and going direct to their ultimate customers. Third, while existing law prohibits a manufacturer employing a dual distribution system from granting lower prices to his direct buying customers than he charges his wholesalers, it does not prohibit him from charging the same price to all as matters presently stand. Many students of our economy are greatly concerned with this latter point, but it cannot be forgotten in projecting future plans.

It seems to me that the task of the wholesaler today is to make his services so valuable to manufacturers and retailers that he will continue to be an indispensable cog in our distribution machinery. To the extent that he succeeds in doing this, manufacturers will not be tempted to take over the function themselves and he can then legitimately call upon the law to protect him from unfair and illegal practices on the part of his suppliers, his competitors and his customers. To the extent that he fails, he cannot expect the law to step in and, in effect, reward him for his inefficiency with an artificial support for his continued existence after he has ceased to serve a useful economic function. I, for one have confidence in the ability of the wholesaler in most industries to perform in a manner which will assure his continued relevance.

AN ADMINISTRATOR'S LOOK AT PRIMARY-LINE PRICE COMPETITION UNDER THE ROBINSON-PATMAN ACT*

(Address by Commissioner Mary Gardiner Jones, Commissioner, Federal Trade Commission, before the American Bar Association National Institute on Antitrust Problems in the Sale and Distribution of Goods, Los Angeles, Calif., November 9, 1967.)

To me antitrust is not a subject which can or should be discussed outside an actual record of real marketing facts. And so I do not want to discuss routine interpretations of the law of Robinson-Patman with you today. That can be done much more eloquently—and freely—by others on this panel. Rather I shall try to give you some idea of how at least this administrator approaches the practical task of applying the statute to market realities.

In approaching the administration of the Robinson-Patman Act, it is well to keep a few basic premises in mind.

The administrator has a statutory responsibility to carry out the strictures of the statute and to interpret its provisions in such a manner as to give life

*While this text forms the basis for Miss Jones' oral remarks, it should be used with the understanding that paragraphs of it may have been omitted in the oral presentation and, by the same token, other remarks may have been made orally which do not appear in this text.

and positive effect to both the spirit and the letter of the law as Congress intended. Thus the determinants of enforcement policies must always lie centrally in the intent and purpose of the statute, the facts of the marketplace and the court decisions applying the statute to these facts.

The antitrust administrator has a different perspective on Robinson-Patman from that of the private practitioner. Most private practitioners confront Robinson-Patman—a least initially—from the point of view of the initiator of the price discrimination and hence tend to focus their attention on the market reasons prompting the price cut. The administrator's eye, on the other hand, is most typically focused on the "Utah Pies" of the industry who may on occasion be complaining to the Commission that their competitors pricing practices are forcing them out of the market. The administrator, therefore, tends to center his initial attention on the many diverse marketing factors which may be accounting for the alleged competitive injuries flowing from the price cut.

Let me give you one example of how these marketing facts of life, flowing from territorial price cutting tactics, may be portrayed to the Commission. Recently a large multi-product national company submitted a memorandum to the Commission in which it set out what it saw as the results of one multi-product national company's territorial pricing policies on the competitive viability of its more specialized local and regional competitors. The memorandum contrasted in graphic detail the types of promotional and pricing practices used by the larger company in areas in which it had no competition with those used in areas in which it was confronted with substantial competition. The memorandum then pointed out the disastrous impact of this type of territorial pricing strategy both on consumers and on the company's local and more specialized competitors.

"The national consequences of this marketing strategy is that the consumer pays substantially more for an amount of brandco in the eastern part of the nation than she does in the West where a healthy competitive marketing environment exists and where Giantco experiences strong competition".

* * * * *

"The eastern consumer is financing the current market tactics of Giantco. This strategy involves the generation of large profit dollars from that segment of its business in the heavily populated eastern portion of the United States, where no strong regional or local competition exists. These dollars are used promotionally to exert intense marketing pressure on the Western regional operators, forcing them into a defensive marketing posture and diminishing their geographic expansion capability. The competitive vulnerability of the Western regional operators will exist until Giantco encounters strong national competition."

And the memorandum concluded with this statement of the consequences of Giantco's discriminatory pricing tactics:

"If there have been deaths of small competitors in the Brandco industry, the Commission should look to Giantco for the cause of death."

I can assure you that complaints of this nature are not unique. Other examples from the Commission files would fill a set of encyclopedias. While the particular complainant was pleading to be allowed to take its own self-help measure, namely, to merge with another national company so as to be able to fight fire with fire and deal with Giantco on its own ground, such an individualized solution may not, from the administrator's point of view, necessarily promote competition in that market. It is understandable that a company, believing its ultimate existence to be in jeopardy, does not want to wait for uncertain administrative action to eliminate the discriminatory pricing practices and would prefer to merge with a stronger national company able to engage in the same type of tactics. However, the antitrust administrator knows that there is no guarantee that two Giantcos in that market will in fact compete. Similarly, there is no guarantee that they will not also engage in the same conduct vis-a-vis the remaining local and regional companies in the market until these companies, too, are forced to seek a structural solution to this situation.

Accordingly, the administrator must focus his attention both on direct changes in industry structure as well as on forms of market conduct since both provide important clues as to the state of actual or future competition. The central issue before the administrator under either Section 2(a) and Section 7 is the same. Is there a reasonable probability that the effect of a particular course of conduct is substantially to lessen competition, either immediately or ultimately? The possibility of injury to competition may be more obvious in the case of mergers because the act of merging always brings about some change in industrial structure pricing policies. The problems confronting an administrator in resolv-

ing this issue under Section 2(a) are more difficult and complex. In the first place, results flowing from territorial price-cutting—the diminution of profit margins or of market shares of affected competitors—may be as much a reflection of competitive vitality as of competitive impairment.

Moreover, the administrator is also well aware of the competitive significance of price-cutting and of the fact that in some situations it is an essential competitive tool in order to penetrate or expand in a market. The argument is frequently advanced that price-cutting carries within it its own seeds of self-regulation since no company can operate long at a loss nor, in the case of the multi-product national company, can any one corporate division carry the losses of another for any extended period of time. The difficulty with this thesis is that with the increasing prevalence of corporate diversification policies with respect to both markets and products and with the increasing expansion of companies through conglomerate acquisitions, the administrators also knows that company pricing policies are increasingly insulated on a short-range basis from the internal discipline of the profit and loss statement.¹

Since the internal profit and loss experience of a company cannot be looked to as automatic and effective disciplinary regulators of corporate pricing conduct, the antitrust administrator has an increasing responsibility, it seems to me, to scrutinize carefully all territorial price-cutting tactics in order to determine whether they are or might enhance or impair the competitive vitality of a market. Moreover, the administrator's answer to this question cannot turn on the more philosophical inquiry of whether enforcement of the statute adversely influences the extent and degree of price competition which some other company may or may not engage in.² If such adverse effect in fact results, it must be accepted in the larger interest of promoting competition as a whole.

The real challenge confronting the administrator is how to interpret and apply the statutory test of competitive injury so that it encompasses meaningful and realistic criteria in terms of the competitive facts of life influencing the particular market involved in the price cut.³

I do not want to dwell this morning on the question of competitive injury in cases turning on predatory pricing conduct.⁴ The Supreme Court has made it clear that this type of conduct is not a necessary threshold statutory element in a Section 2 (a) violation.⁵ Nor do I want to go into the very intriguing question of what factors should be looked at in order to determine whether the pricing conduct was or was not predatory.⁶

¹ Recent articles in leading financial magazines point up the problems which diversification presents to companies and demonstrates the ways in which a company's profitable divisions subsidized losses incurred by other divisions for as long as ten years before the impact was detected. McDonald, *Why Evans Products Co. Had a Bad Year*, *Fortune*, May, 1967, p. 139; Burek, *The Multi-Market Corporation*, *Fortune*, February, 1967, p. 131; *Divisional Profit Reporting by Public Corporations*, *Forbes*, July 15, 1966, p. 16.

² For example, territorial price-cutting is frequently pointed to as an important business tool for test marketing and price experimentation purposes and as an essential means of breaking local monopolistic or collusive pricing structures. It should be pointed out, however, that some of the reasoning underlying these arguments do not necessarily support the conclusions so frequently drawn that the law, therefore, should focus primarily on predatory territorial pricing conduct. For example, the need to test market products and experiment with selective price cuts can certainly be done in markets in which the price-cutter is not confronted solely with smaller or regional competitors. Moreover, where the markets are in fact dominated by monopolistic or collusive pricing, I would have imagined that the national seller's national price—assuming it is not also monopolistic, would almost by definition be below the prevailing price and hence selective price cuts would not seem to be essential to counteract those local price monopolies.

³ I see little difference in this sense between Section 7 and Section 2(a) in terms of the proper focus for administrative concern. Thus, the administrator if confronted with the need to choose between the statutory duty to prevent the lessening of competition prohibited in these sections and a claim that enforcement of these sections will inhibit business growth or price competition, cannot refuse to enforce the statute. Moreover, the administrator knows that in both situations companies have alternative courses of action available to them which will not bring them afoul of either section to achieve their goals of expansion or price competition, namely, in the case of Section 7, internal expansion or in the case of Section 2(a), across the board price cuts. While in some situations these alternatives may not always be practicable, neither Section 2(a) nor Section 7 contain *per se* prohibitions so that companies still have the possibility of so constructing their acquisition policies and discriminatory price cuts as to remain within the law.

⁴ In most predatory pricing cases, the courts have usually taken the position that such conduct is itself anticompetitive and hence questions of competitive injury require little analysis. As the Seventh Circuit put it in *Lloyd A. Fry Roofing Co. v. FTC*, 371 F. 2d 277 (7th Cir. 1966), where the pricing conduct is held to be predatory, "the actual market results of the price reduction need not be manifest before enforcement of the Act is justified". *Id.* at p. 285.

⁵ *FTC v. Anheuser-Busch*, 363 U.S. 536 (1960).

⁶ Machlup suggests this criteria: "Does the price cutter expect his additional business to come from one or two particular competitors who would not be able to withstand the

I also do not want to get into the debate as to whether competition or merely competitors are being injured.⁷ But I would be less than candid if I did not confess to some problems with this description of the issue. It is self-evident that competition involves rivalry among competitors. It can, therefore, only be injured, as the Commission and courts have frequently noted, by the intimidation, weakening, coercion or destruction of competitors already in the market or of potential competitors poised on the edge of the market.⁸ I am not arguing that injury to a competitor is competitive injury, only that it may or may not be, depending on the market situation affected by the discriminatory price cut. Hence the "injury to competition"-"injury to competitors" dichotomy seldom sheds much light on the central question of whether the competitive vitality of the market has been impaired.⁹ These terms are too often merely slogans; they are not part of an analytical framework.

The essential questions concerning the market impact of price discrimination must be answered within the same kind of careful market analysis used in analyzing the market impact of mergers. This obviously is not a revolutionary observation. It has frequently been urged by commentators¹⁰ and in fact applied by many courts.¹¹

Time prevents me, today, from distilling from court decisions and suggestions of commentators the factors which have been or should be looked to in determining competitive injury. However, it is perhaps useful to mention a few of the more important market factors which should be considered.

It is not unlikely, that competitors seeking to meet a territorial price cut may suffer a reduction of profits. Such a setback may be greatly enhanced by the

loss of clientele, or is it to come from a large number of competitors each of whom would not suffer badly enough to be forced out of business." Machlup, *Characteristics and Types of Discrimination*, in *Business Concentration and Price Policy*, 426 (1955).

Brooks notes that predatory price-cutting may be indicated when the firms being eliminated are selling products which in the eyes of the market are not inferior to those of the price-cutter. While of the view that predatory conduct cannot be determined on the basis of the likelihood of eliminating competitors, Brooks concludes that a territorial price cut could be regarded as predatory "when used by a geographically widespread firm against localized competitors, and discrimination among products may be predatory when used by a multiproduct firm against specialized competitors". Brooks, "Injury to Competition under the Robinson-Patman Act", 109 U. Pa. L. Rev. 777, 796 (1961).

⁷ Thus, in *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), cert. den., 377 U.S. 954 (1963), the court observed that:

"The protection intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental." *Id.*, p. 104.

Similar observations have been consistently reiterated by courts. For example, see, *Standard Oil Co. v. FTC*, 340 U.S. 231, 248-49 (1950); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. 1961); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959), cert. den., 363 U.S. 843 (1959); *Report of the Att. Gen. Nat'l. Comm. to Study the Antitrust Laws*, pp. 164-65 (1955). Cf. *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945), in which the Supreme Court noted that the Robinson-Patman Act placed an emphasis on individual competitive situations rather than upon a general system of competition.

⁸ E.g., *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966), where the court noted "that there were only two important price competitors of the majors, and the area price discriminations were directed at their practices. In such a situation, the injury to the two independents qualifies as injury to competition." *Id.*, pp. 284-85. In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954) and *H.J. Heinz Co. v. Beech-Nut Lifesavers, Inc.*, 181 F. Supp. 452, 463-64 (S.D.N.Y. 1960), the courts also equated the elimination of a competitor with injury to competition.

⁹ The distinction between injury to competitors and injury to competition may, however, be highly relevant when looked at in reverse. Thus, if price discrimination was practiced collusively in a given market or as a result of a joint pricing structure followed by competitors in the mutual expectation of reciprocal behavior such as may go on in bid price situations or industries having traditional basing point or zone pricing systems, competitors may not be injured but competition most definitely would be. Brooks *supra*, n. 6, at 789-90.

¹⁰ E.g., Barton, *Competitive Injury Under the Robinson-Patman Act*, 19 Bus. Lawyer 649, 657 (1964); Von Kalinowski, *Price Discrimination and Competitive Effects*, 17 A.B.A., Antitrust Sec. 36 (1960). See also Brooks, *supra*, n. 6, at 800.

¹¹ E.g., *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959); *Maryland Baking Co. v. FTC*, 243 F. 2d 716 (4th Cir. 1957); *H. J. Heinz Co. v. Beech-Nut Lifesavers Co.*, 181 F. Supp. 452 (S.D.N.Y. 1960).

For history of Commission decisions and evidence relied upon in this area, see Brooks, *supra*, n. 6 at 812-16. Brooks notes two Commission decisions predicated injury on the hampering effect of the price cut on competitors' ability to expand (e.g., *E. B. Muller & Co.*, 33 FTC 24, 51 (1941), aff'd., 142 F. 2d 511 (6th Cir. 1944)) four on the foreclosure of competitors (e.g., *Bausch & Lomb Optical Co.*, 28 FTC 186 (1939)), four on collusive refraining from competition by the price discriminators (e.g., *National Lead Co.*, 49 FTC 791 (1953)) and one Commission decision rejecting injury because of its finding that increases in competitors' unit sales volume occurred after the price cut (*General Foods Corp.*, 50 FTC 885, 891 (1954)). See also, Note, "Competitive Injury Under the Robinson-Patman Act", 74 Harv. L. Rev. 1597 (1961).

competitor's own inefficiency or because its prior price levels reflected a monopolistic or collusive pricing structure. Or competitors may suffer business losses following a price cut because of their unwillingness to compete aggressively or because of their lack of imagination as to how to compete effectively. Thus given a situation of minimal price competition prevailing in a market, or of a market occupied by inefficient, unimaginative, non-aggressive or poorly managed companies, declining profit margins suffered by competitors as a result of a territorial price cut may not evidence competitive injury at all but simply a return to more competitive pricing.

By the same token, the mere existence of competition in the market after the price cut does not negate the possibility that competition has been injured. As the Supreme Court in its recent *Utah Pie* decision¹² pointed out, competitive injury may have occurred even though sales volume increases and some competitors are making a profit. The Court stated that in a market in which price was the dominant competitive factor, "a competitor who is forced to reduce his prices to a new all-time low in a market of declining price will in time feel the financial pinch and will be a less effective competitive force."¹³

Capability to impair a competitor's viability is obviously important in determining whether the price cut could lessen competition.¹⁴ The Court in *H. J. Heinz Co. v. Beech-Nut Lifesavers, Inc.*¹⁵ agreed that the relative strength and resources of the price cutter and its alleged victim was a proper issue of fact to be determined and could not be answered simply in terms of a comparison of their gross sales or share of the market. I believe that antitrust enforcement policies must take into account obvious disparities of size and strength. But I am doubtful that as a practical matter they have the resources to make the kind of subtle comparative analyses of corporate strength involved in the *Beech-Nut* case.

I would suppose that some attention must also be paid to the more intangible but equally important psychological question of the probable reaction to the price cut on the part of the competitors.¹⁶

Where the territorial price cut is of a sustained duration and is at or below cost, the likelihood of its producing probable competitive injury is substantial, especially where the financial resources of the price cutter are greater than any of its competitors. Thus data on the size, demand elasticity and competitive vitality of the market, the number and relative size of the competitors, the size and duration of the price cut as well as its ostensible purpose, and the comparative profit ratios on both sales and net worth would seem in most cases to be important to a determination of the probable impact of the price cut on the competitive viability of the market.

There is little doubt that the philosophy underlying the antitrust laws is premised on the belief that the innumerable marketing decisions which must be made about productive capacity, quality of goods, modes of distribution, prices and conditions of sale are best initiated by business with maximum freedom. Business decisions spurred on and disciplined by competitive and market forces are conceived of in our system as the best means devised to date by which we can achieve our basic goals of full employment, technological innovation and economic growth.

The Supreme Court has succinctly stated the role of antitrust legislation. It is simply to lay out the ground rules of competition. We as administrators must be ever zealous that to make certain that the Congressional mandate to promote and maintain competition is imaginatively and forcefully discharged. At the same time we must make equally certain that in enforcing the Congressional ground rules we do not eliminate the very competition Congress has commanded us to maintain and promote. This is our major challenge. I hope that it will always be responded to with a sense of proportion and of humility.

Thank you.

¹² *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 699-700 (1967).

¹³ *Id.* at 699-700.

¹⁴ *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Samuel Moss Inc. v. FTC*, 148 F. 2d 378 (2nd Cir. 1945).

¹⁵ 181 F. Supp. 452 (S.D.N.Y. 1960).

¹⁶ Brooks lists as one of the questions to be asked to determine if injury has occurred:

"Does the price discrimination result, or will it result, in an important rival or groups of rivals substantially limiting their competitive activities in order to appease, come to terms with, or avoid or lessen price warfare with a firm granting or receiving the discrimination? Does it result, or will it result, in a trader being so large that his rivals lack capacity to take over a substantial part of his trade?" Brooks, *supra* n. 6, at 800.

AUTOMOTIVE PARTS DISTRIBUTION AND THE FEDERAL TRADE COMMISSION

(Statement by Earl W. Kintner, Chairman, Federal Trade Commission, Before Meeting of the Automotive Service Industry Association, Los Angeles, Calif., Feb. 14, 1961)

I.

Your industry is a vital and dynamic part of our American economy. Over a period of many years the automotive parts industry has received constant attention from the Federal Trade Commission. A discussion of the Commission's work in general, and as it affects your business in particular, may be helpful to you in making better business decisions.

In 1960 the Federal Trade Commission demonstrated that it could be the vigorous and effective law enforcement agency originally contemplated at the time of its creation almost one-half a century ago. The year just ended, by every statistical measurement, was the high water mark in the Commission's history.

During the year, 560 formal complaint proceedings were initiated and 410 cease and desist orders were issued. The previous record year of 1959 was exceeded by 50% in formal complaints issued and by 36% in orders entered.

The largest gain was in actions to halt antitrust violations. Here the 202 formal complaints more than doubled the previous record number of 99 in 1959 and more than tripled the 66 complaints issued in 1958.

Statistics, of course, do not tell the whole story. The figures I have mentioned relate only to formal litigation. Perhaps of greater significance is the fact that, in addition to compulsory processes, the Commission energetically employed investigations, economic inquiries, programs of business and consumer education and an expanding range of consultative services to business. In using all of the tools in our arsenal, our sole objective was to encourage honest competition in American business.

I am confident that the progress of our work has meaning to you. Yours is an industry of central importance. Any governmental agency charged with the duty of eliminating unfair methods of competition throughout the entire range of our half-trillion dollar economy must necessarily devote a large proportion of its total effort to safeguarding free and fair competition within your industry. The record of the Federal Trade Commission over the past 5 years demonstrates this fact. During that period, the Commission has issued some 60 complaints and more than 40 orders to cease and desist involving automobile parts alone.

You should be familiar with the breadth of the Commission's jurisdiction over anti-competitive trade practices. The Commission administers a variety of antitrust statutes: principally, Section 2 of the Clayton Act, more commonly known as the Robinson-Patman Act, which bars price and service discriminations; Section 3 of the Clayton Act which prohibits certain forms of exclusive dealing arrangements; Section 7 of the Clayton Act, which bars unlawful mergers; and Section 5 of the Federal Trade Commission Act which broadly condemns unfair methods of competition and unfair and deceptive acts and practices in commerce.

At one time or another, members of your industry have been cited for violations of every one of these statutes. A number of your members are, today, involved in enforcement proceedings of the Commission.

II.

The Robinson-Patman Act should be of fundamental concern to you. Many automotive parts cases have been included in our Robinson-Patman enforcement proceedings. You would do well to study the past application of this statute to your industry and to review some of the current problem areas.

Each of you—whether a manufacturer, a warehouse distributor or a wholesaler—forms an important link in the chain of distribution for automotive parts. You should be aware of the Commission's recent efforts to obtain compliance with the provisions of the Robinson-Patman Act within your industry. The names of cases like *Moog*, *Nichoff*, *Edelmann*, *Whitaker*, *Thompson Products*, *American Motor Specialties*, and *Automotive Supply of Altoona* are no strangers to the pages of your trade publications.

In the past several years, our principal objective has been no less than total compliance with the trade regulation laws. Passed in 1936, the Robinson-Patman Act, for a complex of reasons, had never, until recently, had a full test of its

impact. When I assumed the Chairmanship of the Commission I was convinced that the time for such a test had come.

Although our antitrust laws state our national economic policies in favor of competition, the opinion has been advanced by some that the Robinson-Patman Act is anticompetitive in effect, but it is my judgment that, as interpreted by the Federal Trade Commission and the courts, and fairly and reasonably administered, this Act protects competition as it was indeed designed to do. It is generally agreed that two of the Act's primary objective were and are, (1) to prevent unscrupulous buyers from abusing their economic power by exacting from suppliers unwarranted price reductions and other discriminatory concessions, and (2) to prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among customers.

Section 2 contains six subdivisions. Section 2(a) is directed at injurious price differentials on commodities of like grade and quality, which cannot be justified under the provisos therein, including cost justification, or defended as a good faith meeting of the equally low price of a competitor, as spelled out in Section 2(b). Section 2(c) deals with brokerage payments. Section 2(d) deals with *payments or allowances by the seller to the buyer for services*, and requires them to be made available on proportionally equal terms to all competing customers. Section 2(e) requires that services furnished to a buyer by the seller be made available to all competing buyers on proportionally equal terms. And Section 2(f) bars the *knowing* inducement or receipt of an unlawful discrimination in price.

Of primary concern to your industry are the price discrimination prohibitions of Section 2(a) which have been enforced in a line of proceedings against automotive parts *sellers*, and the reciprocal prohibitions of Section 2(f) which, in another series of cases, have been the basis of attacks against *buyer* abuses in your industry. Let me review for you some of these developments.

PAST CASES

In the celebrated *Spark Plug* cases,¹ the Commission charged the three major spark plug manufacturers—Champion, General Motors, and Electric Auto-Lite—with violation of the Robinson-Patman Act in two major areas: original equipment, and replacement equipment. The Commission's complaint charged that the practice of selling original equipment spark plugs to automobile manufacturers at or near cost while selling replacement plugs at much higher prices through replacement distribution channels caused injury to smaller plug manufacturers who could not meet the original equipment price and thereby lost replacement business which was critically tied to the original equipment market. The Commission's complaint also alleged secondary line injury in a variety of competitive situations in which the spark plug companies allegedly discriminated between competing distribution outlets.

The cases were litigated over a 14-year period. The charge of discrimination with respect to original equipment sales was dismissed; no substantial evidence of injury was disclosed on the record. However, as to the secondary line price discrimination charges, the Commission found violation in a number of instances which foreshadowed later cases in this industry and reflect problems which are still pervasive today.

The Commission found that the spark plug companies had discriminated in price among direct and indirect customers. The Commission order barred discrimination in whatever form it appeared.

Following the *Spark Plug* cases, the next major development, one which is unfinished to this day, came in the famed *Automotive Parts* cases. This series of cases, beginning in 1949, involved alleged price discriminations in violation of Section 2(a) by a number of automotive parts sellers,² and knowing receipt of price discrimination, in violation of Section 2(f) on the part of a number of so-called buying groups. Among the buyers attacked were American Motor Specialties, Borden-Aicklen Supply Co., and D & N Auto Parts Co., all of whom were proceeded against at the outset of the Commission's campaign and a number

¹ *Champion Spark Plug Co.*, 50 F.T.C. 36 (1953); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Electric Auto-Lite Co.*, 50 F.T.C. 73 (1953).

² Among these sellers were Standard Motor Products, Inc., Moog Industries, Inc., C. E. Niehoff & Co., P. Sorensen Manufacturing Co., P & D Manufacturing Co., Inc., E. Edelmann & Co., Whitaker Cable Corporation, Federal-Mogul Corporation, Sealed Power Corporation, Eis-Automotive Corporation, Airtex Products, Inc., Neapco Products, Inc., Guaranteed Parts, Inc., and American Ball Bearing Co.

of groups which have been proceeded against more recently. These cases were fought out over a number of years before both the Commission and the courts.

Several of these cases were not finally settled until Supreme Court review had been completed. While most are now finally decided, some buyer cases are still in litigation. Up to this time, however, the courts have fully endorsed and approved the Commission's decisions.³ Important questions of statutory interpretation have been resolved. Broadly speaking, in these cases the Commission's complaints attacked pricing systems which placed a premium on aggregating volume purchases over a period of time and thus gave to the large volume purchaser an unjustified and detrimental advantage over his competitor. I am sure you all recall, perhaps wistfully, this type of pricing schedule which was previously so prevalent in your industry. Recent Commission actions indicate that vestiges remain, although I would quickly add that this pricing method is now used only by the most audacious or foolhardy among you.

These cases were vigorously defended by the respondents on grounds that the pricing systems were established to meet competition or that they caused no adverse competitive effect, or that they were cost justified. In every instance the defenses were ultimately rejected. The Commission held that in an industry as fiercely competitive as this, where profit margins are narrow and sometimes almost non-existent, a price differential of as little as 2% might in some circumstances mean the difference between the business survival or failure. The Commission further held that the "meeting competition" defense of the statute was not available to justify a general pricing system but only prices met in individual competitive circumstances.

As the Commission was proceeding at flank speed against automotive parts manufacturers, it was also proceeding against buyers charged with knowing receipt of unlawful discriminations. The original buyer cases were the other side of the price discrimination coin uncovered in the seller cases. In many cases, the discriminations involved in the seller cases were made to so-called "buying groups" which, the Commission's investigation disclosed, had been established for purposes of qualifying for the most favorable discount bracket on the seller's cumulative volume discount schedule. The Commission's complaints against these groups charged that they were composed of jobbers who established a joint buying office for the sole purpose of receiving discriminatory discounts from the automotive supplier.

In the *Automatic Canteen* case,⁴ the Court held that the Commission, as a part of its burden in a 2(f) case, must show that the buyers knew they were receiving a price discrimination, knew of the probable competitive effects of the price advantage received, and knew that the price was not within one of the seller's defenses under the statute such as the cost justification or meeting competition defenses. Under the "burden of convenience" rule established in that case, the burden is placed on Commission's counsel to come forward with evidence that the buyer is not a mere unsuspecting recipient of an unlawful discrimination.

A number of companion cases to *Automatic Canteen* were dismissed by the Commission before trial. However, in the pending cases against the automotive buying groups, counsel for the Commission successfully resisted determined motions to dismiss by the respondents and the cases subsequently went to hearing. These cases have now been fully litigated before the Commission and orders to cease and desist have been entered. The Commission has held that the burden of proof allocated in *Automatic Canteen* is not necessarily a heavy one, that trade experience in a particular situation can afford a sufficient degree of knowledge on the part of the buyer to provide a basis for proceeding and that the trade experience of the buyers in these cases was such that they could be held to have knowledge that the price advantages they received from the sellers were not cost justified nor within any of the sellers' other defenses afforded to sellers by the statute. In one of these cases, *American Motor Specialties, Inc.*,⁵ the Com-

³ *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), cert. denied 361 U.S. 826 (1959); *P. Sorenson Mfg. Co. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *P & D Mfg. Co. v. Federal Trade Commission*, 245 F. 2d 281 (7th Cir. 1957), cert. denied 355 U.S. 884 (1957); *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957), modified 355 U.S. 411 (1958); *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), cert. denied 355 U.S. 941 (1958); *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), cert. denied 353 U.S. 928 (1957); *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), aff'd 355 U.S. 411 (1958).

⁴ *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953).

⁵ *American Motor Specialties, Inc. v. Federal Trade Commission*, 298 F. 2d 225 (2d Cir. 1960), cert. denied 364 U.S. 884 (1960).

mission's order to cease and desist has been affirmed and enforced by the United States Court of Appeals for the Second Circuit, and a petition for certiorari was denied by the Supreme Court. In the other two, appeals are now pending in the Court of Appeals for the Fifth Circuit.⁶

As a consequence of these decisions, the Commission has issued complaints against a number of other buying groups alleging similar practices in violation of subsection 2(f). Orders to cease and desist have been entered in some of these⁷—others are still pending.⁸

But the buying group cases do not comprise the only type of buyer cases initiated under subsection 2(f) in this industry. Of considerable interest, for example, is the complaint recently issued by the Federal Trade Commission under 2(f) against *Automotive Supply Co.*, Docket 7142 (August 28, 1959), a large automotive wholesaler in Altoona, Pennsylvania.

There the complaint charged as illegal practices of Automotive Supply and two affiliated organizations—a Central Warehouse Company and an affiliated company located at Tucson, Arizona—with illegal practices relating to the purchase, resale and distribution, at the wholesale level of tires and tubes and like items, household appliances, home and garden supplies,⁹ and automotive parts, equipment and accessories. The respondent had set up its Central Warehouse Company in 1946, according to the complaint, but since that time it “. . . served little purpose other than as a conduit or bookkeeping device through which respondent purchases certain of its products and supplies for sale and distribution at the wholesale level through respondent's principal place of business and branches in the State of Pennsylvania and West Virginia. . . .”

A principal charge of the complaint was that this jobber, through its wholly owned and controlled warehouse, knowingly induced and received warehouse distributor prices. The respondent also knowingly induced and received functional discounts for re-distribution through its *own* outlets, according to the complaint. A cease and desist order has now been entered which prohibits this jobber from knowingly inducing or receiving warehouse distributor prices.

CURRENT PROCEEDINGS IN THE AUTOMOTIVE PARTS INDUSTRY

On a wide front, the Commission continues to challenge illegal pricing practices both of automotive parts sellers and buyers. You may find helpful the following review of some of these current developments.

The Commission's most recent decision has come in the case of *American Ball Bearing Corp.*, Docket 7565, in which an order was issued several weeks ago requiring the company to cease charging different prices to purchasers competing with one another in the resale of its products. The Commission adopted the hearing examiner's initial decision finding that the respondent had classified its purchasers into three categories—jobbers, distributors, and warehouse distributors—and charged them different prices: jobbers 10% more than distributors and 20% more than warehouse distributors. The examiner's decision had found that “many purchasers, classified by the respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications.” As a result, individual jobbers often were placed at a competitive disadvantage with other distributors classified in a higher function by respondent but, in fact, occupying no different competitive status. The Commission rejected respondents' contention that competition could not adversely be affected unless a price advantage to a buyer is reflected in the buyer's own resale price.

Similarly of interest to you may be the recent consent order issued in *Gojer, Inc.*, Docket 7851, which, while not an automotive parts case, has, I believe, real

⁶ *Borden-Aicklen Supply Co.*, Docket 5766, *D & N Auto Parts*, Docket 5767.

⁷ *Warehouse Distributors, Inc.*, Docket 6837 (order to cease and desist August 14, 1958); *Midwest Warehouse Distributors, Inc.*, Docket 6888 (order to cease and desist September 24, 1959); *Albright's*, Docket 6890 (order to cease and desist March 27, 1959); *Hunt-Marquardt, Inc.*, Docket 6765 (order to cease and desist December 23, 1958); *Southern California Jobbers*, Docket 6889 (November 10, 1960).

⁸ *Automotive Jobbers, Inc.*, Docket 7590 (complaint issued September 21, 1959); *Ark-La-Tex Warehouse Distributors, Inc.*, Docket 7592 (complaint issued September 22, 1959); *Southwestern Warehouse Distributors, Inc.*, Docket 7686 (complaint issued December 9, 1959); *Automotive Southwest, Inc.*, Docket 7686 (complaint issued December 10, 1959); *National Parts Warehouse*, Docket 8038 (complaint issued July 12, 1960).

⁹ A companion action under 2(a) was brought against the supplier, *Firestone Tire and Rubber Co.*, Docket 7141 (complaint issued May 12, 1959).

significance for your industry. In that case, a manufacturer of soap and cleaning products was charged by the Commission with discriminating in sales to customers within the same functional classification. The Commission charged that jobbers who owned their own warehouse facilities were classified as a "warehouse group," and obtained higher discounts than competitors in a straight "jobber" classification. The theory of the Commission's complaint, reflecting numerous court and Commission decisions, was that the two customer classes were in actual competition with one another, were thus functional equivalents, and were accordingly entitled to equal treatment by their sellers.

Another recent case of some interest is the 2(f) proceeding against *Southern California Jobbers*, Docket 6889, which was one of the allegedly favored group buyers in the *American Ball Bearing* case. The Commission found that the fact that the group operated a warehouse did not alter the situation, other than to assist the members to get warehouse distributor rebates to which they were not entitled and which were not received by non-member competitors. To this extent the case would go beyond the earlier buying group cases where no substantial distributive facilities were operated by the group.¹⁰

Another recent case involved the *Heckethorn Manufacturing and Supply Co.*, (Docket 7499) a manufacturer of automotive shock absorbers, seat covers and other products. The Commission's complaint alleged that Heckethorn discriminated in price between competing customers of its products. A consent order entered early last year requires the company to charge the same net prices to customers who compete with each other in resale of its products. At the same time, the Commission dismissed because of insufficient evidence, a charge that the price differentials might result in a substantial lessening of competition or tendency to create a monopoly in the seller's line of commerce.

In addition to these recent decided cases, a number of Automotive Parts cases are currently pending before the Commission. Of course, it would be inappropriate for me to comment on the merits of these proceedings, but a brief listing of them, I think, will fairly describe the scope of the Commission's current activity in your industry.

For example, in *Purolator Products, Inc.*, Docket 7850, the Commission has charged the respondent with discriminating in price among competing customers in the sale of its automotive replacement filters. The complaint charges that Purolator grants some warehouse distributors "re-distribution allowances" on sales to dealers and users, but withholds these allowances from other competing warehouse distributors and from competing jobbers. It further alleges that all warehouse distributors are given a warehouse discount which is not made available to their competitors.

In *Dayco Corp.*, Docket 7604, the Commission charged that the former Dayton Rubber Company discriminated in price between direct wholesale customers and indirect wholesale customers, charging the indirect customers up to 25% more than its direct customers. Dayco is defending on the ground, among others, that the alleged practices were discontinued several years ago.

In the case against *Borg Warner* and its wholly owned subsidiary, *Borg Warner Service Parts Co.*, Docket 7667, the Commission has charged discrimination in sales to competing customers, including buying groups and warehouse distributors generally. The respondents are defending on the grounds that the price differentials are cost justified, do not create any cognizable injury to competition, and are bona fide functional discounts.

In a recent complaint issued against *Westinghouse Electric Corp.*, Docket 8053, the Commission has charged discrimination in the sale of the company's automotive miniature and sealed beam lamps. The Commission complaint charges that Westinghouse has discriminated among franchised distributors, granted more favorable terms to volume purchasers, and has also granted more favorable terms to volume purchasers, and has also granted favorable discounts to automobile manufacturers purchasing on a negotiated basis. Westinghouse has denied that any of its price differentials create an adverse competitive effect.

A pending complaint against *Perfection Gear Co.*, Docket 7861, challenges price advantages granted to warehouse distributors who, it is alleged, are simply group buying jobbers not performing the normal functions of a warehouse distributor and thus not meriting higher discounts. The company defends on grounds that it is not within its personal knowledge that its warehouse distributor customers do not normally function as such and further that the practices complained of

¹⁰ An appeal from this decision of the Commission is now pending before the Court of Appeals for the Ninth Circuit.

have been abandoned. A similar abandonment defense is raised in a case against *Inland Rubber Corporation* (Docket 8052) in which the Commission charges discrimination in sales, among others, to buying groups classified as warehouse distributors.

A functional discount defense is also currently being raised in a 2(f) proceeding against *National Parts Warehouse* (Docket 8039) and its member jobbers, alleged to be a buying group receiving discounts not made available to individual jobber competitors in violation of subsection 2(f). The respondents there assert that National Parts Warehouse is not a buying organization for the respondent jobbers but is operated as a bona fide warehouse distributor and the respondent jobbers are merely partners in a legitimate business enterprise in which they have no right in management, direction or control. The respondents also claim that the warehouse organization has at all times bought goods for its own account, operates a 60,000 square feet warehouse and sells to hundreds of jobbers other than the named respondents.

These are typical cases currently before the Commission in your industry. A number of them raise old questions, others new issues which should more clearly define the types of distribution practices prohibited under the Act and give plainer definition to those pricing practices which are lawful under the Act.

III.

During the past year the Commission issued Guides covering Sections 2(d) and 2(e) of the Robinson-Patman Act amendments. These Guides set out in layman's language certain basic rules of thumb concerning the requirements of the Act when any interstate seller offers promotional allowances or merchandising services or facilities to his customers. Within the past month I was afforded the opportunity of making specific suggestions to the National Food Brokers Association during its annual meeting concerning how food brokers could comply with the brokerage provision of the Robinson-Patman Act. The 2(c) suggestions or Guides represented my personal views and were neither approved nor disapproved by the Commission.

There remain only Section 2(a) and its complement, Section 2(f), where no guidelines or suggestions concerning compliance with the law have been furnished to the American businessman, except for opinions in adjudicated cases.

Proceedings instituted by the Federal Trade Commission under Section 2 of the amended Clayton Act, against both sellers and buyers of automotive parts, have established some basic principles in clarification of the statute. I am hopeful that the Commission will continue the Guides Program and that further guides may later be issued to assist those in your industry and others who seek in good faith to comply with the law against price discrimination. In the meantime, each of you should review your pricing practices and develop a successful compliance plan.

It may be of some assistance to you to study and understand the concepts which follow. These seem to me essential as a beginning in the development of careful compliance planning.

1. Any person who sells products of like grade and quality in interstate commerce to at least two purchasers at different net prices has discriminated in price within the meaning of the statutory term "to discriminate in price."

(a) The Act does not prohibit one uniform price to all purchasers. A seller may sell at the same price to wholesalers and retailers without any legal liability under Section 2(a).

(b) A seller's purchasers are not necessarily limited to persons buying direct from the manufacturing seller. A jobber obtaining a manufacturer's products through a warehousing distributor may be considered to be a "purchaser" from the manufacturer where the latter has exercised such a degree of control over the transactions between the distributor and the jobber that the sales are actually sales by the manufacturer. For example, the following factors have been considered in determining if such a jobber is a purchaser of the manufacturer:

(1) Whether the manufacturer's salesmen contact the jobber and solicit orders for the manufacturer's products.

(2) Whether the products are shipped directly from the manufacturer to the jobber, invoiced to the jobber, and payment remitted by the latter to the manufacturer.

(3) The extent to which the manufacturer sets, controls or suggests the prices at which the distributor may sell to the jobber.

(4) Whether the contracts entered into between the distributor and the jobber provide that the manufacturer may require approval before the distributor is permitted to sell any specific jobber account.

If such control is exercised, the manufacturer may be in violation of Section 2(a) when the jobber, buying through the distributor, pays a higher price than competing jobbers purchasing directly from the manufacturer.

2. While sales at different net prices may constitute discriminations in price, such sales may be *illegal* under Section 2(a) only where the price differences may result in adverse competitive effects. A seller, in defense, may affirmatively show (a) the price differentials do not exceed cost differences resulting from different methods or quantities in which the commodities are sold, or (b) a lower price was made in good faith to meet an equally low price of a competitor.

No magic formula permits safe prediction that any given price differential between competing purchasers will or will not be likely to result in competitive injury. The answer to this question depends upon the specific facts in particular cases.

3. Where a manufacturer is unable to justify price differences between his purchasers in accordance with the affirmative defenses provided by the statute, he may be reasonably certain that such price differences *will not be illegal* price discriminations if he classifies his purchases on a functional basis and sells to all purchasers within each functional group at the same net price.

The test to be used in classifying purchasers into functional groups should be based upon how or in what manner each purchaser resells or disposes of the manufacturer's product. If this test is applied, the above rule merely recognizes that ordinarily manufacturers buying automotive parts for use as original equipment do not compete with warehouse distributors or jobbers reselling *replacement parts*. Similarly, distributors reselling only to independent jobbers do not usually compete with the jobbers reselling solely to dealers. Lacking any competitive relationship among such purchasers, a seller may *legally* discriminate in price among the manufacturers, warehouse distributor and jobber *provided* the distributor pays a lower price than the jobber.

Any plan for compliance with Section 2(a) would not be complete without considering that, under certain circumstances, a seller can justify a discriminatory price under the good faith defense regardless of the competitive injury such a discriminatory price might cause.

Since the good faith defense furnishes an absolute or lawful excuse for an otherwise unlawful, injurious price discrimination, Commission and court interpretations have strict limitations upon its availability. Among the more basic limitations are the following:

(1) The defense is valid only when a lower price is given to meet individual competitive situations, as a defensive measure. It cannot be used for the purpose of gaining, instead of retaining, a customer.

Example: Supplier A decides to improve his market position in one trading area and lowers his prices to several large volume purchasers in the area and not to their competitors. Such a practice would constitute aggressive action on the part of the seller without any attempt to retain a specific customer who has been offered a lower price by a competitor of the supplier.

(2) The seller may only meet, not undercut, the price of a competitor.

Example: Suppliers A and B sell to Jobber C at \$1.00 and 95¢, respectively. Supplier A lowers his price to 90¢. A cannot justify the 90¢ price under the good faith defense.

(3) The equally low price of a competitor means the price for the same quantity.

Example: In selling to some of Supplier A's customers, Supplier B sells a smaller quantity at the same price as A's price for a larger quantity. The price for the smaller quantity cannot be defended under 2(b) by Supplier B.

(4) The defense cannot be applied where a seller lowers his price to enable his customers to meet their (the customers) competition.¹¹

Example: Supplier A cannot lower his price to Jobber B to permit B to meet Jobber C's competition in selling Supplier D's products.

(5) Whenever a seller intends to justify a lower price to specific customers, and relies upon the 2(b) defense, he should attempt to obtain verified written statements or invoices which reflect the exact price of the particular competitor whose price the seller is meeting.

¹¹ This issue is now pending in the United States Court of Appeals for the Fifth Circuit in the Commission's case involving *Sun Oil Company*, Docket 6934.

IV.

In addition to its formal proceedings illustrated by the cases I have discussed, the Commission uses a range of techniques other than the issuance of complaints looking to an order to cease and desist in its efforts to secure compliance with all the laws it enforces. One of the techniques used in appropriate cases is the tender of an opportunity to enter into a stipulation to concerns that have exhibited a cooperative attitude during the course of inquiries and have acted promptly to correct deficiencies. The Commission has just achieved a signal gain in its efforts to protect consumers and honest businessmen from deceptive practices in the sale of automotive parts by employing this technique.

Recently the Commission became aware that many rebuilt clutches and other rebuilt automotive products containing previously used parts were being placed on the market without disclosure that the parts had been rebuilt or that previously used components were used in the parts. On November 19, 1959, the Commission approved a stipulation with Borg-Warner Corporation whereby that corporation agreed to disclosure in a clear and conspicuous manner that its rebuilt automotive products have been rebuilt. In the course of inquiry into this specific matter, the Commission learned that numerous other automotive parts suppliers were selling rebuilt parts without disclosing the fact of rebuilding. After investigation, 12 other suppliers were offered the opportunity to enter into stipulations. These stipulations were accepted by the Commission in September. Others have followed. Each of these stipulations contains the following prohibition:

Offering for sale, selling or delivering to others for sale or resale to the public any product containing parts which have been previously used without a clear and conspicuous disclosure of such prior use made on the product with sufficient permanency to remain thereon after installation, as well as in advertising and on the container in which the product is packed.

Note that this inhibition requires a proper disclosure be made in advertising, labeling and on the parts themselves. It is this last requirement that has caused the stipulating companies the greatest concern, it being asserted that to cut the disclosure into the metal by die stamping would not be practical on all parts. After preliminary testing and informal conferences with technicians, the Commission's Bureau of Consultation expressed its opinion that there would be more practical and less expensive methods of marking available to stipulating parties.

While it is expected that stipulation negotiations will be continued with other automotive parts rebuilders, it is apparent that the total number of stipulating companies will comprise only a small segment of the automotive parts rebuilding trade. It is estimated that there are some 2,000 rebuilders of automotive parts. However, the Bureau of Consultation expects that the announcement of these stipulations will convince members of the industry that the Commission means to take effective steps to protect the many car owners who pay for new parts but actually receive rebuilt parts. The stipulations already approved by the Commission furnish the impetus for the correction of this deceptive practice on a broad front by voluntary industry action. The Bureau of Consultation has already opened discussion with responsible members of the industry and with trade associations representing automotive parts rebuilders. Every opportunity for meaningful voluntary compliance will be extended. If this effort is successful this deceptive practice can be eliminated with far more speed and at far less cost than would be the case if the Commission had proceeded only by the issuance of formal complaints.

V.

The Commission has been coupling a campaign for public awareness of the prevalence of this practice with its encouragement of industry efforts to make voluntary corrections. The Commission has never condemned the use of rebuilt parts nor has it ever condemned the utility of rebuilt products. Its sole concern has been to insure that the consumer is not deceived about the condition of the parts that he buys.

The Commission's techniques for insuring compliance with the law are complementary. When voluntary correction offers the best opportunity for protection of the public at the least cost to the taxpayer, every effort should be made to encourage voluntary action. However, the Commission should never lose sight of the fact that honest businessmen who wish to comply with the law are placed at a serious disadvantage if an unscrupulous few reject every prompting of busi-

ness conscience and every consideration of public interest by continuing the use of a deceptive practice in the face of numerous warnings. Therefore, the Commission always must be ready to employ its compulsory process against this tiny minority who scorn the public interest. Only in this manner can the Commission remove the temptation to honest businessmen prompted by the consideration that "X is doing it and getting away with it and taking all the business." It can be expected that the Commission will issue complaints against automotive parts rebuilders if adequate disclosure to the public can be secured in no other way.

I realize that I have discussed only a small part of the Federal Trade Commission's program which may be of interest to members of this Association. I wish that there were time to discuss all the ramifications of the Commission's activities with you. However, I will have accomplished my purpose if I have suggested to you the wisdom of compliance with the trade regulation laws and have assisted you in doing so. In this connection, I applaud the efforts of your Association's counsel, Mr. Harold Halfpenny, to heighten awareness of the law's requirements in the industry and to encourage careful good faith compliance with the law.

Voluntary compliance with the nation's antitrust and trade regulation laws is the wisest course a businessman can follow. Self-interest dictates this course, because it avoids the costs and penalties and the tarnished public image that results from flagrant violation. And the public interest also dictates this course. Free businessmen mock our free enterprise system and invite needless and harmful additional governmental regulation whenever they fail to compete freely and fairly.

SPECIAL MATTER

NOVEMBER 29, 1965.

Re: United Aircraft Corporation, Pratt & Whitney Division, File No. 651 0090,
Response to Points Raised *Contra*.

From: Commissioner Jones.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre, Comm. Reilly, Secretary (J. Kuzsw), General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles & Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See attached memorandum.

MEMORANDUM

NOVEMBER 29, 1965.

To: The Commission.

From: Mary Gardiner Jones, Commissioner.

Subject: United Aircraft Corporation, Pratt & Whitney Division, File No. 651 0090, Response to Points Raised *Contra*.

The matter was returned to the staff by Commission directive for the purpose of commenting on the points raised in my memorandum of September 14, 1965.

This matter was originally before the Commission on the staff's recommendation for closing. An investigation had been instituted on the complaint of a competitor of United Aircraft engaged in the manufacture of certain replacement parts for Pratt & Whitney engines. More specifically, it was alleged that Pratt & Whitney had discriminated in price, sold below cost, cut prices, and disparaged the applicant's competing products. The staff's closing recommendation was based on the fact that the limited investigation had failed to develop sufficient evidence on which to base a complaint and their view that further investigation would develop nothing further.

The staff has now resubmitted the matter to the Commission, adhering to its original closing recommendation and making certain comments in respect to the points raised in my September 14th memorandum. In renewing their closing recommendation, the staff does not state directly but I infer that they do not believe that anything would be served by making a fuller investigation of the complaints leveled against Pratt & Whitney. The staff points out that they have never interviewed the respondent but do not suggest that perhaps such an interview might be useful.

My basic problem with the original staff recommendation and with their current memorandum is that they are viewing this case solely from the point

of view of a Robinson-Patman price discrimination matter. I have no quarrel with the staff's reasoning when the complaint is viewed in this light, and their Robinson-Patman thinking is obviously sound.

However, I do not view the matter as a Robinson-Patman issue. As the staff itself points out, Pratt & Whitney's actions, particularly in its pricing policies, reflect the action of a monopolist. This is precisely the point on which I think all of these actions should be viewed. For example, the staff points out that Pratt & Whitney sales, even if made below cost to the United States Government, should not be ordered to cease and desist. I do not agree. It is a typical practice of dominant companies or companies either attempting to gain a monopoly or already enjoying one to insulate various of their companies from competition by lowering their prices. This is a practice which IBM followed with respect to their pricing of tabulating cards. It lowered its pricing on these cards to such a point that the United States Government Printing Office finally went out of the business of manufacturing tabulating cards, at which point IBM's prices started to go up again. Therefore, in my judgment, Pratt & Whitney's activities complained of should be looked at not as to whether they constitute price discrimination or whether they are in response to meeting competition of the applicant or any other company, but as to whether they reflect the type of conduct of a company either attempting to gain a monopoly or attempting to maintain a monopoly position.

Accordingly, I renew my motion that this matter be accorded a full investigation by the staff, not as a possible Section 2(a) violation but as a possible Section 5 violation.

SPECIAL MATTER

JULY 2, 1968.

Re: Clairol Incorporated v. F.T.C., 9th Cir. No. 21, 239—FTC Docket No. 8647
Proposed Modification of Order to Cease and Desist.

From: Commissioner Jones.

To: Comm. Dixon; Comm. Elman, Comm. MacIntyre, Comm. Nicholson, Secretary (J. Kuzew), General Counsel; Program Review Officer; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles & Furs, Executive Director (Asst.), Bur. of Field Operations.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

This is being circulated as a special matter at the request of the staff.

MEMORANDUM

JULY 2, 1968.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Clairol Incorporated v. F.T.C., 9th Cir. No. 21,235—FTC Docket No. 8647, Proposed Modification of Order to Cease and Desist.

By minute of June 11 the Commission amended the staff's proposal for a satisfactory modification of the *Clairol* order in light of the *Fred Meyer* decision. Staff now informs us that Clairol has rejected our proposal which would require proportionally equal treatment of all competing retailers "including retailer customers who do not purchase directly" from Clairol. Clairol's objection is that such a broad provision would include retailers who do not purchase through Clairol's "normal" channels of distribution. Clairol is making a counter-proposal limiting the order to retail customers "purchasing directly from respondent and to retailers who purchase through wholesalers."

Staff recommends acceptance of Clairol's counter-proposal. However, Clairol's suggested language is essentially the same as that initially proposed by the staff which the Commission previously rejected. We did not want to limit the order to indirect purchasers who buy through some intermediary who must technically qualify as a "wholesaler". The file does not reveal any facts which would indicate that the Commission's prior evaluation of this matter was improper or that there is in fact any real danger of competing retailers' failing to receive an allowance because such retailers purchase outside the "normal" channels of distribution.

The problem here would appear to be one of semantics. If our proposed wording is too broad, surely respondent can pinpoint in what way it might cover people whom the Commission would agree should not be included. Moreover, respondent here should propose language which would be agreeable to it and accomplish the Commission's objective of not being tied to the distribution medium called "wholesaler" when there may be many other distribution intermediaries who are not technically called wholesalers and yet who should be covered by the order.

I move that the counter-proposal be rejected and that the staff be instructed to negotiate an order provision consistent with the Commission objective.

MEMORANDUM

FEDERAL TRADE COMMISSION,
JUNE 26, 1968.

To: Commission.

From: Assistant General Counsel Division of Appeals.

Subject: Clairol Incorporated v. Federal Trade Commission, 9th Cir. No. 21,235—
FTC Docket No. 8647, Proposed Modification of Order to Cease and Desist.

In accordance with the Commission's direction of June 11, 1968, we have communicated to counsel for Clairol the proposed modification of the order, as amended and approved at the table. A copy of our letter to counsel is attached.

Counsel for Clairol has responded with an objection and a counter-proposal. The objection is, in effect, that the Commission's proposed order would require Clairol to make allowances available to retailers who buy neither directly from Clairol nor through its wholesaler distribution channels. While I do not believe that the Commission's proposed modification should be, or necessarily would be, so construed, I believe that if it were it would not be in accordance with the Commission's intention, and therefore that it would be advisable to accept a modification not arguably susceptible to such a construction.

Clairol's counter-proposal is that the order be modified to consolidate into single paragraphs the provisions concerning direct-purchasing customers and those who purchase through wholesalers, and to read as follows:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of respondent's products unless such payment or consideration is available on proportionally equal terms to all other retailer customers purchasing directly from respondent and to retailers who purchase through wholesalers, who compete with the favored retailers customer in the distribution of such products to the consumer for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products unless such payment or consideration is available on proportionally equal terms to all beauty salon customers purchasing directly from respondent and to beauty salons who purchase through wholesalers, who compete with the favored beauty salon customer in the rendering of hair care services and using, in the course thereof, respondent's hair care products.

While the language of Clairol's proposals differs from that chosen by the Commission, I believe it accurately expresses the Commission's intention and Clairol's obligations under the law. The term "wholesalers" was used by the Hearing Examiner (I.D. par. 64-67) and the Commission (Opinion, pp. 17-19) to refer to the source of supply of the dealers and salons buying Clairol products other than directly from Clairol, the Supreme Court in *Fred Meyer* used only that term to designate intermediate sellers. I therefore believe its use in the order in this case is adequate and appropriate, and request permission to stipulate with Clairol for the modification Clairol has proposed.

If the Commission adopts this proposal, the only remaining question in the court of appeals will be whether beauty salons, which apply Clairol's products to the scalp and hair, are "competing in the distribution" of Clairol's products.

If the proposal is not accepted there will be an additional issue as to whether the Commission's proposed modifications comply with the Supreme Court's directions in *Fred Meyer*.

Respectfully submitted,

J. B. TRULY,
Assistant General Counsel.

Attachment.
Approved:

JAMES MCI. HENDERSON,
General Counsel.

JUNE 12, 1968.

Re *Clairol Incorporated v. Federal Trade Commission*, 9th Cir. No. 21,235—FTC
Docket No. 8647

GERALD GUTTMAN, Esq.,
Weil and Lee,
New York, N.Y.

DEAR MR. GUTTMAN: The Commission has considered the form of orders to be used in the *Fred Meyer* and *Clairol* types of cases, and has authorized us to enter into a stipulation in this case which would provide for the following modifications of paragraph 1(b) of the order, and of paragraph 2(b) if the Commission's decision concerning beauty salons is upheld:

1. (b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer unless such payment is available on proportionally equal terms to all other customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the resale of respondents' hair care products to consumers for home use.

2. (b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such customer unless such payment is available on proportionally equal terms to all beauty salon customers of respondent, including beauty salon customers who do not purchase directly from respondent, who compete with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products.

Please let us know if these modifications would be acceptable, and if so I will prepare a draft of stipulation and send it to you for your consideration.

Sincerely yours,

E. K. ELKINS,
Attorney.

SPECIAL MATTER (NON-STAFF)

NOVEMBER 16, 1964.

Re: *Irwin Consumer Catalogs, Inc.*
(Respondent in Docket S100—
ATD Catalogs, Inc.),
Advisory Opinion
(See attached memorandum.)

From: Commissioner Reilly.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre, Comm. Jones, Secretary (J. Kuzew), General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles & Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

MEMORANDUM

NOVEMBER 16, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: *Irwin Consumer Catalogs, Inc.* (Respondent in Docket S100—ATD Catalogs, Inc.)

This request for advisory opinion raises questions identical to *Oakes Consumer Catalogs* in which we have issued an opinion, but differs in that this case involves an individual, N. Irwin Shapiro, who is a respondent in *ATD Catalogs, Inc.*,

et al., Docket No. 8100. However, since Shapiro is no longer associated with ATD, I see no reason for denying the request for advisory opinion.

This matter is not analogous to ATD, in which we have requested additional information from the requesting party, since ATD presented the question whether a catalog firm could avoid the restrictions of a Commission order by becoming an independent through elimination of jobber ownership and control. That question is not involved here and accordingly I am in favor of granting an Oakes' type opinion to Irwin.

I would prefer that the second sentence of the second paragraph in the proposed letter read "It further appears that the catalogs which you proposed to distribute are available . . ." and that the word "practicable" be changed to "practical."

JOHN R. REILLY,
Commissioner.

SPECIAL MATTER (STAFF)

OCTOBER 5, 1964.

Re: Associated Merchandising Corporation, et al., File 601 0059.

(See attached memorandum.)

From: Commissioner Reilly.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre, Secretary (J. Kuzew), General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles & Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

MEMORANDUM

OCTOBER 5, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation et al., File 601 0059.

After considering proposed respondents' settlement terms, I am convinced that decision as to the breadth of the order in this case should await trial of the issues and that the form of order attached to the staff's proposed complaint should stand. I am convinced that a broad order running against the stores in their individual capacities should follow any finding that the circumstances surrounding any 2(f) violation indicate a proclivity on the part of the individual stores to violate 2(f) in their separate capacities.

If, as the staff says, AWC is not a legitimate independent wholesaling operation but was established for the principal purpose of securing preferment from suppliers, it seems to me an inference may be drawn that having chosen to participate in a 2(f) violation through an instrumentality the stores are equally capable of pursuing it alone.

In short, it may be that in choosing an instrumentality for accomplishing a Section 2(f) violation the stores simply chose the most efficient method for accomplishing the desired results. It does not follow from this however that they would not in their individual capacities violate 2(f).

The breadth of the order in this context is simply a question of the adequacy of the remedy and I have no doubt the Commission may close the "individual" avenue to violation as well as the "collective" if complaint counsel can show that the stores are likely to resort to solicitation of preferential prices in their separate capacities.

I see no justification for antecedently disabling the Commission from securing an adequate remedy by acceptance of proposed respondents' terms of settlement. I think it is too much to bargain away in order to get the collective proscription.

Accordingly, I move that the staff be directed to communicate a rejection of respondents' offer of settlement and to give proposed respondents 10 days within which to agree to the proposed order as presently drafted, failing which I move that the Commission should proceed with issuance of complaint.

In regard to Commission MacIntyre's suggestion that any violation of Section 5 be alleged in the complaint, I feel that the present case is sufficiently comparable to the Atlas Supply case, Docket 5794, to warrant consideration of his suggestion. I would however prefer to hear from the staff prior to making a recommendation.

I am attaching a copy of staff memorandum prepared at the request of Commissioner MacIntyre which may be of interest.

JOHN R. REILLY,
Commissioner.

SPECIAL MATTER

OCTOBER 28, 1968.

Re: AMC, Docket 8651.

See attached Memorandum.

From: James M. Nicholson.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre, Comm. Innes, Secretary J. Kuzew, General Counsel, Program Review Officer; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles & Furs, Executive Director, Assistant Executive Director.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

MEMORANDUM

OCTOBER 28, 1968.

To: The Commission.

From: Commissioner Nicholson.

Subject: AMC.

In connection with the revision of the Commission minutes of October 8 in this matter to accord with discussions at the table on problems within the proposed consent agreement, a situation has arisen which merits discussion at the table.

First, I find that the staff has serious question about the proposed investigation of the AMC members for individual violations. One view is that the Commission should pursue other buying groups in this industry. Another view is that the investigation of individual violations of AMC members would be a major project and our efforts might well be made in a different direction if we are to get the "most bang for our buck."

Second, Commissioner Elman has raised with me the question of the propriety of accepting the proposed consent order without disclosure of the determination of the Commission to conduct investigations of individual violations. I believe there is merit to his feeling that this could be somewhat in the nature of entrapment, and would suggest that if we proceed in the manner determined on October 8 that disclosure should be made.

I am more concerned with the staff attitude toward investigation of individual violations. At the table on October 8, I suggested that we adopt Commissioner Jones' proposals in this phase of the case instead of the direction of the investigation as proposed by Commissioner MacIntyre. Commissioner Jones had suggested that the staff report to the Commission on the scope and nature of an individual investigation—had this been adopted we would have received the comments which have been made to me privately. I, of course, provided the third vote in favor of Commissioner MacIntyre's proposal.

Although we seem to have hold of a basket of snakes and no reasonable solution suggests itself to me, I move that we once again discuss this matter at the table with Frank Mayer and Basil Mezines.

In connection with the revision of the Commission minutes of October 8 in this matter to accord with discussions at the table on problems within the proposed consent agreement, a situation has arisen which merits discussion at the table.

First, I find that the staff has serious question about the proposed investigation of the AMC members for individual violations. One view is that the Commission should pursue other buying groups in this industry. Another view is that the investigation of individual violations of AMC members would be a major project and our efforts might well be made in a different direction if we are to get the "most bang for our buck."

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gation as proposed by Commissioner MacIntyre. Commissioner Jones had suggested that the staff report to the Commission on the scope and nature of an individual investigation—had this been adopted we would have received the comments which have been made to me privately. I, of course, provided the third vote in favor of Commissioner MacIntyre's proposal.

Although we seem to have hold of a basket of snakes and no reasonable solution suggests itself to me, I move that we once again discuss this matter at the table with Frank Mayer and Basil Mezines.

SPECIAL MATTER

JULY 23, 1968.

Re: Associated Merchandising Corporation, et al., Docket No. 8651.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kurew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director Charles A. Tobin.

Attached is my dissenting statement to accompany the letter informing respondents that their offer of settlement has been rejected.

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

ASSOCIATED MERCHANDISING CORPORATION, DOCKET NO. 8651

I must record my disagreement with the action of the majority in refusing to accept the consent order which has been negotiated with the respondents. The order proposed is surely an adequate, if not completely satisfactory, disposition of the matter. As in any settlement, it represents reasonable concessions by both sides—the Respondents and the Commission. The concessions by the Commission are not contrary to the public interest, but, in fact, best serve that interest.

This case was initiated, according to the complaint, for the purpose of terminating alleged inducements of discriminatory prices by the individual members of AMC from their suppliers. These inducements were allegedly made, not individually, but through the wholly-owned subsidiary buying organization of AMC, known as AWC. Termination of those alleged violations has been achieved by the proffered settlement, which would effectively prevent all the group buying activities which gave rise to this complaint and which would, additionally, provide for the permanent divestiture of AWC by the individual members who comprise AMC.

The Commission has already expended a great deal of time, effort and expense in bringing this case to the point where it now rests. We are now confronted with a very simple choice. I can appreciate the majority's apparent desire to obtain an order, at this time and in this action, to which a number of individual retail corporations are parties, broad enough to block all other paths by which the respondents might reach the same objectives. Assuming that the individual retail corporate respondents now engage, or intend to engage, in the individual inducement of discriminatory prices in violation of Section 2(f) [neither of which, fact or intention, is alleged in the complaint], it is far from clear that the pleadings, as now constituted, would provide sufficient basis for such a prohibitory order. But, assuming further, that an individual order might be obtained, the breadth of that order is conjectural. Would it apply to all purchases by individual respondents? Would it apply only to those lines where there is some evidence group buying violations are proved? Or, would it be limited to those ten (10) or so lines where in depth proof of violations will purportedly be made? I am concerned that the price we will have to pay to achieve any individual order will be out of all proportion to the benefit which might accrue to the public.

No member of the Commission would stop short of any solution to this matter, nor would any compromise be accepted, which did not discharge the duty to protect the public interest and enforce the law. In weighing the alternatives before us, however, I am persuaded that, by accepting the proposed settlement, we would have achieved the major goal which we set. The public interest will be little served by the rejection which is based upon a tenacious insistence upon a

catch-all provision covering some activities of the members of AMC acting in their individual capacities.

The complaint in this matter, as issued by the Commission in 1964, was accompanied by a form of order containing two prohibitions. One was designed to prevent the direct inducement of discriminatory prices by the individual stores comprising AMC and the other was aimed at their group buying activities. However, the direct-buying activities of the individual store members were not challenged in the complaint, which was based solely upon the use of AWC as a "wholesale" front for purchases by the AMC member stores. The direct-buying provision apparently was included since it had become standard practice from the orders growing out of the so-called "automobile parts" cases.¹

However, it should be noted that in those cases the buying groups were formed and existed solely for the purpose of inducing and receiving lower prices, whereas AMC, of which AWC is merely the buying arm, was formed to render a broad range of other services to its members. Thus there is doubt as to the wisdom of using these "order desk" situations as models for all subsequent buying group orders.

Further, the initial automotive parts cases were concluded only after protracted litigation, during which the respondents contested every foot of the ground, following which broad orders were drafted which were coextensive with the Commission's power to prohibit illegal practices in whatever form they might become manifest.

I have no quarrel with this approach following litigation and believe that in that posture the Commission is well justified in drafting orders which are broad enough "effectively to close all roads to the prohibited goal."² But this is not to say that we need to insist dogmatically upon this approach in all cases which come before us. We should not extend this solution to necessarily include those matters where the parties are able to reach an agreement without litigation and which will effectively terminate all the practices we challenged and concerning which evidence can be produced.

In such circumstances, a stubborn insistence upon an exact reproduction of past orders issued in other cases and under different conditions constitutes an issuance of orders by rote, sacrificing our discretion to choose a remedy deemed adequate to cope with the unlawful practices found to exist.³ It is, furthermore, in contravention of the mutual concessions necessary to any compromise settlement procedure. The majority wants by way of settlement, the whole cake which *might* be obtained from litigation.

The history of this matter goes back more than a score of years to an earlier consent order obtained prior to the Finality Act.⁴ The record of respondent's activities in this history is much less tarnished than that of the Commission. In 1956, after an extended investigation of compliance in which the respondents disclosed the establishment of AWC as a means of complying with the order, a responsible member of the Commission staff (albeit without "official" Commission action) informed respondents that there would be no Commission action with respect to the establishment of AWC.

A new investigation was commenced some four years later, which culminated in issuance of the complaint herein. To date, in this most recent effort alone, the Commission has expended approximately \$500,000 of its limited resources and eight years time. Yet, even now, administrative hearings herein are not on the horizon.

As pointed out by Commissioner Elman in his dissenting statement, respondents have barely begun to utilize the discovery procedures available to them, or to exhaust the potential collateral lawsuits which they might institute, the third of which is even now pending in a federal district court in Maryland. Further, as Commissioner Elman has also observed, the administrative hearings themselves promise to be "exhausting if not exhaustive" and will undoubtedly take years to complete, considering the number of localities in which hearings must be held, the number of witnesses who must be called, the number of documents to be introduced and the number of individual transactions to be considered. Comple-

¹ *American Motor Specialties Co., Inc. v. F.T.C.* (2nd Cir. 1960) 278 F. 2d 225, cert. den. 364 U.S. 884 (1960); *Alhambra Motor Parts v. F.T.C.* (9th Cir. 1962) 309 F. 2d 213; *General Auto Supplies, Inc. v. F.T.C.* (7th Cir. 1965) 346 F. 2d 311; *Mid-South Distributors v. F.T.C.* (5th Cir. 1961) 287 F. 2d 512.

² *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952).

³ *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

⁴ 73 Stat. 243 (1959), 15 U.S.C.A. 21 (Supp. 1960).

tion of all these necessary steps promises to take this proceeding well beyond the expiration of the terms of all the present members of the Commission, in indeed the administrative hearings themselves can be commenced within that period of time.

This should not be interpreted as an invitation to the litigating anti-trust bar to advise their clients to use all devices to fight and delay the Commission, in the hope that the Commission will eventually "cave-in". In appropriate cases the Commission should not, and I am sure would not, hesitate to devote extensive resources to obtain the relief sought at the time complaint issued. This is just *not* the appropriate case for such a position.

The majority here is willing to pay the price of this indeterminate delay in enforcement of the law for the sole purpose of obtaining orders against the direct-buying practices of the individual stores. In so doing, it is obviously willing to devote a considerable portion of the Commission's limited resources and key personnel to the pursuit of this debatable objective, when such resources and personnel could and should, in my view, be more advantageously devoted to a broad-scale, industry-wide attack on the many problems which purportedly exist in connection with the buying practices of large department stores and buying groups throughout the country. That is the real task before us in this area, now that the solution to the particular problem of his case is within our grasp.

In the hearings in December of last year on the confirmation of my appointment to the Commission, a number of the Senators on the Commerce Committee asked me whether I would devote my efforts to a more prompt disposition of matters before the Commission. I did not hesitate to pledge my efforts to that goal, nor, having become aware of the new programs which began to be initiated in 1961, and which were designed to expedite matters before the Commission, did I doubt my ability to make a meaningful contribution. The decision of the majority herein, with the necessary commitment of personnel and funds, represents a substantial retreat from declared Commission, and Congressional, policy.

We should not sacrifice broad Commission policy of expedition and the ultimate objective of industry-wide solutions for the limited and dubious purpose of adding one more provision to an order which already accomplishes substantially everything we set out to achieve.

Three years ago, Commissioner Jones dissented from the rejection by the Commission of a settlement, substantially identical to that now before us, offered by only *one* of respondents. How that position can be reconciled to the majority determination, and, on what basis the majority justifies the substantial commitment of funds and personnel to continuation of this matter, will remain a mystery since they have declined to enter a formal order and opinion.

The price the majority would pay is to high, and, apparently, cannot be justified by them. For the reasons set forth above, I would not pay it.

SPECIAL MATTER

MARCH 6, 1967.

Re: Salinas Valley Vegetable Exchange, et al. File 661 002.

(Previously circulated by Comm. MacIntyre as a Special Matter on March 2, 1967.)

From: Commissioner Elman.

To: Comm. Dixon, Comm. MacIntyre, Comm. Reilly, Comm. Jones, Secretary, General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See attached memorandum.

MEMORANDUM

MARCH 6, 1967.

To: The Commission.

From: Philip Elman.

Subject: Salinas Valley Vegetable Exchange, et al. File 661 0022.

I feel strongly that we should not issue this complaint. The field attorney recommended closing even if proposed respondents may have technically violated Section 2(c). His recommendation was based on two grounds. The first

was that the lack of records would make it impossible to enforce an order against a seller in this industry. There is no easy way to determine after a transaction has been consummated which party the broker "represented". Depending on market conditions, a transaction may be initiated by the seller or the buyer. None of the brokers or buyers interviewed by the field attorney remembered which party had initiated any specific transactions and no written records are kept. The field attorney summed it up as follows:

"[N]o one keeps sufficient records so that it could be ascertained which party the ground broker represented in any given transaction, because most of the business is consummated by telephone, and because the ground rules are well laid down by the U.S. Department of Agriculture covering perishable commodities, requires very little writing. . . . The only person that would ever really know who he was representing on a given transaction is the ground broker. The ground broker keeps a minimum of records and unless you could direct him to make notations on each and every transaction sufficient to make a determination, he could and probably would if he wanted to cheat, put his records in such a way that enforcement of an order would be impossible." (P. 23.)

The field attorney's second reason for recommending closing was his conclusion that although a broker may technically "represent" only one party in each transaction, the broker is really "somewhat in the same category as a wholesaler, in other words, a cog in the wheel of distribution, subject to neither the control of the seller or the buyer." (P. 22.) The field attorney found that the broker is an independent middleman who performs valuable service for *both* parties to the transaction, and that whether his service is of greater value to the seller or the buyer depends on the state of the market. As the attorney pointed out:

"The pure economics of distributing lettuce or other vegetables would indicate that his fee will be paid by the person to whom he renders the most service. It is therefore the writer's opinion that we do not have a true brokerage case." (P. 25.)

While I agree with the field attorney's analysis and conclusions, there is an additional and far more important reason why we should not issue this complaint. Unless we close this matter, the Commission will become a party to what amounts to a conspiracy by one faction of the produce growers industry to avoid paying brokerage and thereby raise the price of produce to the public.

Prior to the promulgation of the Trade Practice Rules, the industry practice (which was sanctioned by the Department of Agriculture,¹ had been for sellers to pay brokerage. Certain sellers wanted to stop making these payments, and the only way they could do so without losing business was to find some way to stop their competitors from making them. They enlisted the aid of the FTC for this purpose. After the Trade Practice Rules were promulgated, these sellers who had favored their promulgation uniformly ceased paying brokerage² and lodged complaints against their competitors who continued to pay it.

One of the shippers who continued to pay brokerage after the Rules went into effect was Salinas Valley. The staff would have us go along with the complaining party and issue a complaint charging violation of Section 2(c). The complaint, however, contains no charge of discriminatory use of brokerage payments or of favoring some customers over others. On the contrary, the file shows that Salinas Valley paid the brokerage on every one of its shipments in 1965. Thus, if we issue an order against Salinas Valley, its only effect will be to require Salinas Valley to stop paying brokerage and thereby raise its price across the board to every one of its customers. In this manner, Salinas Valley's competitors will not be forced by competitive pressures to assume the cost of brokerage. I do not believe that the Commission should aid the efforts of a group of sellers to pressure their competitors into maintaining uniformity of prices.

¹ The Department of Agriculture regulations permit the payment of brokerage by either party regardless of which party the broker "represents" under the law of agency.

² See pp. 5 and 9 of the field attorney's report.

SPECIAL MATTER

DECEMBER 11, 1968.

Re: Associated Merchandising Corp., et al. Docket No. 8651.

From: Commissioner Elman.

To: Comm. Dixon, Comm. MacIntyre, Comm. Jones, Comm. Nicholson, Secretary, General Counsel, Program Review Officer, Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs, Executive Director, Asst. Executive Director.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See attached memorandum.

MEMORANDUM

DECEMBER 11, 1968.

To: The Commission.

From: Philip Elman.

Subject: Associated Merchandising Corp., et al. Docket No. 8651.

The attached order represents the first part of the two intertwined motions which I made at this morning's meeting. The other part is that the Bureau of Restraint of Trade, in consultation with the Bureau of Economics and the Program Review Officer, submit to the Commission in 60 days its recommendations, on the basis of information in the Commission's files or otherwise available to the staff, and having due regard to budgetary and other limitations on the Commission's resources, whether it would be in the public interest for the Commission to adopt a resolution directing an investigation of alleged violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act by members of the department store industry in regard to their pricing and purchasing practices during the past two years.

As the Commission will recall, I made these motions only after all the other proposed alternatives had failed to muster a majority. The present impasse cannot continue indefinitely, and must somehow be resolved. I offered these two motions in the hope that they would provide a basis for action upon which we could all agree. If, however, it should transpire that there would be dissent from the attached order, I would want to reconsider my position in the matter. Since withdrawal of the complaint is a course of action which I do not favor, and which indeed seems to me far less in the public interest than unqualified acceptance of the consent order would have been, I would not want to be put in the position of having to defend withdrawal of the complaint if there were to be a dissent.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8651)

IN THE MATTER OF ASSOCIATED MERCHANDISING CORPORATION, ET AL., A CORPORATION

Commissioners: Paul Rand Dixon, Chairman; Philip Elman; Everette MacIntyre; Mary Gardiner Jones; and James M. Nicholson.

ORDER WITHDRAWING THE COMPLAINT

In this proceeding, which the complaint was issued more than four years ago, administrative hearings have not yet begun. Moreover, because of the pendency of collateral litigation arising out of attempted utilization of discovery procedures on both sides, it appears most unlikely that evidentiary hearings on the merits of the complaint could be commenced in the near future. In view of the present posture of the matter, continuation of the proceeding on its present course, with no prospect of a final determination for several years, would not be in the public interest. In order that the slate may be wiped clean and that any new proceeding should not become entangled in the procedural complications which have encumbered and delayed the disposition of this case,

It is ordered that the complaint be, and it hereby is, withdrawn without prejudice.

By the Commission.

JOSEPH W. SHEA, *Secretary.*

SPECIAL MATTER

OCTOBER 28, 1968.

Re: AMC, Docket 8651.

From: James M. Nicholson.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre, Comm. Jones, Secretary (J. Kuzew), General Counsel, Program Review Officer, Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs, Executive Director, Assistant Executive Director.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

MEMORANDUM

OCTOBER 28, 1968.

To: The Commission.

From: Commissioner Nicholson.

Subject: AMC.

In connection with the revision of the Commission minutes of October 8 in this matter to accord with discussions at the table on problems within the proposed consent agreement, a situation has arisen which merits discussion at the table.

First, I find that the staff has serious question about the proposed investigation of the AMC members for individual violations. One view is that the Commission should pursue other buying groups in this industry. Another view is that the investigation of individual violations of AMC members would be a major project and our efforts might well be made in a different direction if we are to get the "most bang for our buck."

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I am more concerned with the staff attitude toward investigation of individual violations. At the table on October 8, I suggested that we adopt Commissioner Jones' proposals in this phase of the case instead of the direction of the investigation as proposed by Commissioner MacIntyre. Commissioner Jones had suggested that the staff report to the Commission on the scope and nature of an individual investigation—had this been adopted we would have received the comments which have been made to me privately. I, of course, provided the third vote in favor of Commissioner MacIntyre's proposal.

Although we seem to have hold of a basket of snakes and no reasonable solution suggests itself to me, I move that we once again discuss this matter at the table with Frank Mayer and Basil Mezines.

WALK AROUND

SPECIAL MATTER

NOVEMBER 26, 1968.

Re: In the Matter of United Fruit Company and United States Fruit Sales Corporation.

In the Matter of Harbor Banana Distributors, Inc.

(Previously circulated as a Walk Around by Commissioner MacIntyre on November 22, 1968.)

From: James M. Nicholson.

to: Comm. Dixon, Bur. of Economics, Comm. Elman, Bur. of Restraint of Trade, Comm. MacIntyre, Bur. of Deceptive Practices, Comm. Jones, Bur. of Industry Guidance, Secretary (J. Kuzew), Bur. of Textiles and Furs, General Counsel, Executive Director, Program Review Officer, Assistant Executive Director.

See attached memorandum.

MEMORANDUM

NOVEMBER 26, 1968.

To: Commission.

From: James M. Nicholson.

Subject: In the Matter of United Fruit Company and United Fruit Sales Corporation, File No. 671 0187

In the Matter of Harbor Banana, Distributors, Inc., File No. 681 0092.

At my request, the staff has prepared the following amendments to the United Fruit order to reflect my concern that the order, as originally submitted, contained no basic attempt to monopolize prohibition directed towards Harbor and no broad prohibition directed at United's participation in this attempt. While the complaint clearly charged Harbor with the attempt and United with aiding in the attempt, the order originally proposed was directed only at the specific practices by which the attempt was given effect and the assistance was rendered.

It should be noted that the staff's original recommendation was generally in accord with the approach previously taken in similar cases. Neither the staff nor I have been able to locate a complaint or order which contains such a broad, catch-all attempt to monopolize prohibition, so to this extent we may be blazing a new trail. In this matter, it is a trail I think we should follow.

It should be noted that the staff has submitted a proposed new paragraph III and a new paragraph VII to the order previously circulated, with the other paragraphs to be renumbered accordingly if the Commission agrees with the new additions, the adoption of which I now move.

I continue to be impressed with the professional skill and willingness to cooperate which the staff has demonstrated in its handling of this case.

III.

It is further ordered that respondents United Fruit Company and United Fruit Sales Corporation, corporations, and their officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale or distribution of bananas in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Granting any advantage to any purchaser of bananas for resale where the purpose or effect may be to create a monopoly in the line of commerce in which said purchaser competes, or where the purpose or effect may be to hinder, lessen, restrict or eliminate competition with said purchaser.

VII.

It is further ordered that respondent Harbor Banana Distributors, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale, offering for sale, purchase, or offering to purchase bananas in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Engaging in any act or practice where the purpose or effect may be to create a monopoly in respondent Harbor in the purchase, sale or distribution of bananas, or to hinder, lessen, restrict or eliminate competition with respondent Harbor in the purchase, sale and distribution of bananas.

Other orders renumbered accordingly.

SPECIAL MATTER

MARCH 2, 1967.

Re: File 661 0022.

In the matter of Salinas Valley Vegetable Exchange.

I concur in the recommendation for the issuance of complaint.

From: Everette MacIntyre, Commissioner.

To: Comm. Dixon, Comm. Elman, Comm. Reilly, Comm. Jones, Secretary J. Kuzew, General Counsel, Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs, Div. of Consent Orders.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See the attached memorandum.

MEMORANDUM

MARCH 2, 1967.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: File 661 0022. In the Matter of Salinas Valley Vegetable Exchange, et al.

This matter involves alleged violation of Section 2(c) of the amended Clayton Act, based on the payment of allowances of illegal brokerage in the sale of produce—lettuce, celery, cauliflower, broccoli, etc.

The case was initiated along with six other cases after a complaint was received by the Commission from Counsel for the Grower-Shipper Association of Central California and Western Growers Association in June of 1965. The applicants contend that a majority of the sellers-shippers of produce in the Salinas area of California were trying to comply with the Federal Trade Commission Trade Practice Conference Rules for the Fresh Fruit and Vegetable Industry promulgated April 15, 1965; that some of the shippers including the proposed respondents were paying or allowing brokerage in violation of the Rules and as a result the applicants were losing sales and were being "penalized" for complying with the Rules.

Investigation of the proposed respondents established that Thomas M. Bunn and Tokeo Yuki are individuals and copartners doing business as the Salinas Valley Vegetable Exchange and having been in the business of packing, selling and distributing produce through ground brokers to buyers located throughout the United States, and doing a substantial annual volume of business. The investigation definitely established that in the majority of transactions analyzed for the period May 15, 1965, to September 1, 1965, that the shipper including proposed respondents have paid fees to the brokers who in fact are the agents of or are under the direction and control of the buyers.

The Attorney-Examiner investigating the case and the Attorney in Charge of the San Francisco Office recommend that the file be closed. Their reasoning is set forth on pages 22 through 25 of the Attorney-Examiner's memorandum dated October 7, 1966, appearing in the History File. In substance, the argument is made that "the ground broker is a mere cog in the wheel of distributing perishable items and is not really under the control of either party and actually is not the agent of either party. He does perform a function and he should be reimbursed for this function. The pure economics of distributing lettuce or other vegetables would indicate that his fee will be paid by the person to whom he renders the most service. It is therefore the writer's opinion that we do not have a true brokerage case, and the writer would therefore recommend that the case be closed * * *."

The Headquarters staff disagrees with this recommendation and concludes that a violation of Rule 2, Section 1, A-(3), Page 7, Trade Practice Rules for the Fresh Fruit and Vegetable Industry, has been established and consequently a violation of Section 2(c) of the amended Clayton Act. The staff further notes that the San Francisco Office has also recommended closing of the six other cases on the same grounds as those proffered in this case. Of the seven cases investigated, the San Francisco Office admits to having sufficient documentary evidence and potential testimony to establish "a violation in a technical sense of Section 2(c)" in five of the cases.

Accordingly, the Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that complaint issue charging proposed respondents with violation of Section 2(c) of the amended Clayton Act.

I concur in the recommendation and so move.

EVERETTE MACINTYRE,
Commissioner.

SPECIAL MATTER

OCTOBER 26, 1964.

Re: ATD Catalogs, Inc., et al. Docket 8100.

From: Everette MacIntyre, Commissioner.

To: Comm. Dixon, Comm. Elman, Comm. Reilly, Comm. (J. Kuzew), Secretary; General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs.

This is a special matter (not listed on the regular agenda) which I am presenting as a *Walk Around*.

See attached memorandum.

MEMORANDUM

OCTOBER 26, 1964.

To : Commission.
 From : Commissioner MacIntyre.
 Subject : ATD Catalogs, Inc. et al. Docket 8100.

As you will recall, the Commission, by minute of October 6, 1964, directed that counsel for ATD Catalogs, Inc., be advised that his August 10, 1964, request for an advisory opinion could not be acted upon pending receipt of additional information from him. In compliance with this directive, the staff of the Compliance Division, Bureau of Restraint of Trade, has prepared drafts of two letters to ATD's counsel, of which copies are attached. One of the letters, prepared for the signature of the Secretary, advises the ATD counsel of the Commission's action and the other, signed by the Chief of the Compliance Division, requests the specific information which it is felt is needed.

I have examined these letters and believe them to be adequate in form and content. I move that they be approved and mailed.

However, there is a question in my mind as to whether we are going to be able to render an "advisory opinion" in this matter in the near future. On October 6, 1964, we directed the staff to prepare and submit the necessary papers to initiate a trade regulation rule or trade practice conference proceeding dealing with the very subject matter upon which ATD is requesting its advisory opinion. An advisory opinion on this subject would, of course, prejudice the issues which the trade practice or trade regulation rule proceeding is supposed to deal with. But we are a long way from initiating the proposed conference and this respondent is faced with an immediate problem of how to comply with our order to cease and desist. So, under these circumstances I think that the best course to take is to send out these letters requesting additional information and if sufficient information is received, render ATD such *informal* advice as needed to enable them to comply with the outstanding order.

As an alternative course, we could suspend ATD's duty to comply with the outstanding order until the completion of the trade practice or trade regulation rule conference. I do not recommend such a course for the obvious reason that we would have to, in fairness, suspend all other similar orders.

EVERETTE MACINTYRE,
Commissioner.

SPECIAL MATTER

DECEMBER 7, 1964.

Re : ATD Catalogs, Inc. Docket 8100.
 From : Everette MacIntyre, Commissioner.
 To : Comm. Dixon, Comm. Elman, Comm. Reilly, Comm. Jones, Secretary (J. Kuzew), General Counsel, Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the Commission meeting, December 10, 1964.

See attached memorandum.

MEMORANDUM

DECEMBER 3, 1964.

To : Commission.
 From : Commissioner MacIntyre.
 Subject : Request by Counsel for Oral Hearing Before the Commission Relative to Pending Request for Advisory Opinion by ATD Catalogs, Inc., Docket 8100.

ATD, a toy catalog publishing concern which is under an order to cease and desist, in August filed a request for advice as to the legality of the operations of the so-called "independent" toy catalog publishing concerns in the light of the Commission's orders entered earlier this year. At that time ATD stated that if the Commission held that the operations of the independents were not within the scope of Section 2(d) of the Robinson-Patman Act, then the respondent faced two choices: (1) itself becoming an "independent" by divorcing the proprietary interests of the related jobbers in ATD and making the publication available to all jobbers desiring the same; or (2) on the other hand, economic extinction.

Reading the request of ATD of August, it is fairly clear that ATD would prefer a Commission rule uniformly requiring that advertising or promotional payments be proportionalized, whether they are made to jobber-related or "independent" catalogs.

The Commission, in the meantime, however, had rendered an advisory opinion to Oakes Consumer Catalogs (Haywood Publishing Company, File 643 7014), on September 30, 1964,¹ to the effect that where a catalog is not owned or controlled by or in any way directly or indirectly affiliated with any customer of the advertiser or groups or classes of such customers and where it is available in a practical business sense to all toy jobbers, then on objection could be raised to payments by manufacturers for advertising in such catalogs. In effect, therefore, the Commission gave the green light to the operation of the "independent" catalogs. This precedent is followed by the advisory opinion rendered Irwin Consumer Catalogs, Inc., by the Minute of November 19, 1964.

In the light of the Oakes advisory opinion, ATD was informed that there was not sufficient information before the Commission to entertain the request for an advisory opinion and the respondent was requested for specific and detailed information as to the proposed manner in which stockholder jobbers would divest themselves of proprietary interests in the catalog publishing concern so as to render the latter an independent operation. By the request for information contained in the letter, therefore, ATD was implicitly advised that if it conformed to the standards set forth in the Oakes advisory opinion, which is now a matter of public record, respondents need have no fear of Commission action with respect to advertising or promotional payments received. (See Commission Minute of October 27, 1964.)

ATD, the Compliance Division of the Bureau of Restraint of Trade informs us, has not yet complied with the request for further information. However, the counsel for ATD and officials of the respondent conferred with representatives of the Compliance Division on November 16. Apparently the conference ended on an inconclusive note and ATD, according to the staff, was not satisfied that it had received a definitive answer to its problem. As a result, ATD's attorney now requests permission to present an oral argument to the Commission, bearing both on the law and the economic facts of the toy catalog publishing business, which, in counsel's view, the Commission may have overlooked in rendering the advisory opinion to Oakes.

ATD's counsel, in his letter of November 19, 1964, asserts that after study of the Oakes advisory opinion, he is at a loss in applying the principles promulgated therein to the realities of the toy catalog industry. He contends further that the criteria enunciated therein cannot be met by any catalog company extant. In addition, he confesses that he is perplexed because, in his view, there are serious and irreconcilable inconsistencies between the Oakes advisory opinion and the prior decisions of the Commission in the litigated cases. He asserts that Oakes and other "punctative 'independents'" are already capitalizing on their interpretation of the advisory opinion in a manner which threatens the continued existence of ATD. He advises, therefore, that immediate clarification is required, requesting an opportunity to present oral argument before the Commission to supplement his request for an advisory opinion and to clarify the intent and meaning of the Oakes advisory opinion. Clearly, therefore, it is apparent that ATD does not wish to take the necessary steps to bring itself within the scope of the criteria enunciated in the advisory opinions rendered Oakes and Irwin. Rather, respondent evidently hopes the Commission can be persuaded to reverse the advice given to these toy catalog publishing concerns.

The Division of Compliance recommends that ATD be advised that the request for oral argument will not be considered until it receives the information requested of ATD by the Commission's Compliance Division by letter of October 30, 1964.

In my opinion, this course is inadvisable. The Division's letter of October 30, requesting further information from ATD, is based on the assumption that the respondent would take the steps necessary to bring it within the criteria enunciated in the Oakes advisory opinion. It seems clear, at this point, that ATD does not wish to take advantage of the Commission policy pronouncement enunciated in the advisory opinion but rather seeks a reversal thereof. As a result, there seems little point in renewing the request for this information.

¹ Published by the Commission on October 30, 1964, in Advisory Opinion Digest No. 2.

On October 6, the staff was directed to prepare and submit to the Commission the necessary papers to initiate a trade regulation rule or trade practice conference proceeding for the purpose of drawing guidelines distinguishing between the operations of the jobber-affiliated and independent catalog publishing firms. To date we have not yet heard from the staff with respect to the actions taken under that directive. I am informed by the Secretary's office, however, that under the normal 90-day period allowed no report is due until January 6, 1965. In my view, the request by ATD presents serious policy and legal problems for the Commission, which deserve a hearing. The question remains: Should ATD be permitted to state its case separately to the Commission in oral argument or should ATD be granted an opportunity to make its views known in the context of the projected trade practice or trade regulation proceeding? I would prefer the second approach, thus avoiding piecemeal action in what is essentially an industry-wide problem. However, it is apparent the Commission will have to take action quickly in this matter, since, if memory serves me correctly, negotiations between toy manufacturers and toy catalogs publishing concerns take place quite early in the year. It seems to me that the question ought to be governed by the date on which the staff is prepared to institute the rule-making proceedings. If these proceedings could be initiated in January, the delay in giving ATD a hearing would not be unreasonable. Should that prove impossible, ATD should be given an opportunity to state its case to the Commission by way of oral argument at the earliest possible date.

In my view, the rule-making proceeding might be speeded if the personnel of the Division of Compliance responsible for administering the orders in the toy catalog cases be directed to participate therein. In addition, this might have the advantage of presenting the Commission with a unified approach to these matters by all staff members responsible for handling these questions.

Accordingly, I move that ATD be advised that a trade regulation or trade practice conference proceeding will be initiated some time in January of 1965 and that at this time ATD and all other interested members of the industry will be permitted to state their views on the problems raised in the respondents' request for an advisory opinion. I further move that the personnel of the Compliance Division responsible for the toy catalog cases be directed to participate in the rule-making proceeding in order that matters may be speeded up by their expertise in this field and to ensure a unified approach by the staff in this area. In the alternative, if the rule-making proceeding cannot be initiated by January, I move that ATD be given an opportunity to present its views at oral argument to the Commission at the earliest convenient date.

EVERETTE MACINTYRE,
Commissioner.

SPECIAL MATTER

JANUARY 6, 1965.

Re: Bureau of Restraint of Trade's, Letter Redrafted in Response to the Commission's minute of Dec. 10, to ATD Catalogs, Inc., Docket 8100.

From: Everette MacIntyre, Commissioner.

To: Comm. Dixon, Comm. Elman, Comm. Reilly, Comm. Jones, Secretary (Mr. Kuzew), General Counsel; Bur. of Economics, Bur. of Restraint of Trade, Bur. of Deceptive Practices, Bur. of Industry Guidance, Bur. of Textiles and Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

MEMORANDUM

JANUARY 6, 1965.

To: Commission.

From: Commissioner MacIntyre.

Subject: Bureau of Restraint of Trade's Letter Redrafted in Response to the Commission Minute of December 10, 1964, to ATD Catalogs, Inc., D. 8100.

As will be remembered, ATD, a toy catalog publishing concern which is under an order to cease and desist, in August filed a request for advice as to the legality of the operations of the so-called "independent" toy catalog publishing concerns in the light of the Commission's orders entered earlier this year. As noted in my memorandum of December 3, 1964, on this subject, it is now apparently ATD's intention to ask for a Commission reversal of the policy enunciated

in the advisory opinion rendered to Oakes Consumer Catalogs (Haywood Publishing Company File 6437014) on September 30, 1964.

The Commission minute of December 10, 1964, directs the Bureau of Restraint of Trade to redraft its previous letter to ATD and to advise the latter that action will be deferred on the request for oral argument until the Commission is more fully informed and that the Commission will attempt to look into the matter on an industry-wide basis with a trade practice conference or trade regulation rule proceeding which will be initiated sometime in January 1965, and that at that time ATD and all other interested members of the industry will be given the opportunity to be heard and present their views.

The Bureau of Restraint of Trade has redrafted the letter, which it now submits to the Commission for its consideration. This letter essentially advises ATD that the Commission is of the opinion that the subject matter of ATD's request requires consideration on an industry-wide basis and that a trade practice conference proceeding or trade regulation rule proceeding will be initiated by the Commission sometime in January of 1965. ATD is also informed that at such time it and other members of the industry will be given the opportunity to be heard and to present their views. The proposed letter further states that the information requested from ATD by the Compliance Division on October 30, 1964, could be submitted at that time.

The Bureau of Restraint of Trade, however, now informs us that it has been advised by Mr. Hall, Chief of the Division of Trade Practice Conferences and Guides, that in his view it is very doubtful that the proposed trade practice conference proceeding could be initiated before the end of January 1965 and that the attached letter should be redrafted to indicate "early in 1965" as the starting date of the proceeding instead of "sometime in January of 1965", as directed by the Commission.

As I indicated in my memorandum of December 3, 1964, I think that it would be preferable to handle ATD's request in the context of an industry-wide proceeding, provided this can be done by January of 1965. I moved at that time, in the alternative, that if the rule-making proceeding could not be initiated by January, ATD be given an opportunity to present its views at an oral argument to the Commission at the earliest convenient date. In view of the uncertainty as to the date when the trade practice conference will in fact be initiated, it is my view that respondent should be given a specific date to present oral argument to the Commission with respect to the operations of the "independent" catalogs and their impact on the industry in the light of the Commission's advisory opinion in *Oakes*. If at all possible, the date for oral argument should be set in January. ATD should not be subjected to a longer delay, if that can be avoided, since undoubtedly respondent as well as others in the toy catalog industry will have to initiate their plans for 1965 rather early in the year.

I think this is the best procedure, even though otherwise it would be preferable to handle respondent's request as a part of the proposed rule-making proceeding and despite the fact that it is unlikely that the Commission will reverse itself on the policy set forth in the *Oakes* advisory opinion. Under the circumstances, good public relations with the business community require the ATD be given its day in court on these issues as soon as possible. Advising respondent that it will have this opportunity sometime "early in 1965" would not, to my mind, be good public relations, since our informal attempts to clarify ATD's problems over a period of some four months have apparently achieved no concrete result.

I see no point in renewing the request for information made by the Compliance Division on October 30. That request, it seems to me, was premised on the scope of the principles enunciated by the *Oakes* advisory opinion. It now appears that respondent does not wish to pursue that course and therefore renewing the request for this information at this time would appear to be meaningless.

I move that respondent be afforded an opportunity to present oral argument with respect to the guidelines to be drawn between the operations of "independent" and jobber affiliated catalogs at the earliest possible opportunity, preferably in January. I further move that the Bureau of Industry Guidance be requested to inform the Commission as to the specific date on which it will be ready to initiate the proposed trade practice conference proceeding.

EVERETTE MACINTYRE,
Commissioner.

MEMORANDUM

DECEMBER 17, 1964.

To: The Commission.

Via: Director, Bureau of Restraint of Trade.

From: Joseph J. Gercke, Chief, Compliance Division, Bureau of Restraint of Trade.

Subject: Letter redraft responsive to Commission Minute of December 10, 1964.
ATD Catalogs, Inc., Docket No. 8100.

Forwarded herewith is a redraft of the letter to counsel for ATD Catalogs, Inc., responsive to Commission Minute of December 10, 1964.

Two matters relative thereto should be noted. First, it is believed that specific direction should be given counsel for ATD relative to the outstanding and pending request for additional information from ATD. We construe the Commission Minute to imply, although it does not specifically so state, that such information should appropriately be submitted in connection with the scheduled trade practice conference proceeding or trade regulation rule proceeding. Accordingly, the subject letter so advises.

Second, this Division has been advised by Mr. Hall, Chief, Division of Trade Practice Conferences and Guides, Bureau of Industry Guidance, that in his view it is extremely doubtful that the referenced trade practice conference proceeding can be initiated before the end of January, 1965. The attached letter redraft presently conforms in this respect to the time indicated in the Commission's directive, i.e., "sometime in January, 1965". Mr. Hall has requested however, that we recommend that this time reference be changed to, "early in 1965".

Respectfully submitted,

JOSEPH J. GERCKE,
Chief, Compliance Division,
Bureau of Restraint of Trade.

Approved:

CECIL G. MILES,
Assistant Director,
Bureau of Restraint of Trade.
JOSEPH E. SHEEHY,
Director, Bureau of Restraint of Trade.

FEDERAL TRADE COMMISSION

OFFICE OF THE SECRETARY

WASHINGTON, D.C.

Re ATD Catalogs, Inc., Docket No. 8100.

Mr. ARNOLD R. ROSSENWASSER, Esquire,
515 Madison Avenue,
New York, N.Y.

DEAR MR. ROSENWASSER: This is with reference to your letter of November 19, 1964, requesting oral hearing before the Commission in connection with your pending request for an advisory opinion.

The Commission is of the opinion that the matters referenced in your requests require consideration on an industry-wide basis. A trade practice conference proceeding, or trade regulation rule proceeding, to consider the problems of the toy industry, including matters such as those referenced in your requests, will be initiated by the Commission sometime in January, 1965. During the course of such proceeding, ATD Catalogs, Inc. and all other interested members of the industry will be given the opportunity to be heard and to present their views. Information responsive to the outstanding request by the Commission's Division of Compliance under date of October 30, 1964, for additional information from ATD Catalogs, Inc., will presumably be germane to such proceedings, and may be there submitted.

The Commission is accordingly deferring action on your request, until it is further informed in the premises.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary.*

AGENDA MATTER

FEBRUARY 7, 1964.

Re: Docket 7790—Alfonso Gioia & Sons, Inc., File 601 0176—Procino-Rossi Corp., File 601 0177—Ideal Macaroni Co., File 601 0178—Gioia Macaroni Co., File 601 0181—Prince Macaroni Co.
From: Sigurd Anderson, Commissioner.
To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

FEBRUARY 7, 1964.

To: The Commission.

From: Sigurd Anderson, Commissioner.

Subject: 1. *Macaroni Cases. 2. Price discrimination and discriminatory allowances and services—Sections 2(a), (d) and (e), Clayton Act, as amended. 3. Recommendations: as set forth below.

These are five interrelated macaroni cases, interrelated to the extent that the Commission by minute of February 1, 1962 (entered in Docket 7790), and by minute of May 10, 1962 (entered in File 601 0181), directed that the following matters be submitted to the Commission simultaneously:

*Docket 7790—Alfonso Gioia & Sons, Inc., File 601 0176—Procino-Rossi Corporation, File 601 0177—Ideal Macaroni Company, File 601 0178—Gioia Macaroni Company, File 601 0181—Prince Macaroni Company.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, now presents these matters for our consideration. All of the above matters are being presented simultaneously but by separate memorandum. The files in these matters comprise approximately 26 binders. The status and posture of each of these matters are hereinafter set forth, together with the recommendation of the Bureau as to what should be done in each instance.

IDEAL MACARONI COMPANY, FILE 601 0177

Forwarded at this time is a draft of complaint charging proposed respondent with a violation of Section 2(d) of the amended Clayton Act. Also forwarded is an executed consent agreement containing an order to cease and desist. The complaint charges and the evidence will show that Ideal granted various payments and allowances during 1962 to the Kroger Company in the form of free merchandise for store openings; discounts and allowances for a stamp promotion; payments and allowances for newspaper and TV advertising; and payments and allowances for coupon sales. Similar payments and allowances were not made available to competing retailers on proportionally equal terms.

The investigation of Ideal did not reveal violations in commerce of other provisions of the Robinson-Patman Act, and the order in this matter is, therefore, limited to Section 2(d). It will be hereinafter noted that the orders in the other macaroni cases being submitted cover Sections 2(a), (d) and (e). The memorandum from the Bureau of Restraint of Trade also outlines the evidence supporting the 2(d) violation herein. As noted above, the proposed respondent herein has executed a consent agreement. The Bureau, accordingly, concludes that the consent agreement in this matter should be accepted by the Commission and issued simultaneously with the issuance of the complaint in Procino-Rossi. It was further recommended that the effective date of the order in the instant matter be stayed until such time as an order is issued against Procino-Rossi. The Bureau points out that somewhat similar arrangements were followed by the Commission in Central Linen Supply Company, Docket 8558.

GIOIA MACARONI COMPANY, INC., FILE 601 0178

Also forwarded herewith is a draft of proposed complaint charging this proposed respondent with violations of Sections 2(a), (d) and (e) of the amended Clayton Act, together with the signed and executed consent agreement which the Bureau of Restraint of Trade recommends that the Commission accepts in disposition of the complaint charges.

The memorandum from the Bureau of Restraint of Trade indicates that prior to the completion of the reinvestigation of this matter, the proposed respondent signified a willingness to sign a consent agreement. Therefore, the files, while not complete, do indicate rather clearly that the proposed respondent was violating a number of the Robinson-Patman amendments to the Clayton Act. The Sections 2(a), (d) and (e) provisions of the order to cease and desist in this matter are substantially identical with the order entered in Docket 7790 and the order contained in File 601 0181, and that recommended in File 601 0176.

The recommendation is made by the Bureau of Restraint of Trade that the proposed complaint should herewith be issued and that the consent agreement be accepted in disposition thereof. It is further recommended that the order to cease and desist not become effective until an order is entered in the Procino-Rossi matter, as suggested above.

PRINCE MACARONI MANUFACTURING COMPANY, FILE 601 0181

This is the third matter in which a draft of proposed complaint is forwarded charging respondent with violations of the Robinson-Patman amendments to the Clayton Act, together with a signed and executed consent agreement. The Bureau of Restraint of Trade recommends that the Commission accept the agreement in disposition of the complaint charges.

Again, in this file, as in the Gioia matter, the proposed respondent indicated a willingness to sign a consent agreement prior to the completion of the reinvestigation. However, the Bureau of Restraint of Trade advises us that the files do contain sufficient information to indicate that the proposed respondent was violating the Robinson-Patman Act rather promiscuously. Here also the order to cease and desist contains provisions relative to Sections 2(a), (d) and (e) of the Clayton Act, as amended. The recommendation is also made by the Bureau of Restraint of Trade that the proposed complaint should issue and that the consent order be accepted, but that the order to cease and desist not become effective until an order is entered in the Procino-Rossi matter.

ALFONSO GIOIA & SONS, INC., DOCKET 7790

By order issued October 21, 1960, the Commission adopted the initial decision of the hearing examiner based on an agreement containing a consent order. However, the Commission subsequently reopened the proceedings, vacated and set aside the order, and the matter was placed on suspense to be reconsidered when the other macaroni cases were submitted to the Commission.

The entire bundle of macaroni cases is now being presented to the Commission for appropriate disposition. I believe it would now be appropriate for the Commission by order to take this matter off suspense and to issue its order in this matter, with the proviso that the order should not become effective until an order is entered in the Procino-Rossi matter, as previously suggested.

PROCINO-ROSSI CORPORATION, FILE 601 0176

Forwarded herewith as to this matter is a copy of a proposed complaint charging the proposed respondent with violating Sections 2(a), (d) and (e) of the Clayton Act, as amended. This is the sole proposed respondent that has declined to sign a consent agreement in these matters. As recently as November 21, 1963, the Commission was advised that Procino-Rossi would agree to sign a consent settlement if its competitors would do so. However, Procino-Rossi has failed to furnish the Commission or its counsel with any positive statements of improper practices of other competitors, even though they have been specifically invited to do so. As indicated above, the other macaroni competitors of Procino-Rossi, insofar as they represent its principal competitors, have entered into consent agreements. Counsel in support of the complaint has advised this office that he believes that Procino-Rossi probably would execute a consent agreement, should it be given another opportunity.

It would appear that these matters are now in the posture requiring Commission action before anything else can be done. In review, it would appear that three of the macaroni respondents have executed consent agreements; another, which is on the adjudicative calendar, has also executed a consent agreement; only Procino-Rossi Corporation is the hold-out. Under the circumstances, I believe we should now extend to Procino-Rossi another opportunity to sign a consent agreement. If it fails to do so within a 30-day period, I firmly believe that the Commission should issue its complaint forthwith.

In disposition of the above matters I make the following recommendation:

1. That the Commission should accept the consent agreement executed in the matters of Ideal Macaroni Company, Gioia Macaroni Company and Prince Macaroni Manufacturing Company, with the understanding that the orders to cease and desist therein shall not become effective until an order is entered in the Procino-Rossi matter. Appropriate orders have been prepared in each of these matters accepting the consent agreement as an appropriate disposition of the proceeding and deferring service of the decision and order until issuance of the Commission's decision and order "in the aforesaid related Commission proceeding."

2. That the case of Alfonso Gioia & Sons, Inc., Docket 7790, rather than be taken off suspense at this time, be continued in its present posture. At the time a decision and order is issued in the Procino-Rossi matter, an appropriate order can then be prepared and issued, adopting the initial decision reinstating the effective date of the order therein.

3. With the issuance of the orders accepting the consent agreements as to the three consenting macaroni manufacturers, Procino-Rossi can be advised of the status of these other matters and that these competitors have executed consent agreements and that it will be given another opportunity to sign a consent agreement; and that, failing to do so within 30 days, the Commission's complaint shall forthwith issue. Accordingly, the Commission can now make its determination to issue complaint herein pursuant to Part II of its Rules.

As to the above recommendations, I move their adoption.

SIGURD ANDERSON, *Commissioner*.

DECEMBER 16, 1963.

Re: Lovable Brassiere Company, et al., File 601 0885.

From: Sigurd Anderson, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

DECEMBER 16, 1963.

To: The Commission.

From: Sigurd Anderson, Commissioner.

Subject: 1. File 601 0885—Lovable Brassiere Company, et al. 2. Bras, girdles, etc.

3. Discriminatory promotional allowances—sec. 2(d), Clayton Act, as amended. 4. Recommendation: that revised complaint now issue pursuant to Part II of our Rules.

On September 5, 1963, the Commission returned this file to the Division of Discriminatory Practices, Bureau of Restraint of Trade, for additional review and reconsideration in the light of certain facts disclosed in the original memorandum from that Bureau. It had been found that proposed respondent's original promotional plan, and particularly its "LIFT" cooperative advertising plan, had been discontinued and a new Retail Promotion Plan instituted as of January 1, 1963. In addition, the name of the proposed respondent had been changed to "The Loving Company". A redrafting of the complaint accordingly seemed indicated. The file has now been returned to us with the revised and redrafted complaint and a detailed memorandum pointing out how the new Retail Promotion Plan used by respondent fails to conform to Section 2(d) of the Clayton Act, as amended, and provides payments to some competing customers that are not available to other competing customers on a proportional basis.

It would appear that the redrafted complaint now covers the proposed respondent under its proper name and its new Retail Promotion Plan. Accordingly, I recommend and move that the Commission make its determination that the complaint should issue pursuant to Part II of its Rules.

SIGURD ANDERSON, *Commissioner*.

APRIL 4, 1969.

Re Arrow Food Products, Inc., Docket No. 8212.

From : Commissioner Dixon.

To : Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

APRIL 4, 1969.

MEMORANDUM

To : Commission.

From : Commissioner Dixon.

Subject : Arrow Food Products, Inc., Docket No. 8212.

The Compliance staffs have forwarded Arrow's compliance report with recommendations that it be rejected. The consent order in this matter, entered in June 1962, broadly prohibits violations of Sections 2(a), 2(d), and 2(e) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act (misrepresentation of quality, etc.).

A supplemental compliance report was received on November 26, 1965. In March 1967, the Bureau of Restraint of Trade submitted its recommendations dealing with the Robinson-Patman aspects of the case. Since this submission did not discuss compliance with the deceptive practice provision of the order, I felt that the Commission should not have to deal with this matter in piecemeal fashion. Hence, Restraint of Trade was told to hold the matter and resubmit it as soon as the Section 5 aspect was completed. This message was conveyed to Deceptive Practices. On January 29, 1969, Deceptive Practices finally submitted a 5-page memorandum dealing with Arrow's compliance.

I am satisfied that the staff's recommendation is appropriate that we reject the portion of the report dealing with Sections 2(a), 2(d), and 2(e). The staff notes that Arrow has granted lower net prices to Kroger stores in Memphis, Tennessee, than it granted to National Tea stores or to stores of a local wholesaler (Dixie Savings stores). Arrow has also granted advertising allowances to Kroger that were not made available to competing customers. Arrow appears to have engaged in sufficiently questionable activities to merit rejection of its report.

The Section 5 prohibition forbids misrepresentation of quality, type, origin, or other characteristics of food products. This relatively small processor deals primarily in beans and peas. Arrow also sells some popcorn, dried fruit, rice, and black pepper. The staff recommends that the entire Section 5 portion of the report be rejected, saying however: "With the exception of the claims made for their popcorn, respondents appear to be complying with the order. However, the fact remains that we do not know the actual grade or quality of the products packaged and sold. Therefore, to make a sound judgment as to respondents' compliance a spot-check investigation would be required."

Because I was troubled by the manner in which this matter was handled, I requested that the Bureau Directors answer the following questions:

- (1) Why this matter has been so long delayed?
- (2) Why we have not done more to bring the respondent into compliance?
- (3) What steps have been taken to efficiently coordinate the actions of the Bureaus in comparable instances?
- (4) What steps have been taken to insure that future reports indicating lack of compliance will not be similarly delayed?

I am attaching copies of the answers received. I am satisfied that the Bureaus and their Compliance Divisions have taken sufficient steps to avoid a repetition of this matter. I move the staff recommendation that the report be rejected.

I also move that respondent be informed that it has thirty days in which to demonstrate that it is now in full compliance with the order. If the staff fails to accomplish this task through voluntary means, the staff should be prepared within ten days after expiration of the thirty-day period to immediately institute a civil penalty proceeding.

PAUL RAND DIXON, *Commissioner.*

MEMORANDUM

MARCH 26, 1969.

To : The Chairman.

From : Frank C. Hale, Director, Bureau of Deceptive Practices.

Subject : Arrow Food Products, et al., Docket 8212.

This is responsive to your directive of March 19, 1969 that I report with respect to the Bureau's handling of the above-captioned matter and in so doing answer four specific questions.

With respect to your first and second questions, both of which relate to the delay in bringing the respondent into compliance, there is little I can add to the explanation contained in the attached memorandum of March 25, 1969, from Mr. Henry Pons to me, except that I do not approve the way the case was handled.

The problem of delay in the handling of matters is one of the most troublesome problems we have to deal with. The fact that the Bureau is handling a tremendous volume of work with limited personnel is a major reason for the delay. There are capable, dedicated, hard-working attorneys in the Bureau who simply have too many matters to handle and they have to make decisions as to priority. There are also attorneys in the Bureau who procrastinate and whose performance is not up to acceptable standard. During the past year there has been a concerted effort to reduce the Bureau's caseload and I believe it is now nearing manageable limits. We have accomplished this by disposing of a substantial number of old matters in which there was little or no current public interest and by being more selective in the starting of new investigations.

The Bureau has instituted procedures and controls designed to prevent undo delay in the processing of current matters. But there are still a number of old matters, like the instant case, which must be disposed of. Each Division Chief has been directed to review every case in his division and to make every effort to move those cases in which there has been unusual delay.

The problem raised by your third and fourth questions has been discussed with the Directors' of the Bureau's of Restraint of Trade and Textile and Furs. We have agreed that in the future the Bureau having primary responsibility for a case during litigation will have the principal responsibility for getting compliance with the entire order but will consult with the compliance division or section of the Bureau having secondary responsibility. In other words, the Bureaus will work together in getting compliance with orders and we will not permit matters to be handled like the instant case was handled.

Respectfully submitted,

FRANK C. HALE.

MEMORANDUM

MARCH, 25, 1969.

To : Director, Bureau of Deceptive Practices.

From : Henry G. Pons, Attorney, Division of Compliance, Bureau of Deceptive Practices.

Subject : Arrow Food Products, Inc., et al., Docket 8212.

Pursuant to your direction the following report is submitted regarding subject matter.

The order in this case was issued on June 26, 1962. This Division requested a report of compliance. Respondents requested and were granted an extension of time in which to submit their report. Respondents' report was received on November 5, 1962.

There are four prohibitions contained in the order. The single paragraph coming within the cognizance of this Bureau prohibits respondents from:

"Representing that their food products conform in quality or type to standards established for such products by the United States Department of Agriculture, when such is not a fact, or in any other manner misrepresenting the quality, type, origin, or other characteristics of such food products."

Because the Bureau of Restraint of Trade was primarily concerned with the case, the report was referred to that Bureau in accordance with the then existing procedure on January 14, 1963.

During the period from April 3, 1963, to February 25, 1966, the Division of Compliance of this Bureau had periodic contacts with the Division of Compliance, Bureau of Restraint of Trade. Copies of the memoranda of these contacts are attached.

On May 19, 1967, Mr. Garvey called this Division and stated that the memorandum of his Bureau had been returned by the Commission for the purpose of including a recommendation as to the Section 5 prohibition of the order. A copy of this memorandum is attached.

On May 24, 1967, respondents were requested to submit a supplemental report of compliance.

On August 1, 1967, a follow-up letter was sent to respondents.

On August 21, 1967, respondents' counsel requested a copy of our letter of May 24, 1967, alleging that respondents did not receive it.

On November 15, 1967, respondents submitted their supplemental report.

On November 22, 1967, the files of the Bureau of Restraint of Trade, Compliance Division, were examined. A copy of a memorandum regarding this examination is attached.

On November 29, 1967, respondents were advised that their report was incomplete and further information was requested.

On September 11 and October 1, 1968, we telephoned respondents' attorney requesting the submission of the additional compliance material. In each instance we were assured the material would be submitted promptly.

On October 31, 1968, respondents submitted the additional requested material.

On January 29, 1969, our memorandum was transmitted to the Commission. A copy of the memorandum is attached.

In summary, at the time of the submission of respondents' initial report this Division was prepared to act on its part. However, it was always contemplated that any submission to the Commission would be a joint effort. Accordingly, the report of compliance this Division requested was referred to the Bureau of Restraint of Trade for its review.

It will be noted from the attached memoranda that from time to time the Bureau of Restraint of Trade was contemplating an investigation or requesting additional information from respondents. Where we were aware of this we requested that they obtain information pertaining to the Section 5 prohibition. At any rate, that Bureau was not in a position to process their part of the case until sometime in 1967. It is to be noted that on February 25, 1966, Mr. Garvey had agreed to contact this Bureau when his Bureau was ready to proceed. We heard nothing until May 19, 1967, when we were advised that their memorandum to the Commission had been returned. It was obvious that we could not act upon a 1962 report of compliance. Accordingly, it was necessary to require respondents to update their report on May 24, 1967. To request a report any time prior to the date the Bureau of Restraint of Trade was prepared to proceed would only result in us having to report to the Commission on an out dated report of compliance.

The files are with the Commission. However, it is my recollection that the record will show that we experienced difficulty in obtaining a report from respondents.

As to the four questions posed on page 2 of the Chairman's memorandum:

"(1) Why this matter has been so long delayed;"

This question, of course, involves both Bureaus. After we learned that the Bureau of Restraint of Trade had submitted its memorandum and it was returned by the Commission on May 19, 1964, we acted promptly to obtain a current report on May 24, 1967. After a follow-up on August 1, 1967, respondents requested a copy of our May 24, letter on August 21, 1967. On November 15, 1967, a report was received, but was unsatisfactory. A further report was requested on November 29, 1967, which was finally received on October 31, 1968. While efforts were made to expedite respondents' submission of their report, and they gave assurances that they would do so, I no doubt, let too much time elapse between follow-ups.

"(2) Why we have not done more to bring this respondents into compliance;"

The order in this case prohibits respondents from, among other things, misrepresenting quality, type, *origin*, or other characteristics of food products. In their report respondents submitted an advertisement which represented that their popcorn was from Nebraska. Certain invoices showed purchases of Iowa popcorn. This matter could have easily been clarified, but the case was "expedite" and this is the principal reason for recommending rejection of the report. Further, in this case respondents submitted labels affixed to bags in which various products are packaged. These labels show various grades of products. Under

the circumstances there is no way of assuring ourselves that the packaged products meet the quality standards set out on the label. This could only be ascertained by a spot-check investigation.

"(3) What steps have been taken to efficiently coordinate the actions of the Bureaus in comparable instances; and

"(4) What steps have been taken to insure that future reports indicating lack of compliance will not be similarly delayed."

So far as I know, the 1962 procedure in this type of matter has not been changed. In answer to these questions it might be desirable to propose that the Bureau having primary jurisdiction should process the entire case, after consultation with the Bureau having secondary jurisdiction.

Respectfully submitted,

HENRY G. PONS,
Attorney, Division of Compliance.

MEMORANDUM

MARCH 26, 1969.

To: The Chairman.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

Subject: Arrow Food Products, Inc., Docket No. 8212. Delay In Handling.

This is in response to your memorandum of March 19, 1969 concerning the above captioned matter. You ask answers to four questions listed on the bottom of the second page of your as yet undated memorandum to the Commission concerning the report of compliance of Arrow Food Products, Inc. The questions listed therein are:

- (1) Why this matter has been so long delayed;
- (2) Why we have not done more to bring this respondent into compliance;
- (3) What steps have been taken to efficiently coordinate the actions of the Bureaus in comparable instances; and
- (4) What steps have been taken to insure that future reports indicating lack of compliance will not be similarly delayed.

Although, I reluctantly allude to our past manpower situation, I believe that unequivocally most of the delay occasioned in originally submitting the Arrow matter to the Commission can be traced back to that one basic problem. As I have, on at least several occasions in the past, reported to the Commission on this situation, this Division after its organization and for many years thereafter was faced with an unmanageable manpower shortage particularly in the Robinson-Patman area. As was reported in an April 13, 1966 memorandum from which I quote, "... When the present Compliance Division was established pursuant to the reorganization in July 1961, I effected a turnover of restraint of trade orders from the former Compliance section of the General Counsel's Office. . . . Superimposed on the turnover of the approximately 247 cases then involved was the assignment of 56 Sherman Act judgment cases to this Division for investigation pursuant to the provisions of Section 6(c) of the Commission Act. As personnel were assigned to this Division from time to time, a goodly number of them were immediately assigned to the 56 judgment cases, among other reasons because approximately a million dollars per year had been identified in the appropriation requests for this purpose. In addition, at this time, or shortly thereafter, we inherited several sizable blocks of companion orders as, for example, over 50 orders in the publishing industry and 100 2(c) orders in the citrus and allied industries. The most complex problem thus presented by the turnover from the former Compliance Division, coupled with new case additions, was in the area of unacted upon Robinson-Patman Act compliance reports or orders.

Thus, as men began to be gradually assigned to this Division in rather limited numbers for other than judgment work, we endeavored to, of necessity, maintain reasonable currency with respect to new orders. To have done otherwise was to insure the inevitable result that no compliance report would be acted upon before several years had passed. With these background factors, a brief reference to but several of the myriad reports which this Division has submitted as to workload problems and statistics commencing with the period shortly following its organization will be helpful. For example, by report of September 30, 1962, . . . we reported, among other things, that there were then available 18 attorneys to handle 370 active matters discounting personnel devoting their

time exclusively to Sherman Act judgment cases at that time. We further commented, by way of illustration, to the effect that all Section 7 divestiture cases, then 18 in number, were assigned to one man; 60 active Section 5 Restraint of Trade orders were assigned to four men, three of whom were inexperienced; 56 2(a) cases were assigned to one man with but one inexperienced man to assist.¹ Both of these men left shortly thereafter. In addition, we reported 97 2(c) cases assigned to one man; 61 2(d) cases assigned to one attorney; and 39 2(d) cases assigned to one other attorney. Since 1962, the situation has gradually improved, * * *.

The details of our recurrent problems over the years in this respect have been reported in such reports, by way of illustration, as those . . . of March 31, 1964, January 5, 1965, April 6, 1965, September 28, 1965, and January 5, 1966 . . .

The 2(c) and publishing case backlogs have been eliminated but we still have some old problems in the 2(a)-2(d) area. With this information taken from our April 13, 1966 memorandum as background, I would like to now comment on the delay in Arrow. Certainly it is unjustifiable. It is explainable however insofar as this Division is concerned. As you indicated in the attachment to your memorandum of March 19, 1969 ". . . It is obvious that Arrow Products is not one of the really significant corporations in the food processing industry . . ." This was a factor which we had to evaluate in view of our unmanageable workload. The initial assignment of this matter to Mr. McMahon became academic in view of the fifty six (56) matter assigned to him. Mr. McMahon left this Division in May 1963. When our case workload was of a sort that provided an opportunity for an attorney to analyze and review this matter, one was assigned. This man was newly graduated from law school and after his review, certain additional materials were requested in order to update this respondent's submission regarding the Restraint of Trade portion of the order. As you indicated in your proposed memorandum to the Commission, the latest submission from the respondent occurred on November 26, 1965. However, prior to the preparation of the memorandum forwarding this matter to the Commission, the attorney who had reviewed and acquainted himself with the files resigned to go with private industry. Three months thereafter the case was assigned to a new law clerk who also had several other matters. Thereafter and within six months our memorandum dated March 16, 1967 was forwarded to the Commission with the recommendation that this report be rejected.

This report was made to the Commission absent the Section 5 material because of the notation in our file, dated July 3, 1962, that "Garvey (of Restraint of Trade) phoned Stanley (of Deceptive Practice) re Deceptive Practice charge. Mr. Stanley advised that his Division will take care of the Section 5 part of the Order." When this matter reached your office a conference was held on May 18, 1967 at which time we were advised to withdraw the matter and to redraft our memorandum and letter incorporating the recommendation of the Bureau of Deceptive Practice, Division of Compliance relative to the Section 5 charge. On May 19, 1967, Mr. Garvey advised Henry G. Pons in Mr. Stanley's absence of the above conference and that this Division was holding its memorandum pending submission of their aspect of the case. The attorney on my staff who was assigned to this matter made repeated calls thereafter to the Division of Compliance of the Bureau of Deceptive Practice concerning the date that we could expect to receive their material and recommendation. In December 1968 we received the memorandum from Deceptive Practice.

This Division did not contact the respondent any further since, in our view, our communications from them led us to believe that Arrow's "Compliance" position was final and that only a rejection of the report by the Commission would force this respondent to change its practices.

While the split jurisdiction order in Arrow is unique it is our intention to insure that Deceptive Practice is immediately notified of any future need to receive Compliance information from them as to an area of an order within their jurisdiction. Of course this was done here but our inability to put an attorney on this case in a meaningful way vitiated effective follow-up.

With regard to the fourth and final question concerning future reports which indicated lack of compliance, we still have problems traceable to the early 60's. There are still a few remaining cases on our docket where our recent analysis has indicated that non-compliance with the order is present. We will secure information concerning the current selling practices of the respondent and if it

¹ Arrow was in this group.

still appears that they are not in compliance the report will be forwarded to the Commission with recommendation. These cases are being handled by attorneys with big case loads and our progress on each such matter is necessarily slow and subject to the demands of current cases.

In our analysis of current cases, where non-compliance is demonstrated, the report is forwarded to the Commission with a recommendation for rejection as quickly as the memorandum and letter can be drafted.

I trust that this information is responsive to your inquiry.

Respectfully submitted,

JOSEPH J. GERCKE,
*Chief, Compliance Division,
Bureau of Restraint of Trade.*

Approved.

WILMER L. TINLEY,
*Assistant Director,
Bureau of Restraint of Trade.*
CECIL G. MILES,
*Director,
Bureau of Restraint of Trade.*

(NON-STAFF)

SEPTEMBER 14, 1964.

Re: General Railway Signal Company, et al., File 601 0336.

From: Commissioner Dixon.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memo.

MEMORANDUM

SEPTEMBER 14, 1964.

To: Commission.

From: Commissioner Dixon.

Subject: General Railway Signal Company, et al., File 601 0336.

This matter is again before the Commission with a recommendation that we accept a consent agreement negotiated pursuant to Section 1.42 of the Rules of Practice. The practices involve price fixing, collusive bidding, allocation of customers, patent agreements, control of a competitor and cumulative volume discounts in the sale of railroad signal equipment by the two dominant companies in the industry, General Railway Signal Company and Westinghouse Air Brake Company.

The consent agreement herein was executed by the parties on December 28, 1962. Upon submission to the Commission, we directed that the matter be referred to the Bureau of Economics for its views as to the effectiveness of the proposed order. We further directed that the matter be submitted to the Department of Justice for consideration looking to possible criminal prosecution.

By memorandum of July 25, 1963, the Bureau of Economics expressed its views, recommending certain changes in the proposed order. A copy of this memorandum is attached.

By letter of July 20, 1964, the Department of Justice advised us that after making substantial inquiry into the alleged restrictive practices, it has concluded that criminal prosecution is not warranted. It concurs in the entering of the consent order as drafted.

The Bureau of Restraint of Trade, while recognizing that certain of the suggestions of the Bureau of Economics may be desirable, opposes reopening of negotiations. I agree that the proposed changes would strengthen the order. However, I seriously doubt that respondents would consent to an order containing the suggested revisions. In this connection, it is to be noted that the consent agreement herein was negotiated at respondents' suggestion prior to the completion of our investigation. Thus, further investigation would be necessary before litigation. One of the factors to be considered is respondents' position at the time of the execution of the agreement that the practices had been discontinued and that since the acquisition by J. H. Whitney & Co. of a controlling interest in General Railway (in 1960) the proposed respondent companies have been very competitive. Certain facts disclosed by the investigation tend to support this argument.

As previously noted, the Department of Justice after "substantial inquiry" is apparently of the view that the consent order as drafted is adequate. While I would prefer to see the order strengthened in certain respects, I am of the view that the present order will substantially assist in insuring competition which had been lacking for a number of years in this industry.

The staff points out two problems which exist insofar as acceptance of this agreement is concerned. First, there has been no contact between the staff and respondents since January 1963 when respondents were advised that the agreement was being submitted to the Commission. Second, the corporate name of General Railway Signal Company has been changed to the General Signal Corporation. There has been no change in the corporate structure.

As to the first point, respondents have in no way indicated a desire to withdraw their agreement. As to the second point, the corporate name on the agreement is accurate insofar as the date of the agreement is concerned. Moreover, I am in agreement with the staff that the name change would have no effect on the enforcement of the consent order.

On the basis of the foregoing, I move that we accept the agreement and issue our decision and order as drafted and submitted by the Office of Consent Orders.

PAUL RAND DIXON, *Commissioner*.

(STAFF)

MARCH 22, 1965.

Re: Sanna Dairy Products, File 611 0556.

(Previously circulated as a non-agenda matter by Comm. Jones on March 19, 1965.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

MARCH 22, 1965.

To: The Commission.

From: Philip Elman.

Subject: Sanna Dairy Products, File 611 0556.

I have placed this matter on the agenda because it raises a question of the adequacy of the investigatory procedures being employed in discriminatory practices matters and because the staff's use of 6(b) questionnaires in investigating a large number of food suppliers, of which the proposed respondent is one, has been a matter of some concern to the Commission.

The special report filed by this proposed respondent shows it gave substantial promotional assistance to large chain grocery stores, sometimes in connection with special promotions solicited by the chains. Respondent states that the food brokers representing it were instructed to offer all customers promotional assistance on proportionally equal terms, but these instructions were transmitted, if at all, only verbally. Moreover, respondent seems not to have kept sufficiently complete records to document its claim that promotional assistance was in fact made available to competitors of the chains that received the assistance.

The staff recommends closing on the basis of the special report filed by respondent. It seems to me, however, that the report is too skimpy in the facts it discloses to justify a conclusion that respondent has not violated the law. I should think that in a situation of this sort, where respondent is unable to document its claimed compliance with the law, a field investigation might be necessary. It might be helpful to discuss with the staff what its policy is with respect to this kind of situation and whether and in what circumstances field investigations are conducted where, as here, the report, while it does not on its face establish a violation of law, does indicate a substantial possibility of such violation which is not negated by any other facts known to the Commission.

MAY 3, 1965.

Re: Discriminatory Promotional Allowances in the Book Publishing Industry—
University of Michigan Press, File No. 621 0232 and 13 related matters.
From: Commissioner Elman.
To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MAY 3, 1965.

To: The Commission.

From: Philip Elman.

Subject: Discriminatory Promotional Allowances in the Book Publishing Industry—University of Michigan Press, File No. 621 0232 and 13 related matters.

The attached memorandum of the Bureau of Restraint of Trade presents a clear and thoughtful analysis of the current state of compliance with the Robinson-Patman Act in the book publishing industry. I agree with its conclusions that the prevailing quantity discounts do not call for any Commission enforcement action whereas the widespread practice of granting discriminatory promotional allowances does. It is apparent that the latter problem will demand the utmost in imagination and resourcefulness to devise an effective method of industry-wide enforcement.

As a preliminary matter, several findings of the staff investigation should be emphasized. The problem of discriminatory payments of allowances for cooperative advertising is one that cuts across the entire book publishing industry, including hard-cover publishers as well as quality-paperback publishers. Almost every major book publisher now has a paperback department and almost every major book retailer now handles both hard covers and paperbacks and regards each as an important segment of his business. If cooperative advertising allowances were not available for the advertising of one such category of books, it is likely that most retailers would shift the bulk of their promotional efforts to the other. The staff is satisfied that no effective industry-wide program of enforcement is possible that does not treat hard-cover publishers and paperback publishers together. If this is done, it is evident that we will be dealing with a very large number of companies—not, of course, as many as in the wearing apparel industry, but certainly several hundred or more.

Apart from all the other considerations that make such a method of enforcement ineffective and unfair, it is apparent that a program of instituting formal proceedings against all the sellers who have engaged in the practice of paying discriminatory promotional allowances would place an unbearable burden upon the Commission's resources. Some consideration, however, should perhaps be given the possibility of issuing complaints against the few major buyers who solicit these discriminatory promotional allowances. The special reports submitted by the dozen or so paperback publishers revealed that almost all the substantial payments of cooperative advertising allowances were made to just a few large book retailers, such as the Doubleday chain and Koch & Brentano's in Chicago. These retailers engage in very extensive local newspaper advertising, and there is reason to believe that contributions from book publishers cover almost the entire cost of such advertising. Several of these retailers expressed the view that large programs of cooperative advertising are essential in order to meet competition from the discount and loss-leader sellers of books.

An enforcement program based primarily upon Section 5 complaints against these few large retailers would no doubt be administratively feasible and would probably bring such discriminatory payments to a prompt halt. It seems clear, however, that it would be far more desirable if cooperative advertising assistance were available to all retailers on a non-discriminatory basis than if it were available to no one. Book publishing does not appear to be an industry in which price competition, *i.e.*, competition among publishers, is significant, and it thus seems important not to discourage such competition in furnishing promotional services. Moreover, it seems likely that many small retailers would find cooperative advertising quite useful. The Section 6(b) reports revealed that a few small book retailers (who appear to have little, if any, buying power) regularly requested cooperative-advertising allowances from these publishers, and were generally successful in receiving them. We can fairly assume that many more would have done so if they had known of the availability of such allowances. Of course, a publisher would be free to effect his compliance with

Section 2(d) simply by stopping payments to the large retailer; but it nonetheless seems appropriate for the Commission to emphasize, and provide guidance along, the alternative road to compliance.

I therefore agree with the Bureau that the situation calls for some technique of industry-wide enforcement outside of the framework of formal adjudicative proceedings. I think, however, that the question of *which* procedure requires a good deal more thought than it has received to date.

The Bureau suggests that the matter be turned over to Industry Guidance for institution of a Trade Regulation Rule proceeding or a Trade Practice Conference. This does not appear to be an appropriate case for application of the Trade Regulation Rule procedure since the basic problem is one of enforcing existing standards of law rather than establishing more concrete and specific ones. Far more than most aspects of the Robinson-Patman Act, the requisites for a lawful and non-discriminatory program of promotional assistance are fairly clear and uncomplicated. Any further specification of the criteria might even be undesirable: The Commission's purpose is obviously not to impose on the industry a detailed uniformity among plans of cooperative advertising. I similarly doubt the desirability of convening a Trade Practice Conference for the purpose of promulgating Trade Practice Rules although there might be some incidental advantages in assembling informally the major segments of the industry.

I think that we need to canvass the possibility of other and less formal modes of industry-wide treatment, perhaps like those we decided on for dealing with promotional allowances in the luggage industry. As I see it, the preliminary tasks to be accomplished are (1) to inform the industry as a whole that the Commission has become aware of the prevalence of discriminatory promotional allowances; (2) to express the Commission's intention to promote industry-wide compliance with Section 2(d) without exacting penalty for past violations; (3) to encourage each publisher to submit to the staff a detailed outline of its plans for conforming to the requirements of Section 2(d); and (4) to make the advice and cooperation of the staff available to publishers who are in genuine doubt as to the constituents of a lawful plan of promotional assistance. Such an announcement of Commission enforcement policy should be given full publicity. The need for further enforcement action, including possibly individual complaints, would then have to be determined in the light of the responses to these efforts. I think we should have the views of the staff on whether they regard this approach as feasible, and if so, how they would suggest implementing it.

I should add finally that I doubt the wisdom of turning over an industry-wide enforcement program, whatever precise form it may take, to a different bureau and to persons who would have to start at the beginning in familiarizing themselves with problems of the industry. The staff members of the Bureau of Restraint of Trade who have worked on this project to date have accumulated a considerable knowledge of the practices and problems of this industry and in addition can draw upon a large expertise in the related field of magazine and mass-circulation paperback publishing. While I understand that these staff members would plan, in any event, to serve as consultants in a Bureau of Industry Guidance project, it seems to me that the kind of program needed could be carried on quite appropriately, and more effectively, within the Bureau of Restraint of Trade.

DECEMBER 15, 1967.

Re: Rheingold Breweries, Inc., et al., File 651 0136.

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

DECEMBER 15, 1967.

To: The Commission.

From: Philip Elman.

Subject: Rheingold Breweries, Inc., et al., File 651 0136.

This matter arose out of an investigation of charges made by a small maltster that producers of brewer's malt were engaging in price discrimination, price manipulation, and sales below cost all for the purpose of suppressing competition in the sale and distribution of brewer's malt. While the staff now recommends

that this aspect of the investigation as well as an inquiry into alleged violations by the maltsters of Section 2(a) of the Clayton Act be closed since there is insufficient evidence to support these charges, it recommends that complaint issue against Rheingold Breweries, Inc. (Rheingold) and one Edward Stern, charging violation of Section 2(c) of the Clayton Act.

The history and relatively complex corporate structure of Rheingold are set out at page 3 of the staff memorandum and need not be discussed here. The firm is engaged in the production, sale and distribution of beer and has breweries in Brooklyn, New York, and Orange, New Jersey. Its sales are in excess of \$100 million annually. Since January 1, 1967, proposed respondent Stern has been Vice President, Operations of Rheingold, but as is explained more fully below, the charges in the complaint concern his activities as President (and controlling shareholder) of Stern Industries, Inc. (now known as RLS Company), a malt brokerage firm, from September 1964 until December 1966. Prior to the formation of Stern Industries, Stern was employed by Rheingold from June 1964 until August 7, 1964, as Assistant to the President. Finally, during the period from September 15, 1966, until December 31, 1966, Stern, while winding up his brokerage business preparatory to joining Rheingold, acted as a consultant to Rheingold for which he received fees of some \$14,500.

The facts on which the alleged Section 2(c) violation is predicated are as follows: Until August 1964 Rheingold purchased most of its malt requirements directly from malt producers, although evidence establishes that the present applicant sold its malt to Rheingold through a broker whom it paid 3½ cents per bushel. Shortly after the incorporation of Sterns Industries in September 1964, Rheingold advised the applicant, and apparently advised all its suppliers, that shipments of malt would be accepted only if the malt was sold through Stern Industries.

Between August 1964 and December 31, 1966, Stern represented three maltsters in their sales of malt to Rheingold and received commissions on those sales. As to two of those maltsters, Fleischmann and Minnesota Malting, the evidence establishes that they paid commissions to Stern, somewhat higher than those customarily paid in the industry, that Fleischmann's sales to Rheingold increased when they worked through Stern but decreased when they ceased to use him, and that when Minnesota ceased using Stern, it gave Rheingold a discount that mathematically approximated the commission formerly paid Stern. Charges made at the beginning of the investigation that Stern passed on part of his commissions to Rheingold have not been substantiated.

The nub of the complaint concerns the Stern-Rheingold transactions with the third maltster, Central Grain and Malting Company. In September 1964, Central agreed to pay Stern commissions of 8 cents per bushel on sales of malt to Rheingold (the evidence establishes that the commission paid was actually 10 cents until November 1965 when it was reduced to 8 cents). Since Central had not previously supplied malt to the brewing industry (it had been a supplier to distillers of whiskey,) Rheingold was concerned about the quality of malt to be shipped by Central. For many years Rheingold had required that the malt it purchased have an extract yield¹ of not less than 79%. Use of high yield malt permits cost savings in the brewing process, or so Rheingold believed, and Rheingold required maltsters to ship them such malt or else grant them a lower price on malt of lower yield. To protect itself against the possibility that Central's malt would be inferior, Rheingold required Central to pay a penalty of 3 cents per bushel for each percentage point the malt fell below 79% extract. These arrangements were not unusual; Rheingold had previously made similar agreements with other small suppliers.

One feature of this transaction was unusual and it is this element which is challenged by the complaint. When Central had difficulty meeting the 79% extract yield standard, Stern, fearing the loss of his commissions, volunteered to pay the 3 cents per bushel penalty. He remitted the sums to Central, which in turn paid them to over to Rheingold. Only the President and Chairman of the Board at Rheingold knew that the penalties remitted by Central were in fact paid by Stern. Stern's commissions from Central during this period totalled about \$192,000 and he rebated penalties in excess of \$116,000; nevertheless, Stern Industries operated at a profit.

¹ Extract yield is the amount of soluble material that can be obtained from malt under brewing conditions.

The staff argues that the Rheingold-Stern relationship involved unlawful payment of brokerage in violation of Section 2(c), and that the transactions with Central fall within the proscription of *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166 (1960), and recommends that, in view of the substantial amount of money involved, the assurances of voluntary compliance executed by Stern and Rheingold be rejected and complaint issue. The assurances are not regarded by the staff as indicative of the good faith of proposed respondents because "the reasons for [discontinuance of the challenged practices] were largely economic, and [the assurance] was not undertaken in connection with any good faith efforts to comply with the laws administered by the Commission." Staff memo, p. 18.

I am not convinced that the public interest requires that this case be litigated or that proposed respondents' activities constitute clear violations of Section 2(c). There is no question that both Stern and Stern Industries, Inc., have ceased their brokerage activities and that Stern's four-year contract with Rheingold pretty well precludes his re-entering the brokerage business at least until 1971; his assurance states unequivocally that the challenged practices will not be resumed. As to the merits, it is doubtful whether, apart from the Central transactions analyzed more fully, *infra*, the Stern-Rheingold relationship violated Section 2(c). Stern did not pass his commissions on to Rheingold and he apparently performed at least some legitimate brokerage functions. To hold that merely because of his friendship and business relationship with Rheingold's management, Stern's receipt of commissions constitutes a rebate to Rheingold—even though nothing was passed on to Rheingold, and there is nothing to show that Stern was not in fact an independent broker—would stretch Section 2(c) far beyond its intended confines. Cf. *Jobbers Warehouse*, File No. 671 0086, circulated December 14, 1967, as a non-agenda matter by Commissioner MacIntyre.

Whether the transactions involving Central violated Section 2(c) is a more difficult question. It is true that the rebate arrangement is similar to that held illegal in *Federal Trade Commission v. Henry Broch & Co.*, *supra*, but it is certainly arguable that this type of transaction does not involve the dummy brokerage—price concessions masquerading as brokerage—that Section 2(c) was intended to reach. Since there was no attempt to conceal the price concession to Rheingold, the transaction should probably be judged under Sections 2(a) and 2(f), not Section 2(c).² In any event, it is difficult to see how the Central arrangement caused competitive injury. Admittedly, Section 2(c) does not speak in terms of competitive injury, but this issue is surely relevant when the question before the Commission is whether the public interest requires the expenditure of our scarce resources to litigate a case where the practices challenged involve few, if any, anticompetitive effects.³ Here the net effect of the transactions was that Rheingold got inferior malt at a price apparently reflecting its fair market value.⁴ Central received a price for its malt that also reflected its value, and Stern received a reduced, but still profitable, commission. Were Rheingold's competitors injured by this transaction? Were Central's? I think not.⁵ If anyone was injured it was Stern, and he is not complaining. Neither should we.

I would accept the assurance of voluntary compliance and close these files.

² Since the malt involved was inferior to the 79% yield malt offered for sale at \$2.04 I question whether there has been a discrimination in price on goods of like grade and quality.

³ At an earlier stage of the investigation, the staff recognized this fact. See TPF 28, where it is stated:

"Thus, it would seem that further consideration should be given to determining whether these practices result in any injury in order that a proper recommendation could be made to the Commission. We are not suggesting that injury is a criteria for a 2(c) case, however, we do believe that some inquiry should be made in order to determine whether the practice results in any competitive advantage to Rheingold in order that the Commission could be apprised of all the facts."

⁴ Since not every brewer can use high extract yield malt and since there is some question as to whether it is really more economical to use, the market value of lower yield malt is not entirely clear. However, it is apparently true that brewers like Rheingold which could use high yield malt received rebates if lower yield malt was delivered. In this connection it should be noted that since January 1, 1967, Rheingold has stopped insisting on 79% yield malt and has agreed to accept lower yield malt from Central at a reduced price. I do not ascribe the sinister connotations to this fact that the staff does (memo, pp. 9-10); on the contrary, it would seem to confirm the analysis made in the text that Rheingold merely paid less money for lower quality malt, and was not accepting a price concession masked as brokerage.

⁵ In fairness, I should note that Central sold 14,500 bushels of the same quality malt to other brewers, with Stern acting as broker (his total commissions were \$1160), and no rebate was paid or offered. Staff memo, p. 10. However, those brewers were satisfied with the malt received and apparently could not use, or at least did not want, a higher yield malt. (They never asked for any refund.)

AUGUST 7, 1968.

Re: Allied Supermarkets, Inc., Humpty Dumpty Supermarkets, Inc., File No. 661 0118.

(Previously circulated by Commissioner MacIntyre as a non-agenda matter on August 6, 1968.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

I am making this an agenda matter because I do not believe an assurance of voluntary compliance should be rejected because it contains a denial that the discontinued acts or practices were illegal. The whole point of such an assurance is that it eliminates controversy and litigation of the legality of the discontinued acts or practices. What is important is the compliance for the future, not disputation of the past. I move that the staff recommendation be approved.

JUNE 24, 1969.

Re: Pacek & Becker Distributors, Inc., et al., File No. 671 0134.

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

JUNE 24, 1969.

To: The Commission.

From: Philip Elman.

Subject: Pacek & Becker Distributors, Inc., et al., File No. 671 0134.

The memorandum from the Bureau of Restraint of Trade speaks for itself. While the memo purports to state the case for issuing a complaint in this absolutely trivial, unimportant case, its paucity of strong reasons for proceeding here inadvertently supports my contention that this matter must be closed before the Commission wastes more time and money on it. To issue a complaint here is to announce publicly that the Commission's talk of priorities is meaningless and that we are willing to emphasize small matters while ignoring large ones.

The Bureau offers no support for its notion that a complaint here will have a prophylactic effect. To the contrary, if experience teaches anything, the Commission's extensive experience in the auto parts industry suggests that this case will have no impact at all on other jobbers and warehouse distributors but will simply disadvantage these respondents, unless they reorganize the corporations in form—but not, of course, in substance—along the lines I suggested in my memorandum of May 28. Again, if the Bureau seriously believes that a single case will have a prophylactic effect, why is it not recommending high visibility action against Gulf and Western or other big firms in the industry? Apparently, a firm doing \$48.95 in commerce is, in the Bureau's view, a better subject for dramatic, prophylactic action.

Despite its protestations to the contrary, the Bureau has not shown that any more effective relief will be obtained from litigating this case than has already been obtained in the assurance. Nor has it been shown that closing this matter, opened by mistake only because a competitor who has not been shown to have been injured made persistent complaint to the staff, would create an undesirable precedent. The precedent is far more desirable than the precedent established in the *Herzog* case and the automotive parts cases where, after years of costly litigation, orders have been entered and then either not enforced because not in the public interest or enforced so as to exalt form over substance. I adhere to the views expressed in my May 28th memorandum:

"The short of it is that there is no reasonable basis for proceeding with this investigation. The violations, if any, have been eliminated. The proposed respondents are basically 'Mom and Pop' operations, hardly major factors in the industry. No competitive injury has been shown and no competitor was injured save perhaps for the applicant whose self-serving declarations have apparently not been substantiated. The whole controversy is a private one. No showing has been made that this case fits into any sane or intelligible Bureau of Restraint of Trade enforcement program.

"An assurance has been tendered which covers all the alleged illegal practices and requires that proposed respondents file a compliance report and make their records available to the Commission. I move that it be accepted. Should this motion fail, I would move the recommendation of the Division of Discriminatory Practices that the case simply be closed but not on the basis of the assurance."

I renew my motion.

(Non-Staff)

JANUARY 20, 1964.

Re: Sylvania Elec. Products, Inc., Docket No. 8501.

From: Commissioner of Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

JANUARY 20, 1964.

To: The Commission.

From: Philip Elman.

Subject: Sylvania Electric Products, Inc., Docket No. 8501.

Under the new procedure, adopted January 16, 1964, for handling requests for advisory opinions, this matter, although assigned to me, has already been circulated and placed on the agenda.

Respondent in the above matter requests advice, pursuant to Section 3.26(b) of the Commission's Procedures and Rules of Practice, as to its compliance with the Commission's cease and desist order. The order is embodied in a consent agreement which provides that the order shall be stayed pending decision by the Commission of a related matter, *General Elec. Co.*, Docket 8487, now pending at the Commission level. Both matters involve alleged violations of Section 2(d) of the Clayton Act, as amended, and there is a common recipient of the allegedly unlawful payments: Druggists' Service Counsel, Inc. In addition, payments to this body are involved in another matter now pending at the Commission level, *Sterling Drug, Inc.*, Docket 8498. Respondent's request for advice involves the same kind of transactions as are at issue in the two pending cases.

The staff recommends that the Commission decline respondent's request on two grounds: first, that it is improper to render an advisory opinion when substantially identical issues are involved in cases pending before the Commission; second, that respondent's request for advice is premature because the cease and desist order against it has not yet become effective. Neither of these grounds seems to me wholly persuasive, although I agree that respondent's request should be refused at this time.

Once *General Electric* is decided and the order herein becomes effective, we would, in my opinion, be obliged to render respondent definitive *compliance* advice even though related issues were still pending in *Sterling Drug* or some other case. It would defeat the whole purpose of the Section 3.26 procedure if we were to refuse to advise respondents, as to whom cease and desist orders were outstanding, on whether proposed conduct would constitute compliance, on the ground that the legal consequences of such conduct were unsettled.

As for the second ground, we should not lay down a flat, inflexible rule to refuse compliance advice until the actual effective date of the order. Indeed, we have given such advice on some occasions, when the proper interpretation of a proposed consent order was in doubt, and it would be inconsistent with our instruction to the staff that the Commission may, where appropriate, give compliance advice before, or pending, appeal of Commission decisions to the Courts of Appeals—at a time, that is, when the Commission's order has not yet become final and effective.

On the other hand, since the Commission saw fit to suspend the order herein pending decision of a closely related case, *General Electric*, I agree that we should withhold compliance advice until that case is decided. The decision, and the Commission's opinion, should provide far more helpful and definitive advice than would supplying the present respondent at this time with a prediction or guess as to the outcome of the *General Electric* case, or otherwise attempting to advise respondent as to its duties under the order.

Accordingly, I move that the following be adopted in substitution for the staff's proposed letter:

"This is in reply to your letter of January 10, 1964, in which you requested advice, pursuant to Section 3.26(b) of the Commission's Procedures and Rules of Practice, as to whether certain proposed courses of conduct would constitute compliance with the Commission's order.

"In the present circumstances, the Commission believes that it would be premature to render such advice in advance of decision by the Commission of the *General Electric Co.* matter, F.T.C. Docket No. 8487, pending which the issuance of the order embodied in the consent agreement of January 4, 1963, between your client and the Commission, has been stayed."

APRIL 7, 1969.

Re: Arrow Food Products, Inc., Docket 8212.

(Previously circulated as an agenda matter by Chairman Dixon on April 4, 1969.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

APRIL 7, 1969.

To: The Commission.

From: Philip Elman.

Subject: Arrow Food Products, Inc., Docket 8212.

I agree with the Chairman that this matter has been poorly handled at the staff level. However, I do not think that issuing an ultimatum to respondent will cure past errors; nor is it fair to put the onus on respondent for the Commission's dilatoriness.

Instead, the respondent should be informed that (1) the Commission now has before it the respondent's various compliance letters and supplementary material, and (2) before deciding whether respondent is in compliance with the order the Commission wants to have current data and information showing the manner and form of respondent's compliance with the order. The new compliance report, including whatever information the Bureaus of Restraint of Trade and Deceptive Practices deem necessary, should be submitted within 30 days. When the Commission has before it more current information, we can better judge how to proceed, whether by accepting the report, seeking civil penalties or otherwise.

I move that the staff be directed to prepare a letter to respondent along the general lines set out in this memorandum.

SEPTEMBER 26, 1967.

Re: ATD Catalogs, Inc., Docket 8100.

(Previously circulated by Commissioner MacIntyre as an agenda matter on September 20, 1967.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

SEPTEMBER 26, 1967.

To: The Commission.

From: Philip Elman.

Subject: ATD Catalogs, Inc., Docket 8100.

I do not agree that the Commission should reopen its investigation of compliance with Section 2(d) of the Clayton Act by publishers of independent toy catalogs. A large amount of money has already been spent on investigating this question, and no evidence of violations has yet appeared. We have held hearings, compiled a lengthy record, and issued a policy statement setting forth our interpretation of the law as it applies to this industry. To my knowledge, the only complaint received since issuance of the policy statement has been Mr.

Rosenwasser's. Despite his self-serving statements about how ATD "has managed to survive these recent harrowing years" only through "great cost and expense", the staff has advised my office that ATD has in fact done well and that its profits are about on a par with those of other catalog publishers, both independent and jobber-owned.

I think that we have already spent enough money investigating this industry, and that it would be unwise at this time for the Commission to assume the role of Mr. Rosenwasser's private enforcement agency.

MARCH 5, 1969.

Re: Docket No. 8100, In the matter of ATD Catalogs, Inc., and Toy Catalog Publishers.

(Previously circulated as an agenda matter by Commissioner MacIntyre on March 4, 1969.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MARCH 5, 1969.

To: The Commission.

From: Philip Elman.

Subject: Docket No. 8100, In the Matter of ATD Catalogs, Inc., and Toy Catalog Publishers.

In rescinding its toy catalog orders, the Commission was acting on an alternative recommendation by Commissioner MacIntyre that "the Commission simply get out of this area entirely by rescinding the orders now in effect." Having spent considerable time and effort on this industry, which is comprised of ten major sellers doing a total annual business volume of \$1.5 million, the Commission wisely decided to call a halt to its intrusions in the toy catalog field. Rescinding the orders was intended to put those in the industry on a relatively equal footing.

Mr. Rosenwasser, counsel to ATD, has now returned to the attack (he has been active in seeking Commission action against the "independents" for years) arguing that advisory opinions issued four or five years ago have been used by the independents as competitive weapons and should be rescinded. He further urges the Commission to rescind outstanding orders against toy manufacturers and to issue Guides for this industry.

What Mr. Rosenwasser really wants is that the Commission pursue the independent competitors of ATD. The Commission's hearings, leading to its policy statement concerning this industry, disclosed that ascertaining the facts is almost impossible amidst the welter of charges, countercharges and recriminations. There is thus reason to believe that Mr. Rosenwasser's statement of the facts concerning the independents' abuse of the advisory opinions and ATD's hardship in competing, is overdrawn. It is not at all clear that anticompetitive practices are rampant in the industry or that the independent's are flourishing, illegally, at the expense of jobber-affiliated catalogs. Indeed, there is no evidence that ATD's profits or market position have suffered because of the alleged practices. I do not think it would serve the public interest for the Commission to act on Mr. Rosenwasser's *ex parte* allegations and to reembroll itself in a morass from which it only recently escaped. I do not agree with Commissioner MacIntyre that the Commission has a "moral obligation" to act as investigator or co-counsel for Mr. Rosenwasser and ATD.

It should be noted that the advisory opinions do not give the independents a license to violate the law, nor do they immunize any violation that may occur from appropriate Commission action. For the present, I see no merit to renewed Commission involvement in this industry, nor do I think that public disclosure of the Commission's action will lead "to painfully embarrassing publicity." The embarrassment, if any, should be suffered by those who for so long have insisted on misallocating the Commission's resources by paying inordinate attention to this relatively minor industry by endeavoring to protect individual firms from the aggressive, but essentially fair, competition of their rivals.

APRIL 14, 1969.

Re: ATD Catalogs, Inc., et al., Docket No. 8100, and Toy Catalog Publishers.

(Previously circulated by Commissioner MacIntyre as an agenda matter on April 11, 1969.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

APRIL 14, 1969.

To: The Commission.

From: Philip Elman.

Subject: ATD Catalogs, Inc., et al., Docket No. 8100, and Toy Catalog Publishers.

I agree with the staff and Commissioner MacIntyre that the Commission should rescind the cease and desist orders. However, for reasons set out in my memorandum of March 5, 1969, I do not agree with Commissioner MacIntyre's further motion that the Commission re-consider its determination not to waste more time and money developing Guides for this industry.

Rescission of the outstanding orders leaves all parties on an equal footing and there is no need to go further and rescind the advisory opinions which correctly state the law. The opinions do not confer a license to violate the law nor do they immunize any violation that may occur. Moreover, it is not at all clear that the independents are "misusing" the advisory opinions or that they have a competitive advantage over jobber-affiliated catalog firms like ATD. Indeed, as is pointed out on pages 2-3 of the staff memorandum, there are significant advantages running the other way.

It still seems to me that the Commission ought not act to protect firms from the aggressive, but essentially fair, competition of their rivals, and that the Commission's decision to put those in this relatively minor industry on an equal footing and thus withdraw from the morass it had created was a sensible and proper one. The public interest would not be served by a further enforcement effort in this industry or by the Commission's acting as investigator and antitrust counsel to ATD.

(Non-Staff)

MARCH 26, 1964.

Re: Request of White & Case for access to compliance report, Docket No. 7732.

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commissioner's meeting agenda.

MEMORANDUM

MARCH 26, 1964.

To: Commission.

From: Philip Elman.

Subject: Request of White & Case for access to compliance report, Docket No. 7732.

This matter is before us upon a request by a member of the New York firm of White & Case that it be sent a copy of the compliance report filed by New England Confectionery Company in Docket 7732. When White & Case initially made this request, they were informed by the Bureau of Restraint of Trade that this report was filed prior to August 1, 1963, the effective date of the Commission's current Rules of Practice and Procedures, and that therefore the provision of Section 1.132 (making compliance reports matters of public record unless respondent asks for, and is granted, confidential status) is inapplicable. The Bureau's letter stated that portions of this report have been determined to contain confidential information and that such information could be made public only after Commission action upon an application filed pursuant to Section 1.134 of the Rules showing "good cause" for the disclosure. In reply to this, White & Case requested immediate disclosure of the "non-confidential" portions of the compliance report and it requested reconsideration of the Bureau's view on the confidential portions. It argues that under the plain terms of Section 1.132(6) of the Rules all compliance reports are available for public inspection unless the filer asked for, and was granted, confidential status and that New England Confectionery did not request such status.

I agree entirely with the Bureau that this is an untenable view. Prior to the adoption of the new Rules, there was no announced Commission policy of permitting public access to all compliance reports unless a claim of confidentiality was approved by the Commission at the time of filing. Since New England Confectionery had no occasion to request such confidential status at the pain of complete waiver of any claim to confidentiality, it would be unfair now to effect such a waiver retroactively. This is so even though the compliance report was filed in the interim period after the promulgation of the new Rules but before their effective date.

With regard to White & Case's request for the non-confidential portions of the report, the Bureau recommends that access to this be similarly denied and that the firm be informed that a formal application under Section 1.134 is its only recourse. It proposes that such informal requests for access to pre-August 1, 1963, compliance reports be denied in any instance in which the report contains *some* confidential information. Its reasoning in support of such a practice is: (1) that it would be unduly burdensome upon the staff to be required to examine the entire compliance report, determine those portions that are confidential, and make sure that they are removed or obliterated from the copies sent to the applicant; and (2) that when substantial portions of the report must be censored, what is left for public disclosure would be of very little utility to the applicant in any event.

While I think the Bureau has raised some difficult questions, I cannot agree with its recommended solution. Even though Section 1.132(6), making free public access to compliance reports the general rule, applies only to those filed after August 1, 1963, I think that nonetheless it reflects an important policy that ought to be applied to the pre-August 1, 1963, reports to the extent that it can fairly be done. Why should we deny access to a compliance report in its entirety or require the filing of formal application to the Commission merely because it contains a smattering of confidential information? I do not believe that the practical problems to which the Bureau refers impose any insuperable barrier to working out a more flexible procedure. It should be noted that what the Bureau has done here is itself to examine the compliance report and exercise its own judgment as to what information contained therein is of a confidential nature. Thus the Bureau has deleted the names of specific customers since a customer list is one of the items that is frequently claimed to be a business secret. It is not inconceivable, however, that what the Bureau has concluded *could* be confidential information, would, in fact, not be regarded as confidential by the person who actually filed the report. Therefore, it seems to me that the best approach for dealing with a request for access to a pre-August 1, 1963, report would be to communicate with the respondent, giving it an opportunity within a specified period of time to indicate which, if any, of the portions of the report it regards as confidential, and to briefly state the grounds for any claim of confidentiality. The Bureau could then evaluate any claims of confidential status as it would do in the case of a report filed under the new Rules. With the supplier of the information itself required to pinpoint the items which it wishes to protect from public disclosure, the job of the staff attorney would be considerably simplified.

Of course, there may be cases where the confidential information is so extensive and pervasive that what is left for public disclosure would obviously be of no use to anyone. In such cases the Bureau ought to be free to tell the applicant this and thus spare the wasted motion of photostating, blotting out, etc. But on the other hand, we cannot assume that simply because there must be some deletions, the remaining "non-confidential" portions will be useless to the applicant. In this very instance, where the staff has been quite liberal in determining what *might* be confidential, there is still reason to think that the remaining portions will be informative to the applicant.

In order promptly to dispose of this particular request, I think we can accept the division which the staff has made between the confidential and the non-confidential. I therefore move that the alternative draft letter which forwards the non-confidential portions of New England Confectionery's report be approved.

It occurs to me that problems rather similar to this can still arise under the new Rules. As I read Section 1.132(6), it provides for a kind of all-or-nothing resolution of the confidentiality question. That is, it seems to imply that the entire report will be labeled confidential if the Commission approves the confidential status claimed for some of the statements therein. I think we should require anyone claiming confidentiality for his compliance report to isolate and identify each statement for which he makes this claim. If the Commission

agrees, the compliance report would then be confidential in the sense that it would not be freely available to the public for its inspection. But it would be possible to respond to requests for copies of the non-confidential portions of the report more readily by deleting specific portions which the filer has clearly identified.

I move that the General Counsel draft a staff directive, for the Commission's approval, on the matters discussed herein.

MARCH 1, 1965.

Re: Visco Macaroni Products Co., File No. 631 0269.

(Previously circulated by Commissioner Jones on February 25, 1965.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

MARCH 1, 1965.

To: The Commission.

From: Philip Elman.

Subject: Vimco Macaroni Products Company, File No. 631 0269.

When this matter is discussed at the table, it might help if we had the staff's views on the following questions in addition to those raised by Commissioner Jones in her memorandum of February 25.

1. Is there any basis for a primary-line charge? The staff's primary-line theory seems to be precisely that rejected in *Quaker Oats*. See p. 20 of staff memo. The issue may not be of great moment since only a secondary-line order (i.e., forbidding discrimination between competing customers) is proposed. But if there is no basis for a primary-line charge, should it be included in the complaint?

2. How substantial is the evidence of secondary-line price discrimination? This phase of the complaint, the staff advises us (p. 6), is based primarily on price concessions in the form of free merchandise and freight allowances. While it seems clear that respondent has discriminated, I am not clear from reading the staff's memo just how substantial the discrimination was. For example, on page 2 of the draft complaint it is stated that respondent granted Loblaw \$9,000 in freight allowances in excess of actual freight cost. One cannot determine whether such a sum is substantial and capable of causing competitive injury without knowing its relationship to respondent's total sales to Loblaw and to competing customers—and on this the staff memo seems unclear. Not every price discrimination is unlawful. In *Morton Salt*, the Court characterized the lower prices granted by respondent as "substantially cheaper"; the discounts found unlawful in that case ranged from 5% to more than 15%.

3. In order to avoid a repetition of our experience in the wearing apparel industry, can the staff give us more precise information as to the structure of the macaroni industry on the selling and the buying sides?

4. Is jurisdiction clear in this case without reference to the Commission's *Borden* theory? Respondent's sales to the competitors of the favored purchaser, Loblaw, were in commerce—which is all the statute requires. The sales to Loblaw were also in commerce. Loblaw, though it took delivery at respondent's plant, purchased for resale in and did resell in other states; there was no break in the flow. The case may thus be unlike *Borden*, where sale and resale took place within one state.

MAY 24, 1968.

Re: Publication of articles or speeches concerning issues in matters pending within the Commission (letter of April 30, 1968, from Roy L. Reardon, Esq., of Simpson, Thacher & Baretlett, counsel for Suburban Propane Gas Corporation).

(Previously circulated by Chairman Dixon as an agenda matter of May 23, 1968.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

MAY 24, 1968.

To: The Commission.

From: Philip Elman.

Subject: Suburban Propane Gas Corporation, Docket No. 8672.

I believe the correspondence with Suburban Propane should be placed in the record of the *Suburban Propane* case. I also think that the notice to the staff should be made public. Regardless of whether the Commission agrees to independent publication of the notice, it should be included in the *Suburban Propane* record. I would substitute the following for the last sentence of the second paragraph of the letter:

"For your information there is enclosed a copy of a notice which the Commission recently issued to its professional staff in order to prevent the recurrence of this practice in this or any future Commission proceeding."

Also, the word "extracurricular" is properly treated as a single word. Therefore, there should be a hyphen after "extra" in the first paragraph of the notice to the staff.

(Staff)

FEBRUARY 25, 1965.

Re: Vimco Macaroni Products Company, File 631 0269.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

FEBRUARY 25, 1965.

MEMORANDUM

To: The Commission.

From: Mary Gardiner Jones.

Subject: Vimco Macaroni Products Company, File 631 0269.

The staff recommends issuance of the proposed complaint charging respondent, a manufacturer of macaroni and related products, with violation of subsections 2(a), 2(d) and 2(e) of the amended Clayton Act. While the evidence supports the allegations, I have some question about the primary line injury. However, the issue is not of great moment in this case since the order proposed by the staff is directed solely against the discriminatory actions complained of and does not seek broad relief which might be appropriate in a major primary line case.

The proposed complaint is one of a series brought by the Commission against macaroni manufacturers, five of whom are presently under order. There are two other investigations currently in process. The staff expresses its opinion that the Commission now has "the largest industry members under scrutiny."

The industry consists of some 150 members, all of whom are relatively small concerns doing business in one or two locations. The staff states that the discriminatory practices complained of in the instant case are rife among the industry. Nevertheless the staff feels that the number of small companies in the industry militates against consideration of tackling the problem through some form of industry-wide treatment.

The staff also states that it is "considering" the possibility of an investigation against Loblaw, Inc., the favored chain purchaser in the instant case.

I would like to have the staff views on the following:

1. In the light of the recent Circuit Court opinion on jurisdiction in the *Borden* case, does the staff believe they can support Commission jurisdiction on some basis other than that quoted on page 30 of their memorandum.

2. I note that we have an outstanding order against the National Macaroni Manufacturers' Association (Docket 8529). Is there any possibility of devising a theory which would justify moving against the Association either by reopening that order or instituting a new complaint charging the Association and/or its members with the giving of discriminatory allowances and obtaining industry-wide relief through the Association's control over its members.

3. On the basis of the evidence now in the file, it appears to me that we have just as solid a case against Loblaw inducing the discriminatory allowances as we do against respondent. (See staff memorandum, p. 7, re "negotiations" between the two.) I believe that one means of tackling this type of situation is to

join both the receiver and the giver and in a sense leaving them to fight it out at the trial as to who was responsible. I believe that joining Loblaw would require very little, if any, additional investigation and could be done promptly.

4. Would it be feasible to provide in the order (and amend those already outstanding) prohibiting the respondents from belonging to any association whose members engage in such discriminatory practices. If, as I would imagine, the Association is primarily financed by the larger members and it is the smaller members who derive the greatest benefit from membership, the suggested sanction might have the effect of inducing the smaller industry members to cease giving the illegal discriminatory prices.

JULY 3, 1969.

Re: Marketers of Fresh Fruits and Vegetables, File No. 681 0040.

(Previous circulations.)

From: Commissioner Elman.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

JULY 3, 1969.

To: The Commission.

From: Philip Elman.

Subject: Marketers of Fresh Fruits and Vegetables, File No. 681 0040.

I welcome Commissioner MacIntyre's invitation to the public to make "a full examination of the Commissioners' votes in this area for the past eight years on the issuance of complaints and orders." As an initial step in that direction, I move that the Secretary be instructed to place on the public record the complete minutes of all the Commission's actions in the instant matter, including motions and votes of individual Commissioners.

DECEMBER 16, 1963.

Re: Docket C-497, Dietetic Foods Co., Inc., et al.

Recommended That Compliance Report Be Received and Filed and that Advisory Opinion Issue.

From: A. Leon Higginbotham, Jr., Commissioner.

To: Commission. Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

DECEMBER 16, 1963.

MEMORANDUM

To: Commission.

From: A. Leon Higginbotham, Jr., Commissioner.

Subject: Docket C-497, Dietetic Food Co., Inc., et al.

Recommended That Compliance Report Be Received and Filed and That Advisory Opinion Issue.

The Commission issued a consent order on May 7, 1963 in this matter prohibiting respondent from engaging in price discrimination by "selling—products of like grade and quality to any purchaser at net price higher than the net prices charged any other purchaser who competes in the resale or distribution of such products—".

By way of compliance, as set out in its compliance reports dated July 17, 1963 and August 22, 1963, respondent has established what amounts to a national one-price system.

It sells to distributors, wholesalers and chains but not to independent retailers. The distribution system varies from trading areas to trading areas whereby in some areas it confines its sales to distributors while in others it confines its distribution to wholesalers and chains. In Philadelphia, for example, it sells exclusively through distributors while in Pittsburgh sales are made to retail chains, cooperatives and wholesalers. The distinction between wholesaler and distributor is that in the case of the latter, solicitation is by salesmen and the sales effort is directed to supermarket chains. Considerable detail and missionary work is apparently involved. A wholesaler, on the other hand, confines his effort to independents and smaller chains and sells through sales books and order blanks.

Respondent reports that although one price prevails at the present time it is anticipated that distributors will shortly be receiving an additional discount. This change will be reported to the Commission when it occurs. Parenthetically, this does not present a problem since distributors and wholesalers are not in competition with one another: it appears that the different distribution methods employed by respondent are contained with discrete areas.

There is nothing in the report of compliance suggesting a seller-customer relationship between the respondent and its wholesalers' customers. Thus, the one-price system does not appear to pose a problem. Similarly, it appears, as noted above, that there is no overlap between distributor-areas and chain-wholesaler areas. Furthermore, as is the case with the wholesalers' customers, it does not appear that there is a seller-customer relationship between respondent and its distributors' customers.

Accordingly, I concur in the recommendation of the Compliance Division that the compliance reports be approved and the attached letter be forwarded to the respondent.

Contemporaneously, with receipt of the compliance reports, the Compliance Division received from respondent's attorneys' Schwager, Landau and Krantz, New York City, a letter which they described as a supplemental compliance report but which is, in practical effect, a request for an advisory opinion. The attorneys report that respondent is contemplating the establishment in New York City and the surrounding area to a radius of 30 miles, but including all of the Long Island area, an innovation unique in its distribution system. It is proposed that in that area, respondent will sell its products directly to virtually all retailers including chains and that all will pay the same price set forth in an attached "Retailer's Cost Sheet." Some few health food stores will not be sold directly but through distributors. The price to the distributors will provide a differential in that the direct buying retailers will pay approximately 20% more. It is contemplated that this differential will accommodate resale by the distributors to the small retailers at a price enabling the latter to compete with the direct buying retailers.

The price to the New York distributors will be the same as to others outside New York. Also, direct buying retailers in areas adjacent New York, who will enjoy a lower price, will not be in competition with New York retailers because respondent's proposed plan provides for a 50 mile buffer between the New York area and adjoining areas where retailers are sold directly. New York retailers will be paying higher prices than direct purchasing retailers outside the New York area but clearly there is an absence of competition because of the way respondent proposes to set up its New York distribution system.

Accordingly, I concur in the recommendation of the Compliance Division that an advisory opinion along the lines set forth in the attached separate letter be forwarded. The Compliance Division combined its letter acknowledging receipt of the compliance report and its advisory opinion in the same letter. It seems to me more proper to send separate letters and I have had them redrafted.

A. LEON HIGGINBOTHAM, Jr.,
Commissioner.

AUGUST 29, 1968.

Re: Associated Merchandising Corporation, et al. Docket No. 8651.

To be considered in connection with Special Matter Circulations by Commissioners McIntyre and Nicholson.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

AUGUST 29, 1968.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Associated Merchandising Corporation, et al., Docket No. 8651.

To be considered in connection with Special Matter Circulations by Commissioners MacIntyre and Nicholson.

I do not understand what advantage Commissioner MacIntyre believes will accrue to the Commission by withdrawing the complaint in this matter and not accepting any order. If confronted with the option of no order or a limited order, I am convinced that a limited order is far more preferable.

The proposed consent settlement under consideration would at least result in an order against each of the individual respondents (all of whom are important and major department store purchasers) prohibiting them from violating 2(f) so far as their group purchases are concerned. Even this order proposed by respondents (which in my judgment is too limited) would have a stronger deterrent effect on these respondents as respects their future buying conduct than the withdrawal of the complaint. Respondents are sophisticated enough to appreciate that if an order was entered against them now under Section 2(f) even though limited, they would be extremely vulnerable to a broad and stronger order if they should ever be caught again violating 2(f) in their individual purchases. Hence entry of some order might well have a substantial effect on the future individual buying conduct of these respondents; withdrawal of the complaint altogether will probably not. Moreover, withdrawal of the complaint would be grossly contrary to the public interest in light of our reason to believe that in fact these respondents *have* violated the law *at least* as respects their AMC purchases. I could never justify to myself or to anyone else withdrawing that complaint and not entering *any* order.

Although I am still troubled, as are all the Commissioners, about the implications of rejecting the proffered settlement, I have not yet seen any hard or persuasive evidence of an acceptable alternative to such rejection. The staff has not come up with an investigatory program which would ensure that these respondents would hue closely to the line in their purchasing practices and which would also extend to the purchasing practices of other industry members.

I have some trouble with Commissioner Nicholson's proposal that we seek a provision binding individual purchases but delay its effective date until other companies are under the same order. While I think this is an imaginative suggestion—and one therefore which I doubt respondents would accept—I do not know whether we have information indicating that others in their individual purchases are violating these same laws apart from respondent's contentions to this effect. More serious than that is my reluctance to delay the effective date of an order which would require a company to stop violating the law merely because others may also be engaged in such violations. As I understand respondent's "competitive" argument, it is that if they were subject to such a 2(f) order for a substantial part of their product lines, this would require them to adopt stringent policing techniques which might curb their flexibility in their purchasing practices, i.e., might force them to obey the law. That this might put them at a competitive disadvantage vis-a-vis other department stores not under comparable orders is a possibility but one which I cannot find myself very sympathetic towards. It does behoove us to proceed with investigations of the industry in as equitable a fashion as possible but I cannot see that it should move us to hold off enforcing the law because of any so-called "competitive" disadvantage flowing to respondents because of their compliance with the law.

AUGUST 20, 1968.

MEMORANDUM

To: James M. Nicholson, Commissioner.

From: The Commission.

Subject: Federal Trade Commission Docket No. 8651. In the Matter of Associated Merchandising Corporation, et al. in connection with the pending proposals for settlement and in alternative solution.

INTRODUCTION

First, I would like to express my appreciation to Commissioner MacIntyre for his considerate and thoughtful circulation of August 7 in this matter. As indicated to the members of the Commission individually, my proposed dissent in this matter was prepared as a means of disciplining my thinking, and for the purpose of provoking a discussion of problems which I did not feel had received adequate discussion at the table. Without the benefit of directly participating in the extended history of this matter (with respect to which I made an effort to familiarize myself), concerned about our ability to achieve the goal sought by the majority within the present pleading context, shocked by the financial commitment already made—and by the prospective costs, doubtful that individual discriminatory pricing orders (even if attainable) in this matter would be either fair or a significant step toward solution of what appeared to be a broader problem, I have felt the acceptance of the proposed consent order was appropriate and desirable.

Commissioner MacIntyre, through his circulation of August 7 has raised broader considerations which I found of considerable help to my understanding of this matter and the broader problems involved. Since I am inclined to believe that any decision here should be made within the context of a broader policy, which includes considerations somewhat beyond those suggested by Commissioner MacIntyre, I should like to raise those questions of policy for consideration at the table.

VIOLATIONS OF THE ROBINSON-PATMAN ACT IN THE RETAIL DEPARTMENT STORE INDUSTRY

It is my understanding that our investigations of the ready-to-wear industry, as well as our investigations of AMC-AWC and their members, provide a basis for the Commission to have reason to believe that:

1. AMC-AWC, their members and other unnamed retail department stores and chains have induced or knowingly received, individually and through group devices, advertising and promotional allowances either not available, or not available on proportionally equal terms, to competitors of the recipients (which, of course, are violations of Section 5 of the Federal Trade Commission Act, not the Robinson-Patman Act); and

2. AWC, as a group buying device, has knowingly received or induced discriminatory prices in violation of Section 2(f).

It is my further understanding that, although direct evidence is not in hand to provide a basis for the Commission to have reason to believe, it is the considered opinion of the staff that:

1. The members of AMC-AWC and other department stores and chains, individually, have knowingly received or induced discriminatory prices in violation of Section 2(f).

With respect to the significance of the discriminatory allowances, I understand that substantial dollar amounts are involved. In an industry of relatively low profit margins this can have a substantial adverse impact upon non-favored competitors. [In this connection, it might be well to consider some evidence in our newspaper investigation files that some large stores are receiving allowances based upon fictitious advertising charges, thus obtaining a further competitive advantage.] I am not clear, however, whether our rather limited investigation of discriminatory prices indicates that there is substantial significance to the advantage acquired by the favored stores.

POLICY CONSIDERATIONS

1. In General

I agree with the statement of our responsibilities found on page 6 of Commissioner MacIntyre's circulation of August 7:

"Our responsibilities require us to secure *effective* relief from what is presented to us and which we have reason to believe are in fact unlawful acts, practices and conditions. This is our responsibility even where litigation is required to get the needed relief. We should not fail in the discharge of that responsibility even if the prospective litigation should be threatened or predicted to be long or costly." [My emphasis]

The emphasis is added to the word "effective" because I believe there are a number of policy considerations implicit in that word which bear heavily on the answers to particular questions which come before us.

Contrary to the opinions expressed by many of the critics of Robinson-Patman, I do not believe that the Act is intended to preclude "hard competition" (I would prefer "hard bargaining") and permit only "soft competition" (the atmosphere in which competing sellers consciously hide behind the Robinson-Patman Act to avoid price competition which might be justified on the basis of cost or meeting competing prices). It is the absence of these supposedly inherent concomitants of Robinson-Patman that presents difficulties in enforcement. If it were necessary to enforce the Act in a manner which fostered "soft competition," I would find it necessary to join the critics of the Act since that view would be in conflict with the policy of the antitrust laws, would entail higher prices to the consumer and higher profits to the sellers and would not subserve the general public interest.

The concept of the Commission that has been emphasized in the last seven years, and one which I embrace with a great deal of enthusiasm, is the enforce-

ment of our obligations as fairly—and on as broad a base—as possible. However, our traditional budgetary limitations have required us to determine priorities in allocating our resources. Generally, this has resulted in efforts by the Commission to attack individual violations of more flagrant nature, and, where the violations are more broadly based, in attempting solutions which reflect a broader view. (Our recent determination to study the conglomerate merger phenomena is, in my opinion, a laudatory effort to resolve individual merger questions within the context of a better understanding of the overall problem.)

It is difficult to reconcile our responsibility for enforcement of the Robinson-Patman Act with our responsibility to promote competition and to reach broader solutions, but it is not impossible. I, for one, am not willing to throw up my hands in defeat and advocate either throwing out the Robinson-Patman Act or substantial tightening amendments which have been beaten down in the past in the Congress. Not having lived intimately with the Robinson-Patman Act for the past thirty-two years, perhaps some of my suggestions which follow will appear naive, or superficial or impossible, and if so I invite the response of my fellow Commissioners. I hope that, not having had that intimate relationship, there may be some merit to a less involved, or less committed, point of view.

Because it seems to me that the AMC case contains most of the frailties and the opportunities for resolution of our obligation to enforce the Act, to promote competition and to seek broad solutions, I suggest we consider the case within that framework.

2. The AMC-Retail Department Store Context

For purposes of this discussion, I am assuming the accuracy of the numbered paragraphs on pages 2 and 3 of this memo.

With respect to the assumption of violation of Section 2(f) through AWC and other group devices, the proposed order would (with the correction of the problem discussed by Commissioner MacIntyre under the heading "Additional Defect" on pages 5, 6 of his August 7 circulation) effectively preclude AMC-AWC and their members individually from using any group device in the future as a means of obtaining discriminatory prices. Acceptance of this settlement does not stop other buying group entities from obtaining discriminatory prices, but I have the impression from the staff discussion that most other buying groups have less bona fides than the AMC-AWC devices and that an order in the manner proposed by the settlement would facilitate and perhaps insure consent orders against other groups with substantially reduced commitments of time and effort. There are only two additional matters that I would suggest for broadening the consent order which would facilitate the other problems in this industry.

First, I would suggest an effort to obtain a provision precluding the use of a group device to induce or knowingly receive discriminatory advertising or proportional allowances.

Second, I would suggest that we consider seeking individual restrictions on discriminatory prices and advertising and promotional allowances which provisions would become effective upon the obtaining of similar restrictions from a mutually satisfactory segment of the department store industry. I made this suggestion sometime earlier, but do not believe it has been explored with the respondents.

I think that every effort should be made to obtain these additional provisions which I have some reason to believe may be obtainable. I am personally of the opinion that there are two very substantial reasons why a fight to the death will be made against broad individual orders: 1.) There is a concern about instances of a buyer, in hard bargaining, inadvertently violating the order (a problem which could be handled in the language of the order); and 2.) There is a very real concern that an individual order would unfairly put the individual members of AMC-AWC at a substantial competitive disadvantage with their competitors who remain free until the Commission acts against them, a concern which I believe can be handled through delaying the effective date of that part of the order.

If AMC-AWC and their members agree to both suggestions for expanding the proposed consent order, we can count the investment of 22,000 man hours since 1961 as well spent, and proceed with our efforts to obtain broader solutions in this industry.

Even if these two additional provisions are not included in a consent order with AMC-AWC and their members, I would accept the consent order (requiring only the correction of the language "unlawfully discriminatory"). I do not see how this interferes with an effort to pursue the members individually along the lines suggested by Commissioner MacIntyre. Although the group challenge enables the combination of individual charges in one action, the charge of individual violations requires individual proofs. We apparently have a good case against AMC-AWC group activity, and, in accordance with Commissioner MacIntyre's section on "Our Responsibilities," we should secure effective relief from these provable violations.

Whether the additions to the consent order are obtained or not, I would propose that we immediately seek group orders against the other buying groups in the department store industry. I would further propose that, if the individual pricing order against AMC-AWC members is not included, we conduct the investigation proposed by Commissioner MacIntyre.

In this connection, I would like to interject another consideration not referred to by Commissioner MacIntyre. Rather than investigating bobby-pins, or hot pads, or fireplace screens, I would suggest that the staff be instructed that the Commission requires evidence of some pattern of price discriminations of some substance in lines which represent some degree of substantiality in the department store industry. If a pattern of violation is found in significant lines, such as linens, or white goods (refrigerators, etc.) or furniture, or ready to wear items, I would concur that we would be failing in our responsibility "even if the prospective litigation should be threatened or predicted to be long or costly." But individual discriminations that are not substantial, or do not affect substantial lines, are not likely, in my opinion to have a substantial effect on competition and therefore do not represent the kinds of violations to which the Congress wished the Federal Trade Commission to address itself.

The really difficult problem which the Commission will face, whether the AMC-AWC members agree to a postponed individual order or we proceed against them individually, is enforcement against individual violations by other department stores and chains. If there is a shortcoming of the Robinson-Patman Act that bothers me substantially, it is the historical inability of the Commission to deal, under the Act, with problems on a broader scope.

The only possibility that occurs to me, and I feel inadequate to judge it, is a trade rule proceeding. Is it feasible to conduct an investigation into discriminatory prices in the department store field which would show a general prevalence, and, from that, prepare trade rules which would facilitate enforcement efforts? Are there any other methods by which a prevalence of price discriminations in the department store industry may be challenged? Is there any method by which the Commission can evaluate discriminatory practices in various industries and establish some priorities related to significance and substantiality? Are there any new recommendations which we could make to Congress at this time for amending the Robinson-Patman Act, which would have a reasonable expectation of enactment?

These are a few of the questions which I believe should be discussed at the table and from which we may be able to develop decisions which we can all enthusiastically support.

SEPTEMBER 20, 1965.

Re: Oil Companies—Unnamed—Twin Cities Area and Northeastern Minnesota, File No. 621 0915; Skelly Oil Company, File No. 641 0049; Sunray D-X Oil Company, File No. 641 0050; Cities Service Oil Company, File No. 641 0051; Phillips Petroleum Company, File No. 641 0052.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

SEPTEMBER 20, 1965.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Oil Companies—Unnamed—Twin Cities Area and Northeastern Minnesota, File No. 621 0915; Skelly Oil Company, File No. 641 0049; Sunray D-X Oil Company, File No. 641 0050; Cities Service Oil Company, File No. 641 0051; Phillips Petroleum Company, File No. 641 0052; Section 2(a)—Clay-

ton Act as amended, Alleged Price Discrimination in the Sale of Gasoline to Dealers Located in Various Areas of Minnesota.

The Bureau of Restraint of Trade recommends the closing of the investigation against the four captioned oil firms selling gasoline in the Twin Cities area and in northeastern Minnesota because of insufficient evidence of violation. The investigating attorneys in Chicago had recommended issuing a complaint against these companies for "illegal price discrimination" under section 2(a).

Investigations disclosed that there was a considerable differential in both the whole sale and retail price of gas between the northeastern area of Minnesota and the Twin Cities area. This arose not only because transportation costs to the former were higher, but also because the Twin Cities market was more competitive, evidently being an area where surplus and distress gas were consistently channeled. The "Suggested Competitive Retail Price" of Standard of Indiana probably contributed to the unstable price structure of the Twin Cities market as well. When this was ascertained the investigation of practices by the four captioned companies was consolidated with a then pending complaint against Standard and its S.C.R.P. plan (dismissed on administrative grounds by the Commission).

The results of the subsequent supplementary investigation to determine injury in connection with the Standard of Indiana matter were adduced by the investigating attorney as proof of injury. Twenty-two service stations in the northeastern area were interviewed and some 76 commercial travelers and vacationers were canvassed by mail. The former declared that they had lost considerable sales to Twin Cities dealers, and the latter claimed that they always purchased a full tank in the cheaper Twin Cities area when going north and that they purchased as little as possible going south from the northeastern area.

The staff here felt that this was insufficient evidence of injury. They note that since the two areas are around 190 miles apart it would virtually always be necessary to purchase a full tank of gas in any event. However, they failed to examine the structure of prices between the two areas, a matter which could be of some moment here. However, since entering and exiting commercial travelers and vacationers between these two areas likely represent only a very small percentage of the market, it is difficult to see how any impact on competition could be more than infinitesimal, especially given the separation of the two market areas.

I have discussed this matter with the staff. I am informed that the staff would make this recommendation for closing irrespective of the Commission's action in the Standard of Indiana case. The staff also advises me that they have considered this case in the light of the information developed at the oil hearings but cannot nevertheless devise a theory of liability which will apply to those facts.

In view of these considerations, I concur with the Bureau of Restraint of Trade that evidence of injury has been insufficient and move that the investigation against the captioned companies be closed. I agree that no closing letter should be sent.

JUNE 14, 1963.

Re: Liquid Carbonic Division, General Dynamics Corp., File No. 641 6285; and Cardox Division of Chemetron, Inc., File No. 651 0102.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

JUNE 14, 1965.

To: The Commission.

From: Mary Gardiner Jones, Commissioner.

Subject: Liquid Carbonic Division, General Dynamics Corp., File No. 641 0285; and Cardox Division of Chemetron, Inc., File No. 651 0102.

The attached matter involves a staff recommendation for closing of an investigation of the above-named respondents for allegedly selling dry ice at below cost or unreasonably low prices. The staff recommends that the complaints and the half-completed investigatory files be transferred to Justice because of two consent decrees which Justice has with General Dynamics and Chemetron prohibiting them from, among other things, establishing territorially discriminatory prices for the purpose of destroying competition.

When this matter was first considered by the Commission, the Justice Department was contacted and clearance granted to the Commission to proceed. Justice did not at that time tell us of the outstanding consent decrees. The Commission's staff proceeded to investigate this matter but suspended the investigation as soon as it learned of the outstanding consent orders.

My initial feeling was that we should continue our investigation, since below-cost selling and territorial price discriminations were more in line with our investigatory skills than those of the Justice Department. However, the staff believes that it is more appropriate for Justice to conduct the investigation in view of the outstanding decrees. The staff, at my request, checked with Justice and learned that it does not now have pending any active investigation of the practices of the above-named companies. The Justice Department attorneys placed their emphasis on the consent decree provision that the territorial price discriminations must be "for the purpose of destroying competition or eliminating a competitor in such part of the United States." They consider this requirement of showing intent as posing difficult problems with respect to demonstrating noncompliance with the consent decree.

While the staff still believes that referring the specific complaints and the half-completed files to Justice may stimulate them to action, I believe that we should continue with our investigation to the point at least of determining whether the practices are going on. In this connection, it should be noted that respondent contends that he will urge a "double jeopardy" argument should the Commission take any action. I do not give this argument any weight. It should also be pointed out, however, that the investigation by the Chicago Office thus far has not revealed anything of significance. Nevertheless, I still believe that we should proceed with our investigation to the point where we can determine whether we wish to bring an independent case or whether Justice believes that the evidence is sufficient to warrant a contempt action under its own consent decree.

I move, therefore, that the file be returned to the Chicago Office with instructions to complete the investigation and to make sure that the investigation is broad enough to encompass the intent part of the Justice Department's consent decree. I am attaching to this memorandum a memorandum to me from our Liaison Officer which is self-explanatory.

MEMORANDUM

To: Commissioner Jones.

From: Henry I. Lipsky, Liaison Officer and Assistant to the Director, Bureau of Restraint of Trade.

Subject: Liquid Carbonic Division of General Dynamics Corp., File No. 641 0285, and Cardox Division of Chemetron, Inc., File No. 651 0102.

With regard to the above matters, Mr. Franklin Michels posed the following questions:

1. Why did the Department of Justice give clearance to the Commission with the existence of consent decrees obtained by the Department of Justice against the above companies?

2. Why are we discontinuing the investigation if the Department of Justice has outstanding consent decrees?

3. What, if anything, is the Department of Justice doing in regard to the above two companies?

In connection with the first question raised, the liaison office of the Federal Trade Commission informed the Department of Justice on May 6, 1964 that the Commission intended to conduct the subject investigations. The Department of Justice granted clearance on May 12, 1964, without conditions or comments.

In connection with the second question raised, the recommendation has been made that the Commission's files be closed and be referred to the Department of Justice. On the basis of the fact that consent decrees were obtained by the Department of Justice in August 1963 from General Dynamics and Chemetron, it was the recommendation that the files be forwarded to the Department of Justice. In general, the practices appeared to fall within the decrees. Therefore, it would be more appropriate for the Department of Justice to investigate the alleged practices. It is not unusual for the Department of Justice initially to grant a clearance to the Commission to investigate alleged practices, which may be generally related to a matter involved in one of the Department's decrees. If, after preliminary investigation, it becomes apparent that the complained of practices more closely fall within one of the Department's decrees, it would not be unusual to refer the files to the Department of Justice for its consideration. If there were no outstanding decree, there would not be a basis for referring the files to the Department.

With regard to the third question, the liaison office of the Department of Justice informed the liaison office of the Commission during the week of May 24, 1965 that the Department did not have under active investigation the practices of the above-named companies. On the basis of information obtained from the attorneys in the Department of Justice, the consent decrees, a portion of which is quoted in the memorandum of March 12, 1965, from the Bureau of Restraint of Trade to the Commission, is interpreted narrowly. Based on such information, emphasis is placed on the last portion of the quoted paragraph "—for the purpose of destroying competition or eliminating a competitor in such part of the United States:" The Department of Justice attorneys consider the requirement of showing intent as narrowing the scope of the decrees as well as making it more difficult to show non-compliance with that portion of the decrees.

While the investigation which the Commission intended to undertake, and so informed the Department of Justice, may have a general overlapping area, it would not be unusual for the Department of Justice to grant a clearance to the Commission for its investigation, particularly in this circumstance where the Department of Justice attorneys interpret their consent decrees as being narrowly drawn. Practically, the Department would expect the Commission to undertake an investigation, under the noted charges which are apparently broader and to inform the Department of Justice at a later date of facts, if any, which might indicate non-compliance with the narrower consent decrees.

Respectfully submitted,

HENRY I. LIPSKY,
*Liaison Officer and Assistant to the Director,
 Bureau of Restraint of Trade.*

FEBRUARY 28, 1968.

Re: In the matter of Southern Railway System, F. 531 0214; Baldwin-Lima-Hamilton Corp., F. 651 0145; W. H. Miner, Inc., F. 651 0146; Morton Manufacturing Co., F. 651 0147; Amsted Industries Inc., F. 651 0148; Standard Car Truck Co., F. 651 0149; American Seal-Cap Corporation of Delaware, F. 651 0150; William S. Hansen, F. 651 0151; Crucible Steel Company of America, F. 651 0152; Universal Marion Corp., F. 651 0153.

(Previously circulated by Commissioner MacIntyre on Feb. 7, 1968, as a non-agenda matter.)

From Commissioner Jones.

To Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

FEBRUARY 28, 1968.

To: The Commission.

From: Mary Gardiner Jones.

Subject: In the Matter of Southern Railway System, F. 651 0214; Baldwin-Lima-Hamilton Corp., F. 651 0145; W. H. Miner, Inc., F. 651 0146; Morton Manufacturing Co., F. 651 0147; Amsted Industries Inc., F. 651 0148; Standard Car Truck Co., F. 651 0149; American Seal-Kap Corporation of Delaware, F. 651 0150; William S. Hansen, F. 651 0151, Crucible Steel Company of America, F. 651 0152; Universal Marion Corp., F. 651 0153.

I move the addition of the following paragraph to the letter to the ICC proposed by the staff. The paragraph would be inserted between the third and fourth paragraph on page 2.

"Each of these complaints allege that the supplier companies named as respondents made secret payments to the Southern Railway System in exchange for which Southern specified the use of respondent's products in its purchase contracts with independent railroad car builders. We have not filed a complaint against Southern Railway for its role in these arrangements. Since jurisdiction over Southern lies exclusively with your Commission, we have not pursued the question of Southern's culpability for allegedly inducing these secret rebates. Our complaints against the supplier companies are based upon a 'reason to believe' that these companies have violated the law by making such payments. We are inviting your attention to this matter inasmuch as only your Commission is empowered to take any regulatory action against Southern which might be warranted in this regard."

MAY 17, 1967.

Re: File No. 661 0169, Oil Companies—Unnamed.
 From: Commissioner Jones.
 To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
 See attached memorandum.

MEMORANDUM

MAY 17, 1967.

To: The Commission.
 From: Mary Gardiner Jones.
 Subject: File No. 661 0169, Oil Companies—Unnamed.

The staff has submitted its recommendation in connection with the preliminary investigation which they undertook in May 1966 of alleged price-fixing practices in the Wichita, Kansas area in connection with a gasoline price war going on there since 1964.

The investigation disclosed the following illegal—or at least questionable—practices all of which occurred subsequent to our petroleum hearings:

1. Pressure exerted by oil companies to cause dealers to reduce price.
 - a. Informants who complained: Watson, Rossi, Fry, Larson, Stevens, Keith, Johnson.
 - b. Coverage in guidelines: pp. 52–53.
2. Pressure exerted by oil companies to cause dealers to increase price.
 - a. Sinclair threatened and then refused to renew their contract with Joy, a pricing maverick who sold major gasoline at private label prices.
 - b. Coverage in guidelines: p. 48.
3. Pressure to reduce dealer discretion as to TBA.
 - a. Informants who complained: Watson, Costello, Rossi, Fry, Stevens, Dennis, Dodson, Weidner, Keith, Johnson.
 - b. Coverage in guidelines: pp. 63–64.
4. Pressure to induce dealers to increase hours.
 - a. Informants who complained: Fry, Stevens, Johnson.
 - b. No particular coverage in guidelines, but see p. 63, first sentence of Section F.
5. Area or zone pricing to dealers by majors.
 - a. Informants who complained: Costello, Gaines, Nelson, Weidner, Shell.
 - b. Coverage in guidelines: p. 49 ff.
6. Discriminatory pricing by jobber discounts to dealers by majors.
 - a. Informants who complained: Costello, Strange, Chester, Gaines, Dahley, Wolf.
 - Cheatum and Hillman admitted they got jobber rates although they each had only one station and no tank-wagons or warehousing facilities.
 - b. General coverage in guidelines: p. 49 ff.
7. One informant, Chester, referred to the use of a company station to discipline prices in an area.

The staff recommends—inexplicably to me—that the investigation be closed, relying in part on the fact that the market had settled down somewhat in November 1966 as contrasted with February 1965 and July 1966. The staff also notes that one interviewee indicated in 1967 that the 1965 practices of American about which he had complained had abated. I do not believe that allegedly illegal conduct becomes any less so because market conditions change and it may be no longer engaged in.

I move that the staff be directed to prepare appropriate complaints based on the conduct in the Wichita area disclosed by these investigations and submit them to the Commission within 30 days.

OCTOBER 22, 1968.

Re: Precision Universal Joint Corporation, File No. 661 0177.

(Previously circulated by Commissioner Elman on October 17, 1968 as a non-agenda matter.)

From: Commissioner Jones.
 To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

I am placing this matter on the agenda to discuss the logic of the attorney here who has recommended no provision for forwarding additional compliance reports on the ground that the respondent has sworn to discontinue the granting

of "large" promotions and that its additional reports would simply continue the same assurances. The attorney I think has too narrow a view of compliance powers. Obviously the additional report is necessary to verify the respondent's promise and equally obviously the way to verify this is not to solicit another promise but to require respondent to submit (probably at the end of a 12 month period for the next three years) a list of promotions actually engaged in together with dollar value and dollar value of sales broken down quarterly if possible so that the promotions can be evaluated as a percentage of sales and their market impact can be readily determined.

Our objective is a self-executing affidavit. Requiring this type of information tends to make it self-executing and militates against respondent's self-interpretative and conclusionary reports.

JUNE 14, 1968.

Re: (Circulated as a Non-Agenda by Commissioner Jones on June 11, 1968.)

From: _____.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

JUNE 14, 1968.

To: The Commission.

From: Commissioner Elman.

Subject: A. Greenhouse, Inc., Docket No. C-1201.

The staff's recommendation to reject respondents' compliance report is based on an interpretation of the order which appears directly in conflict with respondents' understanding at the time they entered into the consent agreement.

The order prohibits A. Greenhouse, Inc. from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of grocery products for respondents' own account, or on purchases made through Food Trends, Inc. or Consumer Motivation, Inc., or any other brokerage organization where, and *so long as, any relationship exists between the brokerage organization and the respondents named herein, either through ownership, control, management or representation.* (Emphasis added.)

A. Greenhouse, Inc. purchases products through Food Trends, Inc., and Consumer Motivation, Inc., but the staff finds that no "relationship exists between [the companies] . . . through ownership, control, [or] management". The only question is whether a relationship exists through "representation" (that would render the transactions unlawful) by reason of the fact that several full-time employees of A. Greenhouse, Inc. also work on a part-time basis for Food Trends, Inc. According to respondents, these employees are employed and compensated independently by the two companies and the "work is offered and accepted on the basis of purely individual decisions". (Staff memorandum p. 5.)

Prior to issuance of the order, the staff and respondents' counsel discussed the meaning of the order, and particularly the interpretation of the word "representation". As noted on page 8 of the staff memorandum, counsel for A. Greenhouse, Inc. stated in a letter to the staff:

We call your attention to the word 'representation' which appears at the end of the first portion of the order which does not appear in the Guercio order. *We assume that this word means 'agency' as recognized and defined under the common law, and if so, we have no objection to its inclusion.* You will note that our original submission proscribed any agency relationship between my clients and the broker organization. (Emphasis added.)

The staff did nothing to dispel this interpretation, and, in fact, stated in an earlier memorandum to the Commission:

"Respondents' counsel have properly assumed that this additional wording is to cover the agency relationships." (Staff memorandum, p. 8.)

Now, although the staff finds that no agency relationship exists between the two companies through the use of common employees, it rejects this interpretation of the order as too narrow. It now considers that the use of common employees violates the order despite the lack of any agency relationship. Thus, on page 10 of its memorandum, the staff states:

On the assumption that it was the intention of the Commission by its order to prohibit the utilization of common employees by and between either of the named respondent brokerage companies and A. Greenhouse, Inc., we recommend rejection of the report of Compliance.

I find this grossly unfair. To have accepted the consent order with respondents' express understanding that only an agency relationship was prohibited, and now to expand the order based on an amorphous "intention of the Commission" that was never communicated to respondents, constitutes, as I see it, *post hoc* amendment of the order.

Accordingly, I move that respondents' compliance report be accepted and that respondents be so advised.

(Non-staff)

MARCH 13, 1964.

Re: Ernest E. Fadler Company, Inc., File 621 0300.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that this matter be closed on the ground of the insubstantiality of the practice concerned. The proposed respondent was charged with allegedly receiving illegal brokerage, directly or indirectly, on purchase of fresh citrus fruits and other produce in violation of Section 2(c) of the Robinson-Patman Act.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See memorandum attached.

MEMORANDUM

MARCH 13, 1964.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Ernest E. Fadler Company, Inc. (Fadler), File 621 0300.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed.

Fadler is a Missouri corporation operating solely as a produce broker. Brokerage payments for the fiscal years 1960 and 1961, ranged from \$130,000 plus, to \$127,000 plus. Fadler was charged with allegedly receiving illegal brokerage, directly or indirectly, on purchases of fresh citrus fruits and other produce in violation of Section 2(c) of the Robinson-Patman Act. The investigation established that in sales made for January 1, 1959, through March 20, 1962, seven transactions showed that Fadler made a profit beyond his normal brokerage fee, and in all seven instances the additional profits were realized from one of the following three methods: overcharging for thermo-cooling or top ice; re-invoicing customer at a higher delivered price; or overcharging for freight. The extra profits realized ranged from \$11.60 to \$75.00. Based on these facts, the staff concludes that while Fadler technically violated Section 2(d) of the Robinson-Patman Act, the violations constitute only a few unintentional instances, and did not establish a pattern of conduct that would require corrective action, and recommends that the file be closed, and that the applicant and proposed respondent be advised of this action.

I concur in the recommendation and so move.

EVERETTE MACINTYRE, *Commissioner*.

(Non-Staff)

FEBRUARY 25, 1964.

Re Kay Windsor Frocks, Inc., et al., Docket 5735 and File 621 0817.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

The Compliance Division, Bureau of Restraint of Trade, recommends that file 621 0817 be closed and a copy of the memorandum in this file be incorporated in Docket 5735. The compliance investigation established overpayments to two ac-

counts in 1961 (Wieboldt's and Altman's). The staff observes that while Windsor has been under almost constant surveillance and is taking care that it favors no customer in promotional payments, it appears that there are probably no current violations upon which to predicate further proceedings * * *, and recommends that the file be closed. The staff notes that since these two customers were selected as some of the most favored in 1960-61, and the reported payments made by counsel in August of '63, do not show any gross favoritism, it is concluded that respondent is keeping its promotional allowance payments on proportionally equal terms. Under the circumstances, I am not satisfied with the investigation conducted concerning promotional allowances made in 1962, and move that the matter be returned to the Bureau with the direction that supplemental compliance investigation be conducted to determine whether respondent is complying with the Commission's order. See attached memorandum by the Division of Compliance, Bureau of Restraint of Trade, dated February 4, 1964.

(Non-Staff)

DECEMBER 16, 1964.

Re File 621 0824 Consolidated Foods Corporation, Lawson Milk Company Division; File 621 0825 Kroger Company; File 621 0826 Thorofare Markets, Inc.; File 621 0827 Jewel Tea Company; File 621 0828 National Tea Company; File 621 0829 A & P; File 621 0830 Consolidated Foods Corporation Eagle Food Centers, Inc., Subsidiary; File 621 0831 Loblaw, Inc.

From: Everett MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

DECEMBER 16, 1964.

To: The Commission.

From: Everett MacIntyre, Commissioner.

Subject: File 621 0824 Consolidated Foods Corporation, Lawson Milk Company Division; File 621 0825 Kroger Company; File 621 0826 Thorofare Markets, Inc.; File 621 0827 Jewel Tea Company; File 621 0828 National Tea Company; File 621 0829 A & P; File 621 0830 Consolidated Foods Corporation, Eagle Food Centers, Inc., Subsidiary; File 621 0831 Loblaw, Inc.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the above-numbered files be closed because of insufficient evidence of violation.

These eight matters originated as a result of alleged price wars waged in the retail sale of white bread in Peoria, Illinois, and western Pennsylvania, and involved alleged area price discrimination in violation of Section 2(a) of the Clayton Act, as amended, and sales below cost in violation of Section 5 of the Federal Trade Commission Act.

The Commission authorized a Section 6(b) investigation of the practices covering the period May 1, 1961 through November 30, 1961. Proposed respondents filed special reports during the summer of 1962. This information appears in chart form in the buff file.

After the material was analyzed, the files were sent to the Chicago Field Office to determine the amount of competitive injury which might have been inflicted by the alleged Illinois price war. This investigation was discouraged by the applicant, Illinois Bakers Association, and other interested parties, and the files were returned to Headquarters.

In reviewing the files, it appears that proposed respondent, Lawson Milk Division of Consolidated Foods did not operate stores in either of the areas involved. The Eagle Food subsidiary of Consolidated Foods operated only one store in the areas and this one was closed on November 18, 1961. Thorofare Markets, Inc. operates no stores in Illinois and does not sell the bread involved in its Pennsylvania stores.

In the Peoria area, the pricing information submitted by Kroger is limited. The prices indicate, however, that at no time did they drop below the prices of National Tea Company and Jewel Tea Company, and it is obvious that Kroger was meeting the competition of these two firms. Kroger's costs of bread production were submitted, but no figures were given on distribution costs, but in

analyzing the statistics, the inference is drawn that Kroger's costs are above the costs of production and distribution. In the western Pennsylvania area, evidence of below cost selling by Kroger is meager, and from the cost figures submitted, it may be assumed that Kroger sold its 16 oz. loaf of bread below cost when the retail price was 10¢, but this price occurred only during 3 weeks of the 7 month period covered by the special report. Other evidence indicates one instance of price discrimination occurred during a one week period, when one store charged 10¢ per 16 oz. loaf of bread, while other stores in this area were charging 15¢.

It appears that A & P prices for the bread involved were the same throughout both the Peoria and western Pennsylvania areas, and no evidence was developed with respect to sales below cost.

Evidence of possible violations of law in the western Pennsylvania area indicates that Loblaw sold its one pound loaf of bread in 2 of its 122 stores during an eight week period at below cost and a one week promotion in 15 other stores at below cost: Loblaw also sold its one pound loaf at higher prices in western Pennsylvania than in central Illinois; it also allowed stores in nine Pennsylvania counties the benefit of 16 days of 24 oz. bread loaf promotions which were disallowed in stores in other Pennsylvania counties during the 7 month price study.

Evidence established with respect to possible violations in Illinois, indicates that Jewel Tea Company maintained a slight difference between prices in central Illinois and in Chicago; National Tea Company maintained a consistent price differential in this area on its 16 oz. bread loaf.

The staff notes that when recently contacted, the applicant, Illinois Bakers Association, discouraged further investigation and expressed satisfaction with the Commission's investigation as it was instrumental in the early discontinuance of the complained of practices.

Based on these circumstances, the staff recommends that the files be closed and that no closing letters be sent to applicant Kenny's Food Market and proposed respondents.

I am submitting this matter to the Commission for consideration and action.

EVERETTE MACINTYRE, *Commissioner.*

(Non-Staff)

JANUARY 22, 1964.

Re: Dodge Division, Chrysler Corporation, File 631 0242.

This matter involves an alleged coercion of franchised dealers to use a single advertising agency. The Bureau of Restraint of Trade recommends that the file be closed for "Insufficiency of Proof".

From: Evrette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

This matter is of such importance as to warrant the consideration and action of the Commission at the table. See attached memorandum.

MEMORANDUM

JANUARY 22, 1964.

From: The Commission.

To: Everette MacIntyre, Commissioner.

Subject: Dodge Division (Dodge), Chrysler Corporation (Chrysler), File 631 0242.

The Division of General Trade Restraints, Bureau of Restraint of Trade, recommends that the file be closed for "Insufficiency of Proof".

The Washington Representative of Advertising Age, on behalf of unidentified small advertising agencies, complained that the Dodge Division of Chrysler, through coercion of its franchised dealers, compelled them to join regional advertising associations and to place advertising with Batten, Barton, Durstine and Osborn, Inc. (BBDO) of New York, thereby precluding Dodge dealers from placing advertising with agencies of their own choice, in violation of Section 5 of the Federal Trade Commission Act.

The investigation established that for the last decade, Dodge dealers in some thirty metropolitan centers had formed associations to pool regular contributions from members for the purpose of cooperative advertising. The associations were

commonly known as "Retail Selling Associations" (RSA). On the invoices of each vehicle delivered to an association member, Dodge billed an additional amount of \$15.00 and itself contributed \$6.00 per vehicle to a common pool of all RSA funds. The advertising committee of each regional association was authorized to select the advertising agency to act in its behalf. Dodge's contributions to this fund in 1961, amounted to \$437,000, and its national advertising expenditure through BBDO amounted to \$7,197,921.

Chrysler, like other automobile manufacturers, used different national advertising agencies for each of its major automobile lines. In 1963, Dodge decided upon a new program, referred to as "Dodge Regional Advertising Associations" (DRAA), designed to collect funds for cooperative advertising. While no directive or statement specifically indicates that dealers are required to become members of an association or required to engage BBDO as its advertising agency, all funds raised for advertising are based upon membership and contributions by the dealers. All respondents directives to regional personnel reflect the assumption of 100% dealer participation; all procedural directives, including DAA Accounting Procedure, embody the assumption that BBDO will be engaged by each regional association. One June 23, 1963, in the 16 regions where regional associations exist, or are being organized, 2,006 of 2,299 Dodge dealers have signed membership agreements with the local DAA association. Of 29 dealers interviewed in the Midwest, none acknowledged that any form of coercion had been exercised on them by the manufacturer's agents. Twelve of these dealers refused membership and stated that they had no intention of joining the local associations. No evidence was established indicating that the proposed respondent cancelled or terminated any contract, franchise, or agreement with any dealer or threatened to do so because of the refusal of the dealer to engage the advertising services of BBDO.

In support of the dealer associations who have engaged BBDO, proposed respondent states that BBDO handles Chrysler's national advertising and has advanced knowledge of factory advertising plans; has information concerning other successful group and promotional activities; has knowledge of Dodge products; has information concerning factory prepared advertising material and accessibility; and is able to cut production costs through means of circulating art work, and other expensive items through the branches of the agency. House counsel for Chrysler states, "There have been no contracts between either Chrysler Corporation or Chrysler Motors Corporation and Batten, Barton, Durstine & Osborn, Inc., relating to any dealer cooperative advertising program, and no such contract now exists. There have been no commissions or any other financial benefits received by either Chrysler Corporation or Chrysler Motors Corporation from Batten, Barton, Durstine & Osborn, Inc., on dealer advertising placed through it."

The staff notes that the practice complained of has existed among the manufacturers of motor vehicles since 1934, when the first Ford dealers fund was organized. Since then only one successful suit has been brought involving coercion of dealers. In *U.S. v. General Motors Corp.* (7th Cir.) [1940-1943 Trade Cases 56,120, 56,139] 121 F. 2d 376, it was shown that defendant's purpose was to control the financing essential to the wholesale purchase and retail sale of GM cars. In order to accomplish this, the conspirators resorted to concerted action and coercion.

The distinction between the *General Motors* case and the most recent ones involving advertising used in the sale of automobiles is set out in *Miller Motors, Inc. v. Ford Motor Co.*, 1957 Trade Cases, 63, 663 (see page 4 of the Bureau's memorandum).

After considering the proposed respondent's position in the industry and the absence of any tangible evidence of coercion the staff is of the opinion that it appears reasonable for the corporation to handle its advertising through a single agency in order to realize not only maximum advantages to itself, but also to the dealers participating in the cooperative advertising program. Based on these circumstances the Bureau recommends that the file be closed, and closing letters omitted.

I concur in the recommendation and so move.

EVERETTE MACINTYRE, *Commissioner.*

[Non-Staff]

MARCH 6, 1964.

Re: Safeway Stores, et al., File 641 0149.

This matter is before us as a result of a complaint alleging that Safeway Stores, Inc., of Lewiston, Idaho, and Dairy Gold Co-op (a supplier) were deliberately undercutting prices of dairy products in Lewiston and maintaining higher prices in other markets.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

MARCH 6, 1964.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Safeway Stores, et al., File No. 641 6149.

This matter is before us as a result of a complaint made by Golden Grain Dairy (Golden) of Lewiston, Idaho. The Commission was requested by United States Senator Frank Church of Idaho and Idaho State Senator Carl C. Moore to investigate this matter. Senator Moore had alleged that Safeway Stores, Inc., of Lewiston, Idaho, and Dairy Gold Co-op (a supplier) were deliberately undercutting prices of dairy products in Lewiston and maintaining higher prices in other markets. There was a suggestion in the letter of a possibility of a price-fixing conspiracy between these two companies and possibly illegal price discrimination.

On the basis of a very limited investigation, the Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed for the lack of evidence, and that letters to this effect be sent to the applicant, the Safeway Stores, to Idaho State Senator Moore and to United States Senator Frank Church advising them of such action.

The investigation established that Golden, an independent dairy in the Lewiston, Idaho area, enjoyed, over a period of years, a unique and favorable position in a local market where the price of milk at retail grocery stores was traditionally the same as the home delivered price. Prior to June 1963 retail prices for fluid milk were: Gallon jug, 92 cents; half gallon jugs, 47 cents; paper cartons (retailed out-of-store), 50 cents per half gallon, 25 cents per quart. In August 1963, Safeway introduced a secondary brand of milk, Blossom Time, in error at 46 cents per half gallon carton, which was increased to 48 cents in one week. The paper carton was selling at 1 cent above the glass jug and threatened the traditional advantage enjoyed by retail home-delivery in Lewiston.

It was established that the milk being sold in Lewiston, Idaho by Safeway is purchased in that area from Darigold Farms, a co-op of producers in the area.

Both Lucerne and Blossom Time are Safeway "private labels." Both are bottled for Safeway by Darigold Farms, Inc., at its Spokane plant. The Safeway store in Lewiston has never handled Darigold's regular brand of milk. The daily test sheets in Safeway's division office files show that Blossom Time has a minimum of 3.5 butterfat and will average from 3.5 to 3.6, whereas Lucerne has a minimum of 3.8 butterfat. The division manager, Mr. Pringle, indicated that Safeway paid less for Blossom Time than for Lucerne. However, he would not give the exact prices or the price differential without permission from Safeway's home office. No effort was made to obtain further pricing information from Safeway or Darigold Farms.

Safeway's Lewiston store sells Golden Grain milk in addition to Lucerne and Blossom Time. Mr. Pringle stated that the Golden Grain milk outsells both private label milks in the Lewiston store.

It appears from the record of the investigation that the applicant, like small processors and distributors of dairy products in other areas, is quite concerned over the trend in the pricing of milk through stores. In other words, it is concerned that its retail home delivery sales will be in jeopardy if the margin in the prices between the milk sold through the stores and the milk delivered to homes is increased to the point to induce housewives to buy their

milk through stores rather than have it delivered to homes. The Commission is aware that this is a common complaint from small processors and distributors in other areas. It is recalled, for example, that the Cream Crest Dairy of Greenville, Michigan, has complained about Borden's milk being sold through Kroger stores and other such outlets at very low prices, and allegedly at prices below cost, to the damage of home delivery sales. Many of these complaints are based on the suspicion, and in some instances charges, that the retail store operators are favored with supplies from their sources at discriminatory prices. In some investigations the Commission has established facts supporting such suspicions. In other situations, the Commission has established that the retailers were the ones taking losses on the sales of milk through the stores.

It is difficult from the meager record established in this case to determine what the facts are on these crucial points. Moreover, it does not appear that even if we were to develop evidence of all of the facts relevant to this single situation in Lewiston, Idaho, that we would thereby gain a perspective sufficient to permit a judgment on whether Safeway Stores, Inc. is in violation of Section 3 of the Federal Trade Commission Act because of the part it has played in these situations. The problem is one the solution of which cannot be found through this investigation in Lewiston, Idaho.

In view of these circumstances, it would seem to me that the Commission would be somewhat "sweeping this matter under the rug" if it were to attempt to make a judgment on this meager record from a single marketing community. To do so would not be taking as much as a knothole view, perhaps not even as much as a pinhole view, of the problem we know to be before us in all of the complaints which have been called to our attention.

For these obvious reasons I cannot reach a judgment on this case. I am unable to determine from this record whether Safeway Stores is guilty or not guilty of an unfair method of competition or an unfair act or practice in commerce. Also, I am unable to determine whether, if it is guilty, it was aided and abetted in that guilt by any other party, such as Darigold.

Therefore, I believe that the problems should be further considered and further investigated by consolidation with other investigations and other complaints of a similar character regarding Safeway Stores.

EVERETTE MACINTYRE, *Commissioner*.

(Staff)

NOVEMBER 25, 1964.

Re: Thompson Ramo Wooldridge, Inc., File 841 0189.

See attached memorandum.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

NOVEMBER 25, 1964.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Thompson Ramo Wooldridge, Inc. (Thompson), File 841 0189.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed based on an assurance of discontinuance under Section 1.21 of the Commission's Rules of Practice. The matter involves price discrimination and resale price maintenance in violation of Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act. Thompson manufactures automotive replacement parts, etc. which are sold to original equipment manufacturers (OEM) and in the "aftermarket". In February 1959, the Commission issued an order prohibiting respondent from discriminating in price between OEM and "aftermarket" customers by allowing OEM customers discounts as high as 45.06% over Thompson distributors. Thompson cost justified 38.15% and the order was related to the percentage of the discount that was not cost justified. A charge involving discrimination in price between "aftermarket" distributors by use of a non-retroactive annual volume discount was dismissed, having been cost justified.

In May 1956, Federal-Mogul Corp. (Federal-Mogul), Thompson's major competitor, consented to an order involving price discrimination in the "after-market". In September 1961, Federal-Mogul submitted a revised compliance report almost identical to Thompson's "aftermarket" program, claiming that it had instituted the program to meet Thompson, as that portion of the Thompson program had been considered by the Commission in the original Thompson proceeding.

In July 1964, the Washington Field Office recommended that complaint issue charging Thompson with violation of Section 2(a) of the Clayton Act, based on the theory that Thompson's internal redistribution allowance of 4% resulted in a discrimination between multi-outlet and single outlet distributors; and that the non-retroactive annual volume rebate was discriminatory between competing distributors as well as between distributors competing with jobbers.

Counsel for Thompson in a conference with the staff advised that they were anxious to settle the matter without litigation and would prepare a proposal under \$1.21 of the Commission's Rules of Practice. The settlement offer eliminated the internal redistribution allowance and jobber contracts, thereby removing any charge of resale price maintenance. An affidavit confirming the elimination of the resale price maintenance practices signed by the Vice President and General Manager appears in the file. Thompson agreed to abandon in its entirety the internal redistribution allowance program. Copies of the revised distributor franchise appear in the file. Thompson agreed to abandon all of its jobber franchise agreements and will advise all distributors and jobbers purchasing replacement parts that it will no longer franchise any jobbers purchasing from its distributors (see counsel's letter of October 3, 1964).

If the Commission approves and accepts the settlement offer, the staff has prepared a letter advising Thompson that pursuant to the settlement agreement, Thompson is requested to provide the Commission within 60 days after receipt of the letter, the following material: (1) an affidavit to the effect that the practices involved have been in fact discontinued; (2) a complete explanation of your new program of distribution, with particular emphasis on the changes resulting from your discontinuance of the practices in question; and (3) copies of all contracts or franchise agreements in use in the sale of your automotive replacement parts, subsequent to the discontinuance.

Based on these circumstances, the Bureau concludes that the settlement offer includes everything that could be accomplished by litigation and recommends its acceptance. The Division of Compliance prefers to have an order issued against Thompson for use in processing the Federal-Mogul case, but agrees that this method of disposing of the Thompson matter will be of some value in dealing with Federal-Mogul.

In considering the facts presented herein, I am of the opinion that they are of such importance as to warrant the consideration and action of the Commission at the table, and I so move.

EVERETTE MACINTYRE, *Commissioner.*

DECEMBER 12, 1967.

Re: Southern Railway System, F. 651 0214; Baldwin-Lima-Hamilton Corporation, F. 651 0145; W. H. Miner, Incorporated, F. 651 0146; Morton Manufacturing Company, F. 651 0147; Amsted Industries, Incorporated, F. 651 0148; Standard Car Truck Company, F. 651 0149; American Seal-Kap Corporation of Delaware, F. 651 0150; William S. Hansen, F. 651 0151; Crucible Steel Company of America, F. 651 0152; Universal Marion Corporation, F. 651 0153.

From: Everett MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

DECEMBER 12, 1967.

To: Commission.

From: Commissioner MacIntyre.

Subject: In the Matter of: Southern Railway System, File No. 631 0214; Baldwin-Lima-Hamilton Corporation, File No. 651 0145; W. H. Miner, Incorporated, File No. 651 0146; Morton Manufacturing Company, File No.

651 0147; Amsted Industries Incorporated, File No. 651 0148; Standard Car Truck Company; File No. 651 0149; American Seal-Kap Corporation of Delaware, File No. 651 0150; William S. Hansen, File No. 651 0151; Crucible Steel Company of America, File No. 651 0152; Universal Marion Corporation, File No. 651 0153.

This matter concerns the granting of secret rebates by manufacturers of railroad car component parts used in the construction or repair of railroad cars to Southern Railway System in violation of Section 2(c) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act.

Briefly, Southern, when drafting specifications upon which competitive bids by railroad car builders (contractors) would be based, would specify the parts of a component manufacturer to be used in the particular project. Southern, however, would only specify the parts of a particular manufacturer if that manufacturer paid a secret rebate to Southern on the amount of parts purchased from the manufacturer by the contractor. The rebates were never paid to or through the contractor, who paid the manufacturer's list price, but would be paid directly to Southern. The products involved are "railroad specialty products" which are completely standardized.

The staff is proceeding under a Section 5 theory because it considers such rebates to be in the area of commercial bribery rather than price discriminations. In those instances in which rebates were effected through commissioned representatives, the staff has included a Section 2(c) charge and corresponding paragraph in the order.

Ten cases are before the Commission :

1. *Southern Railroad System, File No. 631 0214.*

The staff recommends closing this file because of lack of jurisdiction and that no closing letter be sent because the ICC is presently conducting an investigation of the company concerning this practice.

2. *American Seal-Kap Corporation, Chicago Railway Equipment Company Division, File No. 651 0150.*

The staff recommends closing this file because Chicago Railway Equipment Company is no longer in existence and American Seal-Kap (now AMK Corporation), for all practical purposes, is no longer involved in the manufacture or sale of railroad car component parts.

3. *W. H. Miner, Incorporated, File No. 651 0146; Amsted Industries, Incorporated, File No. 651 0148; William S. Hansen, d/b/a A. Stucki Company, File No. 651 0151; Crucible Steel Company of America, File No. 651 0152; Universal Marion Corporation, Scullin Steel Division, File No. 651 0153.*

With respect to these cases the staff has negotiated substantially similar consent agreements for each firm under the old Rules of Practice. It recommends approval as to content and return to the staff for renegotiation of agreements in the form required by the new Rules of Practice.

Basically, the orders proscribe the granting of secret rebates to Southern as being in violation of Section 5. However, with the exception of the *W. H. Miner* case, File No. 651 0146, because of the use of commissioned representatives to pass rebates on to Southern, the orders in addition proscribe the payment of any commission, brokerage, etc., in violation of Section 2(c) of the Robinson-Patman Act.

4. *Baldwin-Lima-Hamilton Corporation, File No. 631 0214; Standard Car Truck Company, File No. 651 0149; Morton Manufacturing Company, File No. 651 0147.*

With respect to these cases the staff recommends the issuance of a complaint because of proposed respondents' unwillingness to negotiate a settlement. In the first two cases, *Baldwin* and *Standard Car*, the complaint charges a violation of Section 5 and attached are appropriate notice orders. The reason the staff is recommending a Section 5 theory in these cases (as well as the executed consent agreements) is that due to the secrecy of the rebates the staff considers them in the area of commercial bribery rather than price discounts. In addition, the staff feels that it would be unlikely that a Section 2(a) violation could be established because competition between railroads (secondary level) is limited at best and competition between manufacturers (primary level) was injured with respect to only one customer (Southern). Moreover, the staff feels that the Section 5 theory would permit more expeditious disposition of these cases. Orders based on the Section 5 theory nevertheless specifically include the proviso that Sections

2(a) and 2(b) defenses of the Robinson-Patman Act are applicable. The staff feels inclusion of the proviso is necessary "because [it is] not aware of any decision holding that cost justification or meeting competition *must* be considered valid defenses in any Section 5 proceeding." This is included because the orders, while aimed at the secret and confidential nature of the rebates and prohibit these outright, in addition contain a paragraph prohibiting rebates granted to induce the purchase of the rebate-grantor's products, unless such rebates can be justified.

Inasmuch as Morton utilized a commissioned representative as a conduit to pass on the rebates, the complaint against it—in addition to the Section 5 charge—includes a Section 2(c) charge and corresponding paragraph in the notice order.

The staff believes that subsequent to the issuance of complaints in these cases proposed respondents will desire to dispose of these matters through the consent settlement procedure and that "In the event these proposed respondents refuse to accept consent orders, these matters are substantially ready for trial on the merits."

5. Two proposed respondents—*Morton Manufacturing Company*, File No. 651 0147, and *Standard Car Truck*, File No. 651 0149—have requested informal disposition of this matter via the assurance of voluntary compliance procedure. The staff recommends that these requests be rejected.

In view of the substantial amount of litigation which may arise out of these matters I am placing this matter on the agenda for a full discussion at the table.

EVERETTE MACINTYRE, *Commissioner*.

APRIL 11, 1968.

Re: File 661 0068. In the matter of Unnamed Beet Sugar Manufacturers.

See the attached memorandum.

From: Everett MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

APRIL 11, 1968.

To: Commission.

From: Everett MacIntyre, Commissioner.

Subject: File 661 0068. In the Matter of Unnamed Beet Sugar Manufacturers.

In May of 1965, Senator Milton R. Young transmitted a complaint that all sugar factories regardless of location were quoting the same delivered price to any given destination. The charge was in effect that sugar manufacturers were engaging in delivered pricing resulting in price discrimination contrary to the holding of the *Staley* and *Corn Products* cases.

The case arose out of a complaint that a multiple basing point system was discriminating against beet sugar production in the Red River Valley area of North Dakota and Minnesota. The Bureau of Restraint of Trade previously recommended that the investigation be closed because of the excessive cost of an investigation and the fact that the sugar industry was closely regulated by the Department of Agriculture. At that time the Commission was not satisfied that there was sufficient data to meaningfully evaluate the recommendation for closing. This matter was therefore remanded to the Bureau of Economics to answer the following questions:

1. Does the Sugar Act dictate a resort to a system of delivered pricing?
2. What effect would a Commission proceeding have on the Department of Agriculture's administration of the Sugar Act?
3. Is there a sufficient likelihood of anticompetitive effects to justify a Commission investigation of the sugar industry?

The Bureau of Economics advises that the Sugar Act does not require a delivered pricing system, but that if the Commission were to successfully challenge delivered pricing in this industry, then according to the Department of Agriculture it would be necessary to subsidize certain beet sugar growers and processors who would be disadvantaged by such a change in the pricing system. In the opinion of the Department of Agriculture an amendment to the present law would be required to permit such subsidies. The Bureau of Economics is also of the view that the Commission should not at this time initiate an investigation

because some firms in the industry particularly on the West Coast have switched from delivered pricing to an f.o.b. system. The staff feels that this development should be evaluated before further proceedings.

It is the view of the Bureau of Economics that the multiple basing point pricing system has anticompetitive effects and leads to economic inefficiency because it minimizes location advantages and promotes unnecessary cross hauling. Further, the basing point pricing system may bolster price stability and restrict the role of price in adjusting competing market forces. Because much of the industry's production capacity is located in coastal areas freight absorption is an important element in sugar distribution under the basing point system. According to the Bureau, delivered pricing systems tend to promote price stability because the seller who doubts that he can increase his sales by cutting prices can do so by absorbing freight. Price cuts would apply to all of the sales with the result that if sales did not expand his total revenues would fall. Freight absorption on the other hand reduces the return on only a part of the refiner's total sales and if his mill net realization on each sale exceeds his marginal cost, his total revenues will increase.

The Bureau states that the delivered pricing system is basically inefficient because it increases distribution costs and tends to perpetuate uneconomic plant locations and uneconomic utilization of capacity. Further, delivered prices result in higher costs for customers in favorable locations. At first glance, therefore, this would appear to be a fruitful area for Commission activity. The Bureau, however, apparently feels that conditions are not as bad as they might be since there has been some departure from delivered pricing in the industry and therefore a tentative movement toward price competition.

Further, as already noted, representatives of the Department of Agriculture have indicated that a prohibition by the Commission of the delivered pricing system in this industry at this time would probably require subsidization of certain sugar producers. In that connection it was pointed out that there is no provision for such subsidization under the Sugar Act or other existing legislation. One may infer, therefore, that, should the Commission proceed against delivered pricing in the sugar industry at this time, it would lead to a collision with the Department of Agriculture with the prospect that the action by this agency would not result in meaningful remedial effect. On the contrary, it appears that the prospect would be the opposite, namely, a revision of the sugar Act so as to prohibit Commission action in this area.

In idealistic expression there are those who proudly salute the fluttering banner of antitrust or bow in reverence in its retreat. They are included in a greater number who submit to pragmatism. I am not unmindful of all of these things. Therefore, I concur in the recommendation for closing this matter and so move.

EVERETTE MACINTYRE, *Commissioner.*

Re: Toy Catalogs. D. 7971, D. 8100, D. 8231, D. 8240, D. 8255, D. 8259. File 653 7061, 643 7014.

The attached memorandum is for consideration with previous circulations:

Non-agenda circulation from this office, June 6, 1969.

Agenda circulation from Commissioner Jones, June 11, 1969.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

JUNE 13, 1969.

To: Commission.

From: Everette MacIntyre, Commissioner.

Subject: Toy Catalogs.

On June 6, 1969, I circulated, non-agenda, my motion that the staff be directed to prepare an appropriate order rescinding the cease and desist orders now outstanding against toy catalog publishers which were the subject of the show cause order issued by the Commission on January 15, 1969. I was under the impression that my circulation was relatively clear and straightforward. Evidently I was wrong. For on June 11, 1969, Commissioner Jones put this matter on the agenda stating:

"I had thought that this matter had been finally disposed of in accordance with the minutes of April 30th."

A summary of our recent actions in these matters may be in order. On January 15, 1969, the Commission issued an order requiring a number of respondents¹ to show cause why the Commission should not reopen this proceeding for the purpose of rescinding their orders and dismissing the complaints. Answers were filed to the show cause order and none objected to such cancellation. No order has yet been filed actually rescinding the cease and desist orders in question. In short, it is time to take these proceedings off dead center. Furthermore, my office has been informed by the staff that a number of inquiries have been received from those concerned inquiring as to the status of the orders in question.

The minute of April 30th to which Commissioner Jones refers,² according to my reading, directed action only with respect to the advisory opinions outstanding in this industry. This matter not having been finally disposed of, I renew my motion of June 6th.

EVERETTE MACINTYRE, *Commissioner.*

SEPTEMBER 20, 1967.

Re: Docket 8100, In the Matter of ATD Catalogs, Inc.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See the attached memorandum.

MEMORANDUM

SEPTEMBER 20, 1967.

To: Commission.

From: Everette MacIntyre, Commissioner.

Subject: Rosenwasser letter—ATD Catalogs, Inc., Docket 8100.

The Rosenwasser letter of June 22, addressed to all the Commissioners, brings the toy catalog matters to a head. The Commission will have to make up its mind whether it is going to enforce its previous rulings on this matter in connection with the independent catalogs or, failing that, whether all the orders in this area including those relating to jobber-affiliated catalogs should be rescinded. It seems to me that Rosenwasser has a valid complaint that making jobber-affiliated catalogs such as ATD live up to the requirements of the statute is unconscionable when the law is not enforced as to the publishers claiming independent status.

The root of the problem, has lain in the fact that the Commission simply has had insufficient data about the actual operations of the independent catalogs to determine whether their activities come within the scope of the statute. In this connection, the TPC hearing gave little concrete information on the actual operation of the independents. In effect, there was a stalemate between the jobber related catalogs, such as ATD, asserting the independents could not be independent as a matter of law, and the allegedly independent catalogs arguing to the contrary. This led to the Commission's policy statement on this subject which did not promulgate a *per se* rule on the point, but outlined those circumstances whose existence would justify the conclusion that the independents' activities are within the scope of the statute.

Prominent among these are:

1. The indication that the payments for advertising by the manufacturer are conditioned on the value of orders placed with the advertising manufacturer by the jobbers buying the catalog or that the purchase volume of these jobbers is guaranteed.

2. Consulting payments, namely, payments to jobbers by independent publishers for help in the selection of merchandise to be advertised.

Assuming either or both of those factors can be demonstrated, I believe there is sufficient nexus between advertising payments of the manufacturers and the jobbers so as to bring the jobbers even in the case of the independent catalogs,

¹ Docket 7971, *Individualized Catalogs, Inc., et al.*; Docket 8100, *ATD Catalogs, Inc., et al.*; Docket 8231, *Santa's Official Toy Preview, Inc., et al.*; Docket 8240, *Billy & Ruth Promotion, Inc., et al.*; Docket 8255, *United Variety Wholesalers, et al.*; and Docket 8259, *Santa's Playthings, Inc., et al.*

² Docket 8100, *ATD Catalogs, Inc., et al.*; File 643 7014, *Haywood Publishing Company*; and File 653 7061, *I. Lodge Catalogs, Inc.*

into a customer relationship within the scope of Section 2(d). It seems to me that the consulting payments and the advertising guarantees are the crucial points, although Mr. Rosenwasser's other allegations should be explored. If they could be documented in the course of a field investigation, then obviously action should be taken. Failure to explore these issues fully in a field investigation would be manifestly unfair to ATD. Mr. Rosenwasser has, in effect, provided a manual for investigating whether such guarantees and consulting payments exist. The real question is whether the Commission is determined to make an adequate investigation. To ensure an expeditious investigation by staff members well acquainted with the industry, the personnel of the Division of Compliance with previous responsibility in this area should actively participate in the field investigation, irrespective of whether the particular independent is already under order. Further, I believe it will be necessary to ensure that an accountant be assigned to the investigation at the outset and that he also actively participate in the field investigation. On a reading of the Rosenwasser letter, it appears that accounting help may well play the most important part in this investigation if it is initiated. I would like to emphasize my conviction that what is required here is a searching field investigation to determine what the independents actually do. Experience indicates that further public hearings or requiring reports from the industry will not enable the Commission to go behind the rhetoric of the parties to this industry dispute. Should there be a successful investigation, the Commission might then at last be able to take a clear cut position on the legal status of the independent publishers.

Accordingly, I move that the Division of Compliance and the Division of Accounting be directed to initiate an investigation in accord with the views outlined above.

EVERETTE MACINTYRE, *Commissioner.*

MARCH 4, 1969.

Re: Docket No. 8100, In the Matter of ATD Catalogs, Inc., and Toy Catalog Publishers.

From Everette MacIntyre, Commissioner.

To: Secretary Kuzew.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

MARCH 4, 1969.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Docket No. 8100, In the Matter of ATD Catalogs, Inc. and Toy Catalog Publishers.

Arnold Rosenwasser, on behalf of ATD, has filed an answer to the show cause order why the order outstanding against that respondent should not be rescinded. Rosenwasser has summarized aptly. I think, the Commission's confused relationship with this industry. Assuming that he manages to get sufficient publicity, the Commission's actions in this area might well become a cause celebre.

Essentially Rosenwasser takes the position that the Commission is now trying to wash its hands of this industry after having turned it upside down with ten years of enforcement activity. He claims, in effect, that the Commission has no moral right to do so since, as a practical matter, it will simply be impossible to restore the status quo ante.

He spells out at great length what I stated in my dissent to the show cause order, namely, the Commission's advisory opinions and failure to delineate to legal status of the so-called independent toy catalog publishers have put the affiliated catalogs, such as ATD, at a decided competitive disadvantage. He further notes that simply rescinding the order against ATD will not improve its competitive position. It will take more than this to restore the interest of manufacturers in affiliated catalogs in ATD.

He takes the position that the independents have used the advisory opinions as a weapon against affiliated catalogs, such as ATD, and that it will take "more than abstract pontifications and cancellations of ancient orders . . . to overcome a decade of industry-wide brain washing." He quite rightly construes the show cause order as an indication that the Commission is attempting to throw this problem into limbo, contending this is a problem which will not go away.

He does not challenge the rescission of ATD's order but states that the Commission should go further in order to right the competitive balance. In his view, the following steps should be taken:

(1) The advisory opinions should be rescinded.

(2) The cease and desist orders against manufacturers bearing on the toy catalog problem should also be rescinded as a natural corollary of the rescissions of the orders against the catalog companies (I think he has a point here, particularly if the Commission fails to take steps to clear up the legal ambiguity on the dichotomy between independents and jobber affiliated catalogs).

(3) Industrywide Guides should formulate standards specifically focusing on the problem presented by the independent catalogs.

In this connection the suggestion for a Guide on this subject proposed by Rosenwasser has, I believe, considerable merit since it would make clear that so-called independents are within the scope of the law when certain indicia of jobber-affiliation is present, even when there is no jobber ownership.¹

It is my view that the Commission should take Mr. Rosenwasser seriously. The industry may not be large but once having set this train of events in motion, the Commission has no moral right to walk away as it evidently intends to do. Should Mr. Rosenwasser press his case in an astute and aggressive manner, the Commission could well become subjected to painfully embarrassing publicity.

Mr. Rosenwasser's letter of February 12, 1969, which he filed in response to the Commission's show cause order issued January 15, 1969, was forwarded not only to the Commission but to me and each of the other Commissioners. For that reason I am not duplicating it for further circulation at this time. However, I urge that it be reviewed and seriously considered.

EVERETTE MACINTYRE, *Commissioner*.

APRIL 11, 1969.

Re: Docket 8100, In the Matter of ATD Catalogs, Inc., et al.

See the attached memorandum.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

APRIL 11, 1969.

To: Commission.

From: Everette MacIntyre, Commissioner.

Subject: Docket No. 8100, In the Matter of ATD Catalogs, Inc., et al.

This matter is before the Commission on respondents' answers to the show cause order providing for the rescission of the cease and desist orders running against six toy catalog publishers and their jobber members. Service was not effectuated in a substantial number of cases. Evidently not a few of the respondents have gone out of business.

Those respondents filing an answer do not oppose rescission of their orders. Two recipients of advisory opinions, claiming status as independent publishers, however, contend strenuously that the advisory opinions giving the green light to their operations should not be rescinded.

The answers to the show cause order and the statements requesting that the advisory opinions on this subject not be rescinded again bring into focus the larger question before the Commission. That issue is simply whether this agency in fact intends to enforce the law in this industry. If I read the intentions of the majority correctly, it is unlikely that any further enforcement effort will be expended here. In that event, however, the Commission's statement in the show cause order pledging continued efforts to seek compliance with the law through informal enforcement procedures and reserving the right to issue complaints is as a practical matter misleading.

¹ E.g., preparation of a list of jobbers associated with the catalog publisher and presentation of such list to a manufacturer in an attempt to secure advertising payments, and an understanding on the part of the manufacturer that advertising payments are to be guaranteed or conditioned on the purchaser volume of the customer-jobbers distributing the catalog, etc.

In my view the majority committed a serious error when it failed to approve my motion that the staff be authorized to seek the informal settlements recommended by the Compliance Division's memorandum of September 4, 1968.¹ The show cause order issued January 15, 1969, providing for rescission of the cease and desist orders coupled with the meaningless generalizations contained therein on the subject of further enforcement activity has obviously confused the industry. The Commission should therefore seize this last opportunity to clear up the resulting confusion. If the majority is of the view that no further effort should be expended on this industry then it should issue an explicit statement to that effect. Adherence to the spirit of the Freedom of Information Act requires no less. On the other hand, if the Commission does intend to continue surveillance of toy catalog publishers as the show cause order of January 15, 1969, seems to imply then certain steps will have to be taken if such oversight is in fact to be meaningful. The first step would be to rescind the advisory opinions rendered to toy catalog publishers claiming independent status. The second would be to issue guides specifically focusing on the dichotomy between jobber affiliated and independent publishers in this industry.

In my view, the arguments presented for retaining the advisory opinions in effect have little validity. Taking into consideration the information developed by the field investigation of the toy catalog industry whose results are summarized in the staff memorandum of September 4, 1968, it is plain that these advisory opinions were in fact improvidently granted. As the staff states, "the advisory opinions given to the 'independents,' while validly based on factual representations which subsequently proved to be only in part true or correct, have been misused by 'independents' to the competitive detriment of jobber-owned or 'affiliated companies.'" The fact that these advisory opinions have been misused as a competitive weapon against jobber affiliated catalogs is made plain by a letter of March 23, 1967, from Oakes Catalogs to the Tonka Corporation, a toy manufacturer. In pertinent part, Oakes states in that letter:

"Our attorneys have advised us that the Commission's statement makes a legally significant distinction between independent catalogs on the one hand, and jobber-owned or affiliated publications, on the other hand. They point out that, according to the statement, the requirements of the Robinson-Patman and Federal Trade Commission Acts are applicable to advertisers' payments to a jobber-owned or affiliated catalog published, but are not applicable to advertisers' payments to an independent catalog publisher. *Consequently, our attorneys state advertisers in an independent catalog need not bring their advertising payments within a co-operative advertising plan.*" (emphasis supplied)

Oakes, as the letter makes clear, made this statement although acknowledging that in some cases the extent of the advertising payments is conditioned on the sales of the advertised products by jobbers distributing the catalogs. Clearly, the Commission was unaware of that fact when the advisory opinion was granted and equally obvious is the fact that Oakes' operations have violated the law. The Commission's erroneous advice has resulted in a competitive imbalance in the industry which it would be unconscionable to ignore.

Accordingly, I move that the Commission rescind the cease and desist orders now in effect, rescind the advisory opinions now outstanding in this industry, and that the staff be directed to draft guides focusing specifically on the problems of this industry.

EVERETTE MACINTYRE, *Commissioner.*

SEPTEMBER 20, 1968.

Re: File 651 0126. In the matter of The Weatherhead Company.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

¹ See my circulation of October 11, 1968.

MEMORANDUM

SEPTEMBER 20, 1968.

To: Commission.

From: Everett MacIntyre, Commissioner.

Subject: File No. 651 0126, In the Matter of The Weatherhead Company.

The investigation in this case disclosed that Weatherhead, a firm engaged in the business of producing, selling and distributing industrial fittings and related products such as valves, hose ends, hose assemblies and regulators used in the transmission and control of fluid power products discriminated in price through volume-quantity discounts ranging from 5 to 23%. Weatherhead revised its volume-quantity discount by providing that in the case of one order per month distributors could place an order at the maximum discount irrespective of the quantity ordered. To insure that the revised discount program will be functionally available to its distributors, Weatherhead apparently has eliminated many of its distributors who in the past have either been unwilling or unable to purchase and stock Weatherhead's fittings in the quantities necessary to qualify for the discounts. On the basis of its revised volume-quantity discount plan, respondent requested that this matter be closed informally by an assurance of compliance. The Commission rejected that request and issued its complaint under the consent order procedure.

The staff and respondent have now negotiated a consent order. The executed agreement, however, differs substantially from the notice order going out with the complaint and I have serious doubts about its effectiveness.¹

Specifically, the order provides that respondent with respect to a number of specifically enumerated parts, such as brass inverted fittings "and related products regularly maintained in the inventory, by Weatherhead Industrial Distributors pursuant to Weatherhead's Industrial Distributor Policy" is to cease and desist from discriminating in the price of such products by selling to some purchasers at net prices higher than the prices charged their competitors.

The order further provides that "all other products", i.e., those not regularly maintained in inventory pursuant to Weatherhead's Industrial Distributor Policy shall be offered on uniform terms and conditions of sale disclosed to all industrial distributors.

The proposed order presents a number of difficulties. The phrase "regularly maintained in the inventory, . . . pursuant to Weatherhead Industrial Distributor Policy" is ambiguous. Clearly, it modifies "related products" but it may also, as noted by the Division of Consent Orders, modify the products specifically enumerated in the order such as brass inverted fittings. The memorandum of the Division of Consent Orders suggests that this is the interpretation of Weatherhead's counsel. Obviously, the order is unacceptable until this ambiguity is cleared up.

Furthermore, it appears, as the Division of Consent Orders recognizes, that the "regularly maintained in inventory" phrase in effect would permit respondent to contract or expand the scope of the order by its actions pursuant to its distributor policy. Whether or not respondent would be acting in good faith in this connection is irrelevant. Clearly, the scope of Commission orders should not rest on so evanescent a basis.

In addition, this phrase could be construed as incorporating Weatherhead's revised discount plan in the order. This would make a future proceeding most awkward should the Commission later determine that the Weatherhead Industrial Distributor Policy has been implemented in violation of the law.

¹ The first paragraph of the consent order proposed by respondent provides as follows: *"IT IS ORDERED that respondent, The Weatherhead Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale and distribution of brass Inverted, Compression, S.A.E., Mini-Barb, Pipe, Self-Align, Knurl-On, Sermeto and Air Brake Fittings; Auto and Industrial valves; steel and stainless steel Ermeto, J.I.C. and Pipe fittings, Reusable Hose Ends, Swivel Adapters, Swage Ends and Bulk Hose, and related products regularly maintained in the inventory, by Weatherhead Industrial Distributors pursuant to Weatherhead Industrial Distributor Policy in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some purchasers at net prices higher than net prices charged any other purchaser who, in fact, competes in the resale and distribution of respondent's afore-identified products with the purchasers paying the higher net prices, provided, however, that all other products sold to such industrial distributors shall be offered on uniform terms and conditions of sale disclosed to all industrial distributors."* (Emphasis supplied).

The staff by memorandum of February 16, 1968, recognized this difficulty, stating that whether the respondent's revised discount program would be in compliance with Section 2(a) or with any Section 2(a) order, the Commission might issue, would be a question difficult to answer at this time, since "it would appear that valid conclusions may be drawn only after an investigation is conducted to determine how the revised program is actually implemented by Weatherhead" (Memorandum to the Commission from Francis A. O'Brien, dated February 16, 1968, p. 35). The staff's reservations of February 16, are well taken. In my view, the Commission should not in effect approve the revised discount policy by incorporating it by reference in the order.

The revised discount plan whereunder any distributors appointed by Weatherhead may place one order a month at the maximum discount irrespective of the quantity ordered may well be non-discriminatory. Nevertheless, it would be a mistake, for the reasons already stated to as a practical matter pass on it in the provisions of this order. Weatherhead, it appears, is trying to maneuver the Commission into precisely that position, for respondent's counsel, by letter of June 11, 1968, stated:

"We hope we made clear, at our conference, that we should like to have assurances that the Weatherhead compliance report, pursuant to this order would be in substantially the same form and will comply with the pricing procedures described in an affidavit of W. W. Bortner . . . dated December 28, 1966 [the revised discount plan]".

In short, the order proposed by respondent and the staff should not be accepted, because it is ambiguous, the coverage of the order depends on the vagaries of respondent's distribution policy, and because it would commit the Commission as a practical matter to an advance approval of respondent's revised discount policy. If such approval should be granted respondent, it should be provisional and certainly not in the text of the order.

The clause providing "that all other products sold to such industrial distributors shall be offered on uniform terms and conditions of sale disclosed to all industrial distributors" is ill-advised because it could be construed as sanctioning quantity and/or volume discounts as long as they were uniformly offered without regard to the question of whether they are functionally available or cost justified.

The proposed order should be rejected because of the adverse precedent it affords. The Commission should ask the staff point blank whether they have sufficient evidence to try the case. If not, then I think outright dismissal would be the preferable course. One possible compromise which might be considered would be simply to narrow the scope of the order to those fittings and other products specifically enumerated, deleting the phrase with respect to "related products regularly maintained in the inventory," and the last clause as "to all other products".

Frankly, there is some doubt in my mind that this proceeding to date has served the public interest. Evidently, Weatherhead to comply with the letter of the law has eliminated its weaker distributors to make the revised discount "functionally available".² It is not unlikely that this merely compounded the competitive injury against which the statute is directed. While the Commission may or may not chalk-up another statistic for this proceeding, it is unlikely that antitrust objectives have been served in any practical way.

For the foregoing reasons, I move that the proposed consent agreement be rejected.

EVERETTE MACINTYRE, *Commissioner*.

MARCH 28, 1968.

Re: File 651 0126, In the Matter of The Weatherhead Company.

See the attached memorandum.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

² See Staff memorandum, Feb. 16, 1968, p. 35.

MARCH 28, 1968.

MEMORANDUM

To: Commission.

From: Everette MacIntyre, Commissioner.

Subject: File 651 0126, In the Matter of The Weatherhead Company.

The staff recommends that the Commission issue a complaint against The Weatherhead Company, a firm engaged in the business of producing, selling and distributing industrial fittings and related products such as valves, hose ends, hose assemblies and regulators used in the transmission and control of fluid power products, for violation of Section 2(a) of the Clayton Act. In the period January 1964, through December 1966, Weatherhead engaged in two basic price discriminations. The first involved Weatherhead's volume quantity discounts ranging from 5 to 23% on orders exceeding certain volume quantity requirements while the second involved departures by Weatherhead from its volume quantity discount program such as the granting of special discounts and prices to certain large distributors.

According to the staff, Weatherhead's volume quantity discount program benefited only a small fraction of its industrial distributors who are generally large concerns with gross sales and volumes of purchases from Weatherhead greatly exceeding those of competing distributors in the same territory. Forty percent of Weatherhead's distributors apparently were not even aware that Weatherhead has a volume quantity discount program or its requirements.

It would appear that the price discriminations in question are likely to have the adverse effect on competition requisite under Section 2(a) since all distributors interviewed, whether favored or non-favored, agreed that a 1 or 2% cash discount would be highly significant. Many of the distributors were concerned over 5% price differentials. A difference of 10% or more, the staff states, according to some distributors would have such competitive impact that they would no longer be in a position to compete. Apparently net profits for Weatherhead's distributors averaged about 3 to 4%. In view of these circumstances, the staff's conclusion that 5 or 10% price differentials let alone 19 or 23% would be significant seems warranted.

The staff is further convinced that any attempt by Weatherhead to justify the volume quantity discount on the basis of the meeting of competition defense must necessarily fail on the ground that the volume discount program is a part of Weatherhead's overall pricing policy and not adopted in response to individual competitive situations. Further, the staff is of the opinion that cost justification of the volume quantity discounts would not be successful. For example, when Weatherhead offers special prices for unusually large quantities, these are granted because Weatherhead can make a special run of that fitting in response to a single order, but according to the staff, in those cases any savings in manufacturing would be reflected in the individual unit price for the fittings themselves rather than in a volume quantity discount. It further appears that the Chief Operating Officer of one of the favored distributors advised that while the quantity discounts may originally have been meant to reflect cost savings to the manufacturer, this would not be the case currently because of the amount of time and effort now expended by Weatherhead to fill individual orders. According to the staff, Weatherhead no longer treats an order for a large quantity of fittings as a single order, but rather as a series of orders for small quantities of fittings received over a long period of time. In the case of other distributors, also, it seems that Weatherhead frequently has made several incomplete rather than one large shipment. In one instance, apparently Weatherhead made five separate shipments over a five months period to fill a single order for 1,050 steel fittings. Assuming that this is representative of the way in which Weatherhead does business, the staff may well be correct that the cost justification proviso would not apply to these quantity volume discounts. Another fact suggesting that many of Weatherhead's price differentials were not cost justified, is that Weatherhead permitted certain customers, but not others, to accumulate several orders to qualify for the quantity discounts.

Certain of the price discriminations unearthed during the course of the investigation have been discontinued by Weatherhead. Such discontinuance, however, evidently only occurred subsequent to the investigation which the staff advises was for some time frustrated by Weatherhead's intransigence. In view of the widespread and large scale nature of Weatherhead's price discriminations and the fact that certain of these practices have been discontinued only after com-

mencement of the investigation, such discontinuance should not deter the Commission from issuing complaint in this instance.

The staff recommends that the Commission reject Weatherhead's proposed assurance of voluntary compliance submitted to the Secretary on January 2, 1968, pursuant to Section 2.21 of the Rules on the ground that the public interest would not be adequately safeguarded by the acceptance of such an assurance. As the staff notes, the price discriminations here involve unpublished volume discounts affecting some 230 industrial distributors located throughout the United States constituting a program designed to give a few large distributors pricing advantages as high as 23% in an industry where price differences as little as 5% have a decided competitive impact. Secondly, I agree with the staff that Weatherhead's previous contacts with the Commission do not support the conclusion that it has been dealing in good faith with this Agency. According to the staff, Weatherhead immediately terminated cooperation with the Commission's investigation as soon as it became apparent that violations might be unearthed. Weatherhead subsequently agreed to furnish the necessary data only after issuance of subpoenas and then only a portion of that information was actually furnished. In view of Weatherhead's recalcitrance, respondent's record does not justify acceptance of an assurance of compliance in light of the criteria of Section 2.21 of the Commission's Rules.

While there is some question in the staff's mind whether respondent's revised quantity discount program would be in compliance with Section 2(a), this is a question which cannot be definitively answered at this time. In view of Weatherhead's previous propensity to violate Section 2(a), it would be best to evaluate respondent's current practices once an order has issued under the applicable compliance procedures.

I would also be dubious about accepting Weatherhead's assurance because the revised pricing policy gives rise to the suspicion that it contemplates cutting off respondent's weaker distributors, who in all probability were victims of the price discrimination with which we are concerned.¹ Certainly a remedy of this nature is not likely to dissipate the effects of the price discrimination complained of, rather it is conceivable that the injury may be compounded. Were the Commission to accept this assurance, such acceptance, by inference at least, could be construed as sanctioning a formalistic attempt to comply with the technicalities of the Act which obviously violates its spirit considering the past history of discrimination in this instance. The Commission should not put itself in that position.

I note that the staff advises that should the Commission decide to issue complaint it would become necessary for complaint counsel to subpoena additional documentation with respect to certain of respondent's sales areas. This information, it appears, was previously demanded by the Commission by investigational subpoena, but respondent refused to comply therewith. According to the staff, such evidence may become necessary in rounding out the information already available within the meaning of *All-State Industries of North Carolina, Inc.*, Docket No. 8738 (November 13, 1967).

Although I am inclined to recommend issuance of complaint on the basis of the facts presented by the staff, I believe that the Commission should confer with the responsible members of the Division of Discriminatory Practices before issuing complaint to determine whether a supplemental investigation is in fact prerequisite to making an adequate record in this case or whether it is incidental to the information already at hand. After such a conference, I believe that the Commission will be in a better position to determine whether complaint should issue at this time.

EVERETTE MACINTYRE, *Commissioner.*

¹ "Where competition among Weatherhead Industrial Distributors exists, only those Distributors able to compete effectively in the sale of Weatherhead fittings with each other and with distributors of competing lines of other manufacturers are to be appointed, and then only in the line or lines in which the Distributor has demonstrated a capacity to be effective. Thus, if a Distributor appears to be able to stock and promote the sale of only one line of fittings rather than both, it is to be appointed only as to that one line. The Distributor can purchase items in the line in which it is not appointed to handle from another Distributor if it has need for the parts which it is not appointed by Weatherhead to sell." (Bortner Affidavit).

MAY 19, 1967.

Re: File 591 0106, In the Matter of Herman Miller, Inc.
 From: Everette MacIntyre, Commissioner.
 To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
 See memorandum attached.

MEMORANDUM

MAY 19, 1967.

To: Commission.
 From: Everette MacIntyre, Commissioner.
 Subject: File 591 0106, In the Matter of Herman Miller, Inc. (Miller).

This is another of several cases involving law violations in the sale of contemporary office furniture. Directional Contract Furniture Corporation, File 641 0290 and Jens Risom Design, Inc., et al., File 641 0294 are being handled under part 2 of the rules; Knoll Associates, Inc., Docket 8549, is on appeal to the Circuit Court from the Commission's order of August 2, 1966 prohibiting price discrimination; a supplemental field investigation is being conducted in Lehigh Furniture Corporation, File 641 0293; and field investigation is being conducted to Stow and Davis Furniture Company, File 671 0183.

This file involves price discrimination in violation of Section 2(a) of the Clayton Act (Count I) and violation of Section 5 of the Federal Trade Commission Act in maintaining and enforcing a merchandising policy under which contracts, etc., are entered into with customers for the purpose of requiring directly or indirectly its customers to refrain from bidding, or meeting prices which are designed to secure for such customers the sale of respondent's products (Count II).

Following conferences with the staff, Counsel for proposed respondent submitted a proposal of settlement in the form of an order which is attached to a detailed memorandum explaining proposed respondent's position (see memorandum dated February 15, 1967). Miller proposes that the effective date of this part of the order applicable to Count I of the complaint and order relating to price discrimination be deferred until December 1, 1967. The staff states that the reasons advanced by Miller are persuasive and recommend that the Commission defer the effective date of this part of the order to December 1, 1967. The phraseology of this provision of the order is the same as that served with the notice of determination except that the words "such products" have been inserted after the word "selling" and the words "in the resale or distribution of such products" have been inserted after the word "competes." The staff has no quarrel with these changes. However, Miller proposes that the following paragraph be inserted as a provision of the order and applicable to Count I.

"Provided, however, that in any enforcement proceedings instituted hereunder, nothing in this Order shall be construed as prohibiting respondent from establishing that the sale of such products to any purchaser at discounts based upon the quantity sold, which discounts are available only upon single order sales and are made known to and in fact are available to all other purchasers or potential purchasers who in fact compete in the resale or distribution of such products with purchasers paying the discounted price, does not have the effect of lessening competition or tending to create a monopoly in the line of commerce in which respondent's customers are engaged or to injure, destroy, or prevent competition with any such purchaser from respondent."

Miller's reasons for the proviso are also set forth on pages 6 through 9 of its February 15, 1967 memorandum. The staff notes that Miller is aware that in enforcement proceedings he is entitled to the defenses allowed by the statute. However, Counsel for Miller does not want to be required to justify quantity discounts on the basis of cost savings or advance the defense of meeting competition in good faith, as he contends that the primary basis of the legality of the discounts is that they have no anticompetitive effect and are available to all customers. The staff also notes that the proviso does not specifically allege that it shall be a defense in any enforcement proceeding but believe that it was Miller's intention to set up an affirmative defense if the proviso is accepted. The staff points out that the Commission has not found it necessary to include such a proviso in prior orders and to do so in this case might invite other respondents to request similar provisos. Counsel for Miller understands that the staff will not recommend acceptance of the proposed order with this proviso but requests that it be considered by the Commission.

In its February 15, 1967 memorandum Miller discusses the prohibitions of the order relating to Count II of the complaint (bid protection policy) and contends that the prohibitions are much broader than the practices involved. Miller requests the rewording of this portion of the order by striking paragraphs 1(a) and 1(c) and paragraph 3(a) under the second preamble of the order, and deletion of the words "refrain from selling its products or" from paragraph (1). Other minor changes have also been suggested but do no violence to the order. The staff takes the position that Miller's proposed order applicable to Count II of the proposed complaint will prohibit the practices engaged in under the "bid protection policy" and will be re-enforced by the prohibition against price discrimination. Miller agrees that this portion of the order should become effective upon the issuance and service of decision. The staff recommends that Miller's proposed order applicable to Count II of the complaint be accepted. The staff further points out that in the Directional and Jens Risom Cases which have been previously submitted to the Commission, they were willing to recommend that the Commission tie the orders in those cases to the final order in Knoll Associates, Inc., Docket S459. Miller is not interested in having the order in this case relate to the final order in Knoll as he intends to correct his pricing practices by December 1, 1967.

The staff recommends that the proposed settlement submitted by Miller be rejected because of the inclusion of the "proviso" in the price discrimination prohibition. The staff believes that the settlement offer in all other respects is proper and adequate to correct the practices charged in the complaint. It is further recommended that the Commission direct the staff to inform proposed respondent that his proposal of settlement has been rejected and inform him that he has 15 days after receipt of notification within which to execute an agreement containing the order proposed by Miller exclusive of the proviso in the price discrimination part of the order. A draft of the agreement containing such order is attached.

I concur in the staff recommendation and move that the order applicable to the Section 2(a) Clayton Act Count I be served and thereby made final at this time but that as provided by its terms it will not become fully operative until December 1, 1967. I further move that the order applicable to Count II of the complaint which involves violation of Section 5 of the Federal Trade Commission Act be entered, issued, served and made final and fully operative at this time as provided for in the consent agreement and order.

EVERETTE MACINTYRE, *Commissioner*.

MAY 12, 1967.

Re: File 641 0294, In the Matter of Jens Risom Design, Inc., et al.

See the attached memorandum.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

MAY 12, 1967.

MEMORANDUM

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: File 641 0294, In the Matter of Jens Risom Design, Inc., et al.

This is another of several cases involving alleged price discrimination in the sale of contemporary office furniture. Directional Contract Furniture Corp., File 641 0290, and Herman Miller, Inc., File 591 0106, are being handled under Part 2 of the Rules; *Knoll Associates, Inc.*, Docket 8549, is on appeal to the Circuit Court from the Commission's order of August 2, 1966, prohibiting price discrimination; a supplemental field investigation is being conducted in Lehigh Furniture Corporation, File 641 0293; and field investigation is being conducted of Stow & Davis Furniture Company, File 671 0183.

Counsel for Jens Risom following conferences with the staff have submitted a proposal of settlement in the form of a draft agreement containing a consent order and a memorandum in support thereof. Counsel propose that the agreement contain a proviso as part of paragraph 7 to the effect that the agreement will not become effective and no complaint and decision and order shall issue until an order containing substantially the same prohibitions shall become final in the

Knoll case. The actual prohibition proposed is the same as the prohibition contained in the order served with the notice except that in the proposal the words "in the resale of such products" have been inserted after the word "competes." Later during the course of conferences with the staff, Counsel proposed that the order not become effective until a similar order had become effective against Stow & Davis Furniture Company, proposed respondents' principal competitor. The staff states that a field investigation is currently being conducted to determine whether Stow & Davis is violating Section 2(c) of the Clayton Act, as amended, and they have no way of determining what the investigation will disclose, and for this reason the staff opposes the proposal and advised Counsel that it would not recommend to the Commission the tying of the order to a final order against Stow & Davis. However, it would recommend acceptance of an agreement containing a proviso wherein the effective date of the order would not become effective until the order in the *Knoll* case had become final.

The staff recommends that the settlement proposal be rejected but that proposed respondents be given 15 days from receipt of notice within which to execute an agreement containing an order substantially identical to that served with the notice of determination but contained the proviso that such agreement is being entered into subject to the condition that the effective date of the order shall be stayed until the order heretofore issued by the Commission in the *Knoll* case becomes final; that in the event the final order in that *Knoll* case is more favorable than the order to be issued in the instant case, then on proposed respondents' application to the Commission, the order shall be modified or set aside to conform with the final order in *Knoll*. The proviso is to be inserted as part of paragraph 7 of the draft of the agreement.

When Counsel for proposed respondents were advised on April 24, 1967, that the staff was submitting their settlement proposal to the Commission with the recommendation that it be rejected but that proposed respondents be afforded the opportunity of executing an agreement containing substantially the same order served with the notice of determination but including the proviso, the details of which are set forth in the preceding paragraph, he requested the staff to inform the Commission "that he will recommend that proposed respondents execute such an agreement if offered to them and they they will execute it."

The proviso follows generally the phraseology found in agreements entered into in four matters involving alleged violations of Section 2(d) of the amended Clayton Act, viz., *Brown and Williamson Tobacco Company*, Docket 6908; *R. J. Reynolds Company*, Docket 6830 and *Philip Morris Tobacco Company*, Docket 6750. In each of these four cases, the prohibitions and effective date of the order were tied to the matter of *Liggett & Myers Tobacco Company, Inc.* Docket 6642.

The staff further recommends that if the Commission rejects proposed respondents' settlement offer and the staff recommendations, that the file be returned to the staff with the direction that proposed respondents be notified that they have 15 days within which to execute the agreement transmitted to Counsel on December 14, 1966, failing which complaint will issue under Part 3 of the Rules.

I concur in the substance of the staff's recommendations. However, I do not agree that the Commission should approve the use of the language "the effective date of such order shall be stayed until" in paragraph 7 of the proposed consent agreement. I do not think such language is proper. Instead, I suggest that language be used somewhat to the following effect: "The order shall not become final until the order heretofore issued by the Commission in the matter of *Knoll Associates, Inc.*, Docket 8549, shall have become final." It is my view that the language I suggest accomplishes the objective sought by those who propose the consent agreement without doing violence to the statutory period established by Congress within which an order of the Commission shall become effective after it has become final. The Commission knows my view about this. I do not believe that Congress gave us the authority to treat that 60 day period as we would an accordion.

In view of the foregoing, I recommend that the proposed agreement be approved with the direction to the staff that the language to which I have referred be changed as I have suggested. I so move.

EVERETTE MACINTYRE, *Commissioner*.

MAY 12, 1967.

Re: File 641 0290, In the Matter of Directional Contract Furniture Corp.
 From: Everette MacIntyre, Commissioner.
 To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
 See attached memorandum.

MEMORANDUM

MAY 12, 1967.

To: The Commission.
 From: Everette MacIntyre, Commissioner.
 Subject: File 641 0290, In the Matter of Directional Contract Furniture Corp.

This is one of several cases involving alleged price discrimination in the sale of contemporary office furniture. (Jens Risom Design, Inc., et al., File 641 0294 and Herman Miller, Inc., File 591 0106, are being handled under Part 2 of the Rules; *Knoll Associates, Inc.*, Docket 8549, is on appeal to the Circuit Court from the Commission's order of August 2, 1966; a supplemental field investigation is being conducted in Lehigh Furniture Corporation, File 641 0293; and field investigation is being conducted of Stow & Davis Furniture Company, File 671 0183.)

Counsel for Directional, following conferences with the staff, has submitted a proposal of settlement in a draft of agreement containing a consent order and a statement in support thereof. Counsel proposes (1) that the order will not be entered until, and will become effective only upon, the final termination of all pending litigation in the *Knoll* case and only if such termination is favorable to the Commission and (2) that the order against Directional will not become effective unless and until a similar order becomes effective against *Knoll* and against the other competitors listed in the draft of the proposed agreement and supporting statement.

Counsel for proposed respondent has been advised that the staff would not recommend that the Commission accept the proposed settlement but that such proposal would be submitted to the Commission together with the supporting statement for consideration; that the order served with the notice of determination and included in the draft of the agreement submitted to Counsel on December 14, 1966, was appropriate but the staff would recommend acceptance of an agreement containing a proviso which would tie the order to the final order in the *Knoll* case. The proviso is to appear in paragraph 7 of the agreement and not in the order.

Counsel also requested that in the event the Commission rejects the proposed settlement that the files be returned to the staff for further negotiations at which time he would recommend that his client consent to the order served with the Commission's determination, but tied into the final order in the *Knoll* case.

The staff recommends that the proposal of settlement be rejected but that proposed respondent be given 15 days from receipt of notice within which to execute an agreement containing the order served with the notice of determination and containing a proviso that such agreement is being entered into subject to the condition that the effective date of the order shall be stayed until the order heretofore issued by the Commission in the *Knoll* case shall become final. In the event the final order in the *Knoll* case is more favorable than the order to cease and desist in the instant case that on application by the proposed respondent the order to cease and desist shall be modified or set aside and conform to the final order in the *Knoll* case. The staff points out that the proviso in substance is found in agreements entered into in four matters involving alleged violation of Section 2(d) of the Clayton Act, viz., *Brown and Williamson Tobacco Company*, Docket 6908; *R. J. Reynolds Company*, Docket 6848, *American Tobacco Company*, Docket 6830 and *Philip Morris Tobacco Company*, Docket 6750. In each of these four cases, the terms and effective date of the order were tied to the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. The staff further recommends that if the Commission rejects proposed respondent's settlement offer and the staff recommendations, that the file be returned to the staff with the direction that proposed respondent be notified that it has 15 days within which to execute the agreement transmitted to Counsel for proposed respondent on December 14, 1966, failing which complaint will be issued under Part 3 of the Rules.

I concur in the substance of the staff's recommendations. However, I do not agree that the Commission should approve the use of the language "the effective date of such order shall be stayed until" in paragraph 7 of the proposed consent agreement. I do not think such language is proper. Instead, I suggest that language be used somewhat to the following effect: "The order shall not become final until the order heretofore issued by the Commission in the matter of *Knoll Associates, Inc.*, Docket 8549, shall have become final." It is my view that the language I suggest accomplishes the objective sought by those who propose the consent agreement without doing violence to the statutory period established by Congress within which an order of the Commission shall become effective after it has become final. The Commission knows my view about this. I do not believe that Congress gave us the authority to treat that 60 day period as we would an accordion.

In view of the foregoing, I recommend that the proposed agreement be approved with the direction to the staff that the language to which I have referred be changed as I have suggested. I so move.

EVERETTE MACINTYRE, *Commissioner.*

JUNE 23, 1969.

Re: In the Matter of United Fruit Company, United Fruit Sales Corporation, Harbor Banana Distributors, Inc., File No. 671 0187.

This supplements my agenda circulation of June 20, 1969.

This matter is on the agenda for the week of June 23.

From: Everett MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

JUNE 23, 1969.

To: Commission.

From: Commissioner MacIntyre.

Subject: In the Matter of United Fruit Company, United Fruit Sales Corporation, Harbor Banana Distributors, Inc., File No. 671 0187.

Respondents United Fruit Company and United Fruit Sales Corporation (United) and complaint counsel are very close together on an agreed order. It is notable, however, that the staff is willing to eliminate paragraphs II and III of the proposed order on the general ground that the price discrimination provision in the order, paragraph I, will effectively eliminate the challenged practices. The staff is satisfied that the agreement signed by United affords the substantive relief required; they disagree only with the form of the agreement in several specific respects.

The points of disagreement by Commission staff are (a) the use of the word "entire" (paragraph 7, page 3 of United's proposed agreement), which unfortunately suggests disposition of the case not only against United but Harbor as well; (b) the use of the sentence "No other count may be used hereafter for any purpose against proposed respondents, including construction of the order or alteration, modification or setting aside thereof" (page 3 of the submitted agreement), which the staff fears, among other things, may possibly confuse the action against Harbor; and (c) the signing by a vice president, W. B. Mason, rather than the president as the rules require. (Mr. Mason reportedly has full authority to bind the corporation, and the staff does not believe such variance is fatal.)

The Commission has three general options here so far as United is concerned: (a) accept the United signed agreement in disposition of this part of the case, (b) issue a complaint under Part 3 of the rules against United, or (c) agree to elimination of paragraphs II and III of the order and try to have the changes in form made in the agreement, as recommended by the staff.

The matter becomes somewhat confused because there are in effect two respondents, *i.e.*, United and Harbor, with different allegations against them and whose interests in the case and in a settlement agreement are not the same.

So far as Harbor is concerned, it seems clear that the proposed settlement agreement which it has submitted is inadequate.¹ Among other things, Harbor

¹ Harbor's agreement is not signed, though it is understood that Harbor is prepared to sign the agreement. As I understand it, Harbor was assured that the unsigned agreement, which was done to expedite the submission, would not prejudice it before the Commission.

would substitute for divestiture a plant in Long Beach, California rather than the acquisition alleged in the complaint to be illegal, namely, McCann-Crenshaw. The staff points out in their memorandum (pages 8, *et seq.*) the inadequacies of Harbor's proposal. I agree that such a settlement would not be appropriate. Accordingly, complaint should issue as to Harbor under Part 3 of the rules and I so recommend.

This leaves only the question of United to be decided. This is not an easy question to answer, especially since the staff is satisfied that it has from United an agreement which in substance will adequately dispose of the basic allegations against United. In making the decision I would raise these points: (a) it does not appear that the monopoly charge included in the complaint upon Commission direction is entirely resolved by the prohibition in paragraph I of the order in spite of the staff's belief that this is adequate to dispose of the United case, (b) the Commission does not in fact have before it an agreement which is acceptable to complaint counsel though complaint counsel and United differ only in matters of form (form, however, can be extremely important; for instance, the Commission could hardly accept an agreement which would dispose of the "entire" case, which presumably would include Harbor as well as United, though that was not intended); and (c) the unattractive prospect of, so to speak, making a counter offer to United, particularly where United's counsel has so clearly indicated he would not go back again to his clients for modification.

However, in all the circumstances, I would tend at this point to plan the issuance of complaint against Harbor under Part 3 of the rules. From all appearances, the staff and United are very close to an agreement. I would like to have the staff try again to settle the remaining differences. The other options are not attractive. Respondent United has had an opportunity to settle the matter and it should do so now if it is to do so at all before complaint issues against Harbor. At some point these negotiations have to be terminated.

EVERETTE MACINTYRE, *Commissioner*.

OCTOBER 25, 1968.

Re: In the Matter of United Fruit Company and United Fruit Sales Corporation, F. 671 0187; Harbor Banana Distributors, Inc., F. 681 0092.

From: Everette MacIntyre, Commissioner.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

OCTOBER 25, 1968.

To: Commission.

From: Commissioner MacIntyre.

Subject: United Fruit Company and United Fruit Sales Corporation, File No. 671 0187; Harbor Banana Distributors, Inc., File No. 681 0092.

The proposed complaint concerns the actions of United Fruit Company and its wholly owned subsidiary United Fruit Sales Corporation, and its customer, Harbor Banana Distributors, Inc. One of the principal charges in the complaint (Count I) is the allegation that United prefers Harbor over other customers in that it gives Harbor a special delivery service (at extra cost to United), which it does not give to other customers. United, instead of delivering bananas to Harbor at its terminal in Wilmington, diverts its banana boat to Harbor's own pier at Long Beach at no charge to Harbor. Under the staff concept of the case the difference in treatment so involved would be charged as a discrimination in price under Section 2(a) of the amended Clayton Act. Harbor would be charged with the receiving of an unlawful price discrimination under Section 2(f) (Count II).

The proposed complaint contains two other counts, namely, Count III, which is a Section 5 charge of attempted monopoly by selling below cost and through other acts and practices; the fourth and final count (Count IV) is an allegation of a violation of Section 7 of the Clayton Act in connection with the acquisition by Harbor of the assets of a competing banana distributing company.

I believe that there has been uncovered here sufficient evidence of possible illegality to warrant the issuance of a complaint. There are a number of debatable aspects to the proposed charges, but in such an instance as this I am willing to approve the staff recommendation. I so move.

Incidentally, I do not believe it should go unnoticed that the investigating attorney, John F. Gabriel, has done an outstanding job in the investigation of this matter. I therefore recommend that the Commission commend him for his work and that such commendation be noticed in his personnel record.

EVERETTE MACINTYRE, *Commissioner.*

OCTOBER 2, 1968.

Re Piedmont Auto Exchange, Inc., File No. 661 0052.

From: James M. Nicholson.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached Memorandum.

MEMORANDUM

OCTOBER 2, 1968.

To: Commission.

From: James M. Nicholson.

Subject: Piedmont Auto Exchange, Inc., File No. 661 0052.

This matter was originally docketed for investigation as a "buying group" case under Section 2(f) and it appears that as originally conceived Wholesalers Auto Parts Warehouse (WAPW) was set up solely to buy for the 14 wholly-owned jobber outlets. However, by the time of the investigation most of the jobber outlets were independently owned and WAPW had added 156 non-affiliated jobber customers. WAPW solely determines which lines of products it will carry and several competing lines are carried. No drop-shipping is allowed except in an emergency.

While the staff memorandum states that the jobbers who are or were under the control of WAPW receive no competitive advantage over any competitors, it also notes that the "affiliated" jobbers receive a 7% volume discount and the non-affiliated jobbers receive a 6% discount. The memorandum further notes that WAPW salesmen receive only a 2½% commission on sales to affiliated jobbers, as opposed to 5% on sales to non-affiliated jobbers, because they do very little missionary work where the former are concerned.

Thus while I am not certain there is 100% compliance with the law here, I am in argument with the staff that WAPW is now anything but a buying group and that a full field investigation would be costly, time-consuming and would accomplish nothing beneficial in the public interest. I move the matter be closed.

MARCH 20, 1969.

Re The Gillette Company, File No. 661 0081; and Philip Morris, Inc., American Safety Razor Division, File No. 681 0145.

From: James M. Nicholson.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

(The Gillette Company Assurance was previously circulated as an Agenda Matter on December 31, 1969 by this office.)

MEMORANDUM

MARCH 20, 1969.

To: Commission.

From: James M. Nicholson.

Subject: The Gillette Company, File No. 661 0081; and Philip Morris, Inc., American Safety Razor Division, File No. 681 0145.

Included within this circulation are the two Assurances of Voluntary Compliance submitted by The Gillette Company, File No. 661 0081, and the American Safety Razor Division, Philip Morris, Inc., File No. 681 0145. The Division of Discriminatory Practices recommends acceptance of both Assurances as satisfactory disposition of all the charges against both for alleged violations of Sections 2(a) and (d) of the Clayton Act, as amended, in connection with the sale and distribution of razors, razor blades and toiletries. I concur and move acceptance of the Assurances as submitted.

It will be remembered from prior circulations that these two cases are part of an industry-wide investigation comprising the four leading manufacturers in

the industry. Wilkinson Sword, Inc. is now being processed for submission to the Commission and Schick Safety Razor Company is undergoing further investigation, to be explained in detail when forwarded to the Commission. I am advised that these matters should be submitted within the next two weeks.

A second issue presented by these cases is the request by Gillette for confidential treatment of its Assurance. The staff has developed the facts underlying this request in its memorandum dated February 13, 1969. As matters stood at the time that the memorandum was prepared, Gillette requested that the Assurance itself be made public, but that the recitals of fact contained therein be kept confidential. The staff would reject this proposal, primarily because the other three have submitted similar assurances without any request for confidentiality and Gillette has presented no persuasive arguments as to why it should be treated differently. All four have already terminated the practices in question, which is well known in the trade, so release of the Assurances should cause little additional reaction. At the same time, the staff recognizes some inequities might result from a seriatim publication of the Affidavits and recommends withholding of any until all have been considered and acted upon by the Commission.

In the meantime, Gillette retained different counsel who, by letter dated March 12, 1969, requested that we take exactly the action which the staff had recommended, namely, to withhold action on Gillette's Assurance until similar action has been taken with respect to its competitors and then publish all the Assurances simultaneously.

I agree with this proposal and so move. It should be noted that this motion is made on the basis of a copy of counsel's letter which was sent to my office, the original being with the staff. Since the staff cannot prepare a responsive reply until it has been apprised of the Commission's position with respect to (1) acceptance of the Assurances and (2) withholding of publication, I further move these matters be returned to the staff to prepare letters advising the respondents that the Assurances have been accepted and that publication of the same will be withheld until Commission consideration of certain companion matters has been completed.

JUNE 25, 1969.

Re: Pacek & Becker Distributors, Inc., et al., File No. 671 0134.

(Previously circulated by Commissioner Elman on May 28, 1969 and June 24, 1969 both as agenda matters)

From: James M. Nicholson.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

JUNE 25, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Pacek & Becker Distributors, Inc., et al., File No. 671 0134.

Everyone agrees that this matter should not have been investigated in the first place. The proposed respondents are simply too insignificant for us to bother with. I do not accept the staff's arguments about "significant prophylactic effect" or "selective consideration." Trivia is still trivia even when dressed up in the new clothes of selectivity, priorities and planning. The fact that we *did* start an investigation of the goings on at the Paceks and the Beckers is no reason to keep this thing going. I concur in Commissioner Elman's motion to close.

However, I will not be a party to the little domestic deceit which is the subject of the AVC. This reads like a script for the sort of thing on TV which gets a healthy Nielsen. The plot is cute—"his" and "hers" auto parts businesses run with entirely separate books, each with its very own salesmen and trucks, and *even* individual blue cross/blue shield contracts. All that's missing is the canned laughter and I move that the Federal Trade Commission not provide it by accepting the AVC.

I also do not accept Commissioner Elman's account of the amount of commerce involved. If he means \$48.95 (actually \$55.67) is the total interstate sales of the WD, this misses the point. There is unlikely to be much interstate commerce if the business of the WD (Mrs. P.) consists of shoving a piston across her desk to her principal jobber customer who just happens to be Mr. P. As for the

sales of Mr. P. these were almost \$400,000 and about 7%, or \$28,000 of that total was in interstate commerce. I think that amount, too, is insignificant.

If Commissioner Elman's query about Gulf and Western is a motion for initiating an investigation, my vote is "no." I will not support an unevaluated investigation of anyone.

Finally, I concur entirely in Commissioner Elman's comments on the shortcomings of the Commission's priorities and program planning. But this case reveals another point besides the pernicious cycle of good money being thrown into bad investigations. It illustrates the kind of wasteful and to me, depressing exercises we as Commissioners must go through to dispose of a frivolous matter like this.

APRIL 10, 1969.

Re: Scott Finks Company, Inc., et al., File No. 611 0813.

From: James M. Nicholson.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

APRIL 10, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Scott Finks Company, Inc., et al., File No. 611 0813.

I approach the task of circulating this Section 2(c) consent order with some trepidation because I have no desire to revive anew the controversy which recently arose over the issuance of 2(c) complaints in the fresh fruit and vegetable industry, although the similarities between the two situations would be obvious to anyone who studied the voluminous files which were submitted to my office. Scott Finks stands convicted of a clear-cut violation of the law in that it paid brokerage or discounts in lieu of brokerage to brokers buying for their own accounts. There is no real question as to this fact and respondent has affixed his signature to a consent order which will effectively terminate the practice.

Was it worth the cost? I have my doubts. Ordinarily, one does not complain about a consent order for it means the government has obtained compliance without undergoing the expense of litigation. However, this does not take into account all that went before in our efforts to reach this blissful state. This investigation began in January of 1962 on our own motion. Since that time, I am advised that 1,032 hours have been *charged* to the case. Whether that is a completely accurate figure or not, it having been alleged that our staff is sometimes less than completely candid in filling out time cards, it at least represents a substantial expenditure of money and manpower on the part of our headquarters staff and three different field offices and at least 1,000 hours not spent on something else.

Some historical references might aid our perspective. On January 18, 1962 an expeditious field investigation was requested to verify suspicions that respondent was making payments to brokers purchasing for their own accounts. In what must have been a record for such responses, the investigation was completed and reported on February 15, 1962, with a well-documented recommendation that complaint issue based upon numerous such transactions with ten different brokers purchasing for their own accounts. At this stage some of the urgency appears to have gone out of the matter, for three years and eight months later, without any intervening action, the case was reassigned to a new attorney. Three years and nine months later it was reassigned to still another. Then four years and four months later a supplemental investigation was requested into the question of whether illegal brokerage payments were being made to respondent's direct accounts, a question not theretofore raised.

To resolve this point, three different field offices subsequently became involved and it was ultimately determined that respondent did not pay brokerage to its direct accounts, although additional evidence was accumulated as to payments to brokers on purchases for their own accounts. Far be it from me to suggest that the supplemental investigation, ostensibly to look into payments to direct accounts, was necessary in order to gather fresh evidence upon which to base an order prohibiting payments to brokers purchasing for their own account, a step which was taken some seven years and one month after the Kansas City Office had recommended complaint based upon the same charge and substantially the same type of evidence.

So much for history. On the merits, it appears that respondent accomplished the same illegal result by two different methods. As to some brokers, brokerage deductions were made before remitting to respondent (pure brokerage) and, as to others, respondent deducted the equivalent of brokerage in its net billing to them on purchases made for their own accounts (allowances in lieu of brokerage). In either case, the amount was invariably 10¢ per 100 lbs. and, as best as I can tell, all brokers were treated alike in this respect, although it would take a more careful evaluation of the supporting documents than I care to make to fully support this assumption which I have made from a study of the various memorandums submitted.

This brings me then to the point where I found myself when I prepared my dissent in connection with the fresh fruit and vegetable complaints. I question the utility of this proceeding for the same reasons. But since complaints there have been issued, I see no reason for withholding action on a consent order covering potatoes and onions or anything to be gained by renewing the previous controversy each time the question arises.

Consequently, I move the consent order—reluctantly.

(Non-Staff)

APRIL 7, 1964.

Re: Jamco, Inc., et al., File No. 611 0198.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's agenda.

See attached memorandum.

MEMORANDUM

APRIL 7, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Jamco, Inc., et al., File No. 611 0198.

My only reason for placing this matter on the agenda is that there is a disagreement at staff level. The investigating attorney recommended issuance of complaint and the Bureau of Restraint of Trade disagrees. The matter involves the sale of auto parts to various customer classifications under varying discount schedules. There is no question of price differentials but there is a serious question as to adverse competitive effect.

In one trading area four customers purchasing about \$100 worth of parts annually buy at 10% less than one other purchaser. In another trading area one customer purchasing \$2100 worth a year receives 50%, while another buying \$7000 worth receives 60%.

In two or three other trading areas there are similar differentials involving very small amounts.

In short, this matter involves entirely insubstantial competitive effect and I concur in the recommendation of the Bureau that the matter be closed.

JOHN R. REILLY, *Commissioner*.

JUNE 15, 1967.

Re: Procter & Gamble, et al., File 621 0290.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

JUNE 15, 1967.

To: The Commission.

From: Commissioner Reilly.

Subject: Procter & Gamble, et al., File 621 0290.

This matter arose out of a Bureau of Restraint of Trade investigation where subsequent complaints were added to an already opened file with the result that by the time the last matter in the file was presented to the Commission, the first was quite dated. The problem is of course obvious, and in an extreme case a file might never be closed nor the early matters occasioning its opening ever effectively dealt with because of later accretions.

We directed the three operating Bureaus to comment on the desirability of opening successive files for dealing with matters arising after the original investigation has begun.

In brief, the Bureau of Textiles and Furs thinks we should open new files. Deceptive Practices says discretion should be exercised in either associating later material with already opened files or in opening new files. Restraint of Trade feels we should always associate later matters with an already opened file.

My own feeling is: (1) that succeeding matters removed in time or divergent as to product or violation should not be appended to earlier files; (2) even in cases where product and violation are similar, later material should be established under a new file number unless efficiency and economy outweigh the disadvantage in delaying the earlier matter.

I am placing this matter on the agenda for Commission consideration. I move that the staff be instructed to exercise discretion in these matters governed by the observations contained herein.

JOHN R. REILLY, *Commissioner*.

NOVEMBER 3, 1965.

Re: Manufacturers of Dowel Pins, File No. 621 0842.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

NOVEMBER 3, 1965.

To: The Commission.

From: Commissioner Reilly.

Subject: Manufacturers of Dowel Pins, File No. 621 0842.

This matter involves charges of price discrimination in the dowel industry. Applicant has alleged widespread discriminatory pricing by a number of members of the industry. However, it appears that applicant himself is also engaged in the practices.

I earlier circulated a memorandum on December 2, 1964, dealing with this matter and recommending that neither the Bureau of Restraint of Trade nor Industry Guidance be assigned the matter for consideration in view of the fact that the practices appear to be universal throughout the industry, that complaints were few and that consequently the Commission would be better advised to concern itself in more promising areas.

Commissioner Elman circulated a memorandum dated December 7, 1964, apparently concurring in the recommended disposition of this matter but expressing misgivings regarding some staff misconceptions concerning the application of Section 2(a) in circumstances where price discrimination is widely practiced throughout an industry.

By minute of December 10, 1964, the Commission deferred disposition of this matter pending discussion with the Bureau of Restraint of Trade. I understood at that time that the various Commissioners were going to further consider the matter and as they wished consult with the staff.

I have no reason for changing the recommendation made in my memorandum of December 7, 1964, and accordingly move that this matter be closed.

JOHN R. REILLY, *Commissioner*.

(Non-Staff)

DECEMBER 2, 1964.

Re: Manufacturers of Dowel Pins—Unnamed, file 621 0842.

From: Commissioner Reilly.

To: Secretary J. Kuzew.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

DECEMBER 2, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Manufacturers of Dowel Pins—Unnamed, File 621 0842.

Applicant complained to the Commission in 1961 about chaotic pricing and price cutting in the dowel industry which apparently consists of between 20 and

25 manufacturers. Applicant's gross annual sales are in the neighborhood of \$200,000 and he is apparently one of the larger members of the industry.

The Division of Discriminatory Practices directed an investigation in February 1962 which was to, and did, consist exclusively of interviews with representatives of applicant. This investigation which was completed in May 1962 confirmed chaotic pricing and pointed unquestionably to the widespread existence of price discrimination in the industry. It also showed that applicant is up to his elbows in both offensive and defensive price discrimination practices and appears at least as bad as anyone else in the industry. He provided the names of five of the alleged worst offenders seeking apparently to divert Commission attention from himself.

At the recommendation of the Division of Discriminatory Practices in September 1964 this matter was turned over to Industry Guidance because the practices appear industry-wide and a virtually impossible 2(b) situation seemed to have emerged from the investigation whereby the task of litigating who was reacting to what competitor's competition would present insuperable trial problems. Industry Guidance is now back before us stating that the matter does not lend itself to disposition on an industry-wide basis. They say that trade regulation rule is not feasible because the fact determinations in each case will be so complex as not to be resolvable by trade regulation rule. Similarly, trade practice rules and guides do not offer a promising avenue, largely for the reason that price cutting in the industry is frequently for the purpose of gaining new customers, thus, raising the Sunshine Biscuit problem.

My own inclination in this instance is to do nothing on the ground that Commission resources can be more effectively applied in other quarters. While this in effect amounts to letting the industry stew in its own juice, nevertheless, since the practices appear to be universal, complaints few and the applicant apparently tarred with the same brush as his competitors, I feel the Commission would be better advised to busy itself in more promising areas.

JOHN R. REILLY, *Commissioner.*

(Non-Staff)

APRIL 29, 1964.

Re: H. W. Lay & Company, Inc., File No. 611 0160, Frito-Lay, Inc., File No. 641 0161.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

APRIL 29, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: W. H. Lay & Company, Inc., File No. 611 0160, Frito-Lay, Inc., File No. 641 0161.

These two matters have been forwarded to the Commission with staff recommendation for closing for the reason there is not a substantial basis for further proceeding.

File No. 611 0160, H. W. Lay & Company, Inc., involves alleged violation of 2(a) in the sale of potato chips, and it appears that a technical violation has been shown as the result of a somewhat cursory field investigation. The transactions involving questionable discounts amounted to approximately \$500 and there was a total of \$65 in discounts involved in transactions wherein competitive injury appeared. I concur with the recommendation of the staff that this matter does not warrant further investigation.

File No. 641 0161, Frito-Lay, Inc., involves alleged violation of 2(a) in the sale of potato chips. The case arose out of the efforts of Frito-Lay to popularize the "Lay" brand of potato chips in areas in which it had bought out local manufacturers and was substituting the Lay brand for the local brands acquired and retired through the merger.

In pursuit of this goal Frito-Lay embarked on a saturation sales promotion campaign involving extensive advertising and consumer promotion. The

campaign in question was confined to local geographic areas and Frito-Lay's price structure was presumably maintained elsewhere.

One of the deals involved the refund through a box top return deal of 64% of the purchase price of Lay's potato chips to the consumer. The deal ran for a period of four weeks, and was followed by less generous offers involving the granting of free premiums in conjunction with the purchase of potato chips.

In addition to the promotional deals such as that described above, which caused considerable consternation among Frito-Lay's local competitors, the file discloses localized and transient dealer discounts and allegations by competitors that Frito-Lay, by virtue of its promotional program, was engaged in sales below cost.

The staff dealt with this case as a 2(a) geographic price discrimination case exclusively and recommended closing on the grounds that:

1. No evidence of predatory intent appeared.
 2. The competitor applicants withdrew their complaints against Frito-Lay on the ground that the promotional program had not been as successful as they had feared, and
 3. The cost of the box top program in Frito-Lay's Midwest and Southwest divisions amounted to only \$150,000 or 15% of the sales of the relevant products.
- This case was never fully investigated. The file consists largely of applicant letters and evidence of some slight contact with Frito-Lay's competitors. I would have preferred that considering Frito-Lay's possible proclivity for eliminating competition by acquisitions and rigorous area price competition, this matter had been fully investigated both under the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. However, the practices involved herein arose out of the Frito-Lay merger currently under consideration in Docket No. 8865 and, hopefully, will be resolved in conjunction with the disposition of that matter. It will be recalled that we have only recently instructed the staff to communicate with the Department of Justice in an effort to have the Antitrust Division pursue the Frito-Lay matter. Whether or not the matter is concluded by the Department or by the Commission, I do not favor a collateral investigation at the present time. I therefore concur in the recommendation of the staff that this matter be closed but that no closing letters be forwarded to the proposed respondent.

JOHN R. REILLY, *Commissioner*.

(Staff)

SEPTEMBER 15, 1964.

Re: Associated Merchandising Corporation, et al., File 601 0059.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

SEPTEMBER 15, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation, et al., File 601 0059.

This matter is back before us as a result of a breakdown in the consent order negotiations between the staff and respondents' counsel.

Notwithstanding the fact that any inducing and receiving of allowances by the stores who are stockholders of AMC, which in turn owns Aimcee Wholesale Corporation (AWC), has been done through the instrumentality of AFC, nevertheless, the staff in its proposed complaint and order takes the position that the order should run not only against inducing and receiving through the instrumentality of AWC but also inducing and receiving by the individual stores in their separate capacities. Essentially this is the point of impasse between the staff and respondents' counsel. The latter feel that the order should run only against AWC and the individual stores to the extent that they employ AWC or any other instrumentality in inducing and receiving allowances.

Respondents have submitted a "Settlement of Proposed Complaint" dated August 11 which has previously been circulated among the Commissioners. In that proposal they urge that they be permitted to consent to an order running only against inducing and receiving through an instrumentality and they indicate a readiness to bring about a divestiture of AWC by AMC to facilitate achieving this objective.

In their proposal respondents' counsel also request an opportunity to present their position to the Commission at a Commission meeting.

The staff opposes respondents' position and insists upon the broader form of order. The arguments pro and con are fully set forth in the respondents' proposal and in the staff's memorandum.

(Non-staff)

MARCH 31, 1964.

Re: Associated Merchandising Corporation, et al., File No. 601 0059.

From: Commissioner Reilly.

To: Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

MARCH 31, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation, et. al. File No. 601 0059.

This is a proposed 2(f) complaint against Associated Merchandising Corporation (AMC) and its wholly-owned subsidiary, Aimcee Wholesale Corporation (AWC).

Largely as a result of the *Automatic Canteen* decision and consequent infirmities found to characterize the Commission's 1945 order against AMC, the staff has re-investigated AMC, AWC and the department store-stockholders of AMC. AWC was created after issuance of the Commission's original order ostensibly as an independent wholesaler free from the buying-front image of AMC.

The violation alleged in the proposed complaint is corollary to that in Joseph A. Kaplan & Son, Inc., Docket No. 7813, a shower curtain manufacturer, supplier to AMC stores, whose preferential prices to these stores was the basis of violation in that case.

The complaint herein presents certain difficulties among which are the following:

(1) AMC, because of its size, warehousing and other functions, is in a position to argue that it is an independent wholesaler and is not the sort of buying-front or bookkeeping device that the Commission has taken exception to in the automotive parts cases.

(2) AWC was recently more completely divorced from AMC for the apparent purpose of lending weight to the argument that it is a wholesaler independent of the member stores purchasing from it.

(3) The prevalence of group buying organizations patterned after AMC raises a question whether the price preferences employed in such arrangements are not so universally available as to eliminate the likelihood of competitive injury.

The staff is of the opinion that these are not substantial impediments and that the likelihood of violation is great enough to warrant issuance of complaint. I agree and so move.

JOHN R. REILLY, *Commissioner*.

NON-AGENDA MATTER

MARCH 10, 1967.

Re Susan Thomas, Inc., File No. 621 0801; Adele Martin, File No. 621 0518.
From: Commissioner Dixon.
To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

MARCH 10, 1967.

To: Commission.
From: Commissioner Dixon.
Subject: Susan Thomas, Inc., File No. 621 0801; Adele Martin, File No. 621 0518.

These two matters were initiated in 1962 in connection with our investigation of possible Section 2(d) violations in the wearing apparel industry.

It was learned that Adele Martin, under which name one of the investigations was docketed, is a trade name under which Susan Thomas, Inc., operates. The Section 6(b) report received from the corporation indicated a violation of Section 2(d).

Susan Thomas refused the opportunity to enter into an agreement containing a consent order and the matter was referred for field investigation. The staff states that the facts developed in the field in 1963 and 1964 are sufficient to warrant issuance of a complaint. However, since Susan Thomas, as a substantial supplier of Best & Co., Inc., was subpoenaed to testify and produce a significant volume of documentary evidence in connection with our proceeding against that company, the staff did not deem it proper to recommend formal proceedings against Susan Thomas at that time.

Susan Thomas was contacted after the record was closed in the *Best* case and it indicated a desire to enter into a consent settlement. The staff has forwarded a form of complaint and a properly executed agreement containing a consent order which are identical with the complaints and consent orders which we issued against some three hundred other apparel manufacturers. The staff has also submitted a proposed draft of a decision adopting the consent order which follows the form of the decision used in the previous cases.

The staff recommends that we accept the consent agreement and issue the complaint and decision, and that the investigation file assigned to Adele Martin be closed.

I agree with the staff's recommendation, and I so move.

PAUL RAND DIXON,
Commissioner.

APRIL 26, 1966.

Re docket No. 8557, Ace Books, Inc.

From: Commissioner Dixon.
To: Bur. of Restraint of Trade:

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

APRIL 26, 1966.

To: Commission.
From: Commissioner Dixon.
Subject: Ace Books, Inc., docket No. 8557.

REPORT OF COMPLIANCE

The evidence in this matter established that respondents were making advertising or promotional payments to "indirect customers" and to a direct customer. Union News Company, in violation of Section 2(d) of the amended Clayton Act.

The report of compliance shows that respondents are no longer selling their publications to Union News. In addition, they have made every effort to sever all direct connections with the retailers who were found to be their "indirect customers." While such severance would not absolve them from the duty of complying with the order if these retailers continued to receive the discriminatory allowances, respondents state in their letter of January 24, 1966, that they are not currently paying or contracting for the payment of promotional allowances of any kind, either directly or indirectly. The Division of Compliance, Bureau of Restraint of Trade, recommends approval of the Report of Compliance. The draft of the letter so notifying respondents conditions acceptance upon the accuracy of the statement that no promotional allowances are currently being made, either directly or indirectly, and requires the respondents to notify the Commission of any promotional allowance program initiated in the future.

In view of the above, I concur in the recommendation of the Division of Compliance and accordingly move that respondents' Report of Compliance be approved and that respondents be so notified.

PAUL RAND DIXON, *Commissioner.*

December 27, 1966.

Re Texaco, Inc. File 601 0869; Standard Oil Co. File No. 601 0870; Paragon Oil Co., File No. 611 0594; Shell Caribbean Petroleum Co., File No. 611 0595.
From: Commissioner Elman.
To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

December 27, 1966.

To: The Commission.

From: Philip Elman.

Subject: Texaco, Inc., File No. 601 0869; Standard Oil Co., File No. 601 0870; Paragon Oil Co., File No. 611 0594; Shell Caribbean Petroleum Co., File No. 611 0595.

The staff recommends closing four investigations concerning price discrimination and use of tie-ins in the sale of residual fuel oil in the New York City area. I concur in the recommendation for closing. It should be noted, however, that the recommendations for closing the first two matters are based solely upon a memorandum written on June 19, 1961. The closing recommendations in the other two matters are based upon investigations conducted in part during 1960 and 1961, and in part during 1966.

Although it is impossible from the file to determine current practices in the industry, I do not believe it necessary to bring the file up to date. The basic cause of the pricing problems at the time of the investigation had been the Department of Interior's imposition of unrealistic import quotas (staff memorandum, pp. 6-7, 8). Last March, that Department substantially revised the method for allocating quotas (see the appended press release) and according to information obtained by my office, the pricing patterns in the industry have changed significantly since that time.

NEW RESIDUAL FUEL OIL PROGRAM ANNOUNCED

Secretary of the Interior Stewart L. Udall today, March 25, 1966, announced major revisions in the Department's regulations relating to the control of imports of residual fuel oil to be used as fuel in District I (the East Coast). The 1966 revisions will assure, to the maximum extent possible under Presidential Proclamation 3279, as amended, that individual import allocations of residual fuel oil will be responsive to market requirements.

This will be accomplished by a major change relating allocations for participants to actual sales as evidenced by invoices, bills of sale, and contractual commitments.

The new program is designed to eliminate premiums that have attached to import licenses and which have had the effect of forcing the smaller consumers to pay higher prices for residual fuel oil.

Secretary Udall indicated that the new program would "combat inflation by encouraging fuel [sic] and free competition in the market place."

* * * * *

The principal elements of the 1966 revisions are: method of establishing individual allocations: heretofore, allocations were established on the basis of formulas relating to historical imports or imports into deep water terminals. For the forthcoming allocation period an initial allocation will be made to all current eligibles on these bases. The total of these allocations will correspond to the import level in the Year 1957.

Additional allocations will be made on the basis of evidence satisfactory to the Administrator of the Oil Import Administration of contracts for future delivery of residual fuel oil. Such allocations will be in amounts sufficient to cover firm contract requirements in excess of initial allocations. Licenses will be issued pursuant to these allocations as evidence is presented that deliveries have been made.

* * * * *

The revisions announced today will extend eligibility to persons who are in the business of selling residual fuel oil or have or obtain throughout arrangements which permit them to utilize deep water terminals. The effects of this participation in the program.

AUGUST 7, 1969.

Re Red Stick Brokerage Co., File No. 621 0284.

(Circulated as a five-day closing on August 6, 1969 by the Secretary.)

From: Commissioner Elman.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter.

See attached memorandum.

MEMORANDUM

AUGUST 7, 1969.

To: The Commission.

From: Philip Elman.

Subject: Red Stick Brokerage Co., File No. 621 0284.

This hoary matter, which was initiated during the first year of the Kennedy administration (on November 3, 1961), is characterized in the staff memorandum as a matter "deemed to have only a localized and minimal competitive effect". It concerns the question of whether brokerage payments were legitimate or were in violation of Section 2(c) because of a father-son relationship between the ownerships of two businesses located in Baton Rouge, Louisiana. The matter should have been closed upon the report of the field office on April 30, 1962, that the companies were independent business entities and that there was nothing to support even an inference of violation of Section 2(c). Instead, the staff, on January 14, 1965, recommended a supplemental investigation. The supplemental report of the field office on May 26, 1965, again indicated that there was no evidence of violation of section 2(c) and again recommended closing. The Bureau now agrees, stating that "extensive time in the field for two investigations plus analysis by the staff" have contributed to the delay in resolving this matter and that because of the minor nature of the matter "priority was given to other matters of industry-wide significance".

The staff recommends that no closing letters be sent because "of the extensive time consumed by this investigation and the apparent lack of crucial competitive effects from the practices challenged." This type of recommendation is commonplace at the Commission, and I do not agree with it. The age of a complaint is not, *per se*, a valid reason for failing to inform the parties involved of the disposition of a matter. Moreover, there will be little incentive for the staff to avoid undue delays in future cases if such delays are accepted by the Commission as something to be "covered up" instead of something to be eliminated.¹ I move that the staff be directed to prepare appropriate closing letters.

¹ See, e.g., my memorandum of July 15, 1969, to the Commission, concerning *Eden Cigar Company*, File No. 672 3507; my memorandum of August 5, 1969, to the Commission concerning *Stroll-O-Chair Corp.*, File No. 662 3402.

DECEMBER 1, 1966.

Re Spreckels Sugar Co., File 631 0072; Holly Sugar Corp., File 631 0073.

From: Commissioner Elman.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter.

See attached memorandum.

MEMORANDUM

DECEMBER 1, 1966.

To: The Commission.

From: Philip Elman.

Subject: Spreckels Sugar Co., File 631 0072; Holly Sugar Corp. File 631 0073.

These two sugar cases present different factual situations and perhaps should produce different recommendations. In Spreckels, I agree with the staff recommendation to close on the basis that there were no meaningful 2(d) or 2(a) discriminations and that the promotional schemes currently employed present no evidence of violation.

Holly poses slightly different problems for there is stronger evidence here that discriminatory promotional allowances were made available to certain Holly customers during a period from 1961-65. In 1966, however, Holly adopted a uniform nondiscriminatory program comparable to the present Spreckels' offer. In light of the change in program and the necessity of further investigation of the earlier program to confirm that the allowances were discriminatory, to determine their competitive impact, and to ascertain the validity of a possible "meeting competition" defense, the staff, contrary to the field attorney, recommends closing. I am troubled by this recommendation. First, it was Holly who initially made the special promotional allowances which Spreckels was subsequently forced to counter. Second, unlike Spreckels, Holly apparently never attempted to make this allowance available on a nondiscriminatory basis to its various customers. Third, there is some evidence of injury to Holly's competitors (Spreckels lost Ralphs Grocery Co.'s business for about six months), and it should also be relatively easy to show injury to competitors of the retail customers, because sugar is one of the leading items used to lure customers to shop at a particular chain. Fourth, as the special allowances were offered to two of Spreckels' customers (and accepted by one), it will be difficult for Holly to show it was merely meeting competition. Statements made by the favored customers would seem to confirm this.

On the other hand, Holly is a smaller competitor of Spreckels in the Los Angeles market (exact market share figures are not available), and, since Spreckels' merger with American Sugar Co. in 1963, is considerably smaller overall. Holly's special promotional allowances, while not offered to all its customers, were offered to one of its smallest customers as well as its largest, so its effect did not harm all small buyers. In addition, its willingness to offer these allowances exerted the competitive pressure which compelled Spreckels to increase its promotional allowances uniformly. Although such an increase in competitive behavior is desirable, it obviously is not a type which directly benefits the consumer with lower prices.

Because of Holly's position in the sugar market and the fact that its current promotions are being offered on a non-discriminatory basis, I would not favor issuance of a complaint. However, since Holly appears to have violated 2(d) in the past, and may do so again in the future, I would prefer to seek an assurance of voluntary compliance rather than to close. I move that the matter be returned to the staff for that purpose.

NOVEMBER 29, 1968.

Re Giant Food, Inc., File 661 0153.

From: Commissioner Elman.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter.

See attached memorandum.

MEMORANDUM

NOVEMBER 29, 1966.

To: The Commission.
 From: Philip Elman.
 Subject: Giant Food Inc., File 661 0153.

For several reasons I believe that the Commission's interests would best be served by accepting Giant's assurances of voluntary compliance.

First, it may be difficult to prove that the questioned terms are discriminatory. The file shows that some industry witnesses regard sales to individual stores within a chain as sales to a different customer from sales to a chain's central warehouse. If this argument prevails, Giant received no discriminatory terms in accepting the two-for-one offer on items which certain of its individual stores had already purchased. Similarly, the Commission would also be seriously challenged (but perhaps not as successfully) on the issue of whether the "bill and hold" terms were preferential. Second, even if the terms are discriminatory, it may be difficult to establish any adverse effect on competition arising from them. All chains received the initial two-for-one offer, and Giant, as the only customer to accept it, would inevitably be in a position to undersell its competitors. Although the "bill and hold" terms may have enabled Giant to undersell its competitors over a longer period of time, the fact that after 2½ years it had not sold a "one year's supply" and cancelled its contract with over 37% of San Giorgio's products still credited to it, would make it difficult to establish substantial competitive injury. Third, since the "bill and hold" terms were advantageous in the transaction mainly because macaroni is a spoilable product, all evidence points to this as a rather unique and isolated transaction. Finally, Giant was not the moving party in negotiating this transaction and has expressed its genuine concern to avoid further difficulty with the Commission by executing an assurance of voluntary compliance and initiating new buying procedures designed to avoid repetition of this situation.

All things considered, I feel the public interest would be served by accepting Giant's assurances of voluntary compliance, rather than embarking on a long litigation that would in the end yield no better results.

SEPTEMBER 19, 1967.

Re American News Company, et al., Docket No. 7396; Johnson Publishing Co., Inc., Docket No. C-157; Hearst Corp., Docket No. 7391.

From: Commissioner Elman
 To: Bur. of Restraint of Trade

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

SEPTEMBER 19, 1967.

To: The Commission.

From: Philip Elman.

Subject: American News Company, et al., Docket No. 7396; Johnson Publishing Company, Inc., Docket No. C-157; Hearst Corp., Docket No. 7391.

There appears to be reason to believe that respondents, American News Company and Union News Company, may not be complying with the order issued in Docket 7396, although the staff has been unable to uncover specific evidence of violation. For this reason, I think the Commission should not "approve" their compliance report, but should state that the report will be filed without further action. Accordingly, I move that the following changes be made in the letter:

(1) The second and third paragraphs on the first page of the letter should be changed to read as follows:

"The Commission has also reviewed your report of compliance and supplementary material submitted, and determined to file the report without taking further action at this time. The Commission has noted the following statement contained in your letter of April 28, 1967, and pertinent exhibits attached thereto:"

(2) The last paragraph on page 2 of the letter should be changed to read as follows:

"Accordingly, the Commission's determination to file your report of compliance without taking any further action at this time should not be construed as approval or condonation of the adequacy of your past practices in meeting the burden of inquiry imposed upon you by the order in Docket 7396."

(3) Page three of the letter should be changed to read as follows:

"Furthermore, the Commission's decision to file your report of compliance without further action at this time is based on the assumption that the information contained therein, and in supplementary materials submitted, is accurate and complete. However, you are advised that notwithstanding the filing of your compliance report, should it later appear that you have failed to comply with the order at any time, the Commission may take such action as the public interest may require."

FEBRUARY 3, 1969.

Re Marketers of Fresh Fruits and Vegetables—Unnamed, File 681 0040.

From: Commissioner Elman.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

FEBRUARY 3, 1969.

To: The Commission.

From: Philip Elman.

Subject: Marketers of Fresh Fruits and Vegetables—Unannmed, File 681 0040.

For years there has been a continuing controversy in the produce industry between the growers (sellers) and their retail food chain customers as to who should pay fees of the independent shipping point brokers who negotiate sales between them. Until the late 1950's the shipping point or "field" ("ground") brokers were compensated by the buyers but at about that time conditions of oversupply developed which prevailed throughout the early 1960's and probably persist today.¹ Buyers were thus able to obtain merchandise of the quality and price desired fairly easily while shippers had to make increasingly active efforts to sell their produce at a satisfactory price and therefore came to depend heavily on the services of the field broker. It became common, even universal, for shippers to compensate the field broker. Unhappy with this arrangement and preferring, understandably, the former system, sellers attempted to get the Commission to intervene in their behalf under Section 2(c) of the Clayton Act, as amended.

In April 1965, the Commission, by a vote of 3 to 1, with Commissioner Jones not participating, issued Trade Practice Rules for the Fresh Fruit and Vegetable Industry which purported to deal with this controversy and to explain the requirements of Section 2(c), but which were somewhat ambiguous and satisfied no one. Brokerage arrangements in the industry remained as they had been before the Rules issued. A collective (and probably unlawful) boycott by several sellers refusing to use the services of brokers or pay brokerage commissions was short-lived, at least in part because the realities of the marketplace dictated that sellers utilize the services of shipping point brokers.

Individuals and collective action having proved futile, these sellers turned again to the Commission to enlist its aid in forcing buyers to pay brokerage. Charges were made that other shippers were violating the Trade Practice Rules by paying brokerage to field brokers who were acting as agents of the buyers. A staff-proposed complaint against one of the accused sellers was not issued by the Commission which instead directed the staff to reexamine whether action should be taken against field brokers and to support any recommendation that might be made with specific evidence concerning specific transactions alleged to be illegal. Two months later the staff recommended, and the Commission agreed, that, since the practices involved were industrywide, no complaints be issued but a broad investigation be instituted instead. More specifically, the staff argued:

¹ The staff memorandum is unclear on the latter point.

"At approximately the same time, representatives of several fresh fruit and vegetable growers associations met with the Chairman and representatives of this Bureau in order to discuss what they claim to be widespread violations of the Commission's Trade Practice Rules. This group left us with the distinct impression that it would serve no useful purpose for the Commission to file suits against a representative number of shippers and brokers. It was believed that unless there was a massive attack on the entire industry, buyers would be able to shift their purchases through brokers or shippers who are not under order.

"As a result, this Bureau has come to the conclusion that the only possible way of solving the problem and getting some insight into what the precise market conditions are is to concentrate our attention on the larger buyers." (Memo, June 12, 1967)

The proposed investigation has now been completed and the staff has forwarded the attached five complaints against various retail food chains and field workers, alleging violations of Section 2(c) of the Clayton Act, as amended.

The Commission has vacillated, obfuscated and changed directions more than once in this matter and the time has come for a decision as to what enforcement policy makes sense. To reach that decision, we ought to have before us all the facts concerning the course of action proposed by the staff. Apart from the question of the relative importance of these matters—to what extent is the public interest involved in what seems to be essentially a private controversy, and how justified is the considerable investment of time, money and manpower that the Commission will have to make—there is serious doubt as to the economic impact of this enforcement action. Gaps in the information submitted make it difficult to assess the market setting in which these practices are occurring, the significance of Commission action on consumer prices, and the compatibility of such action with a rational economic policy.

Obviously there are important legal obstacles to be hurdled before any orders could issue. Since each Commissioner has by now developed his or her own view of Section 2(c), it is unnecessary to dwell on the point save to note that we do not have here a dummy broker passing on his "commissions" to his principal, the buyer, but real independent brokers who render services and earn their commissions, which are paid by the seller, and who retain such earnings and do not pass them on, in whole or in part, to anybody else.² This is simply not a price concession masquerading as brokerage which is the essential evil at which Section 2(c) is aimed.

Of necessity the case against these respondents depends on the allegation that the brokers are the buyer's agents in the sense in which that term is used in the law of agency—i.e., that the brokers are acting exclusively on behalf of, and at the direction of, the buyer. There is considerable doubt that this is in fact the situation prevailing in this industry. As I have noted, it was due to chronic conditions of oversupply that sellers first began to need the services of brokers and to pay brokerage commissions. The staff memorandum does not indicate that this condition has changed. Since the practice of paying commissions is followed by all sellers, and since the short-lived refusal of some sellers to use or pay brokers left them at a competitive disadvantage vis-a-vis their rivals, it is as reasonable to suppose that the practice is dictated by the sellers' need for the services of these brokers or by legitimate competitive pressures as it is to assume that there has been illegal or coercive conduct.

Moreover, it is conceded that these brokers are independent, that all in fact act as genuine brokers and none was set up as a dummy. The staff nevertheless infers that since they perform services for buyers, they perform no useful functions for sellers. Yet, almost any independent broker can be regarded as performing services for both buyer and seller, regardless of who pays his commission. For example, a buyer may go to a real estate broker and enlist his aid in finding a house, yet the seller usually pays the broker's commission. Neither its language nor legislative history shows that Section 2(c) was intended to deal with the question of which party the broker represents and who should be liable for his services. Absent some showing of markedly changed conditions in this industry, it is also questionable whether the broker performs no services for the seller for which he is entitled to be compensated. This whole proceeding is still subject to the interpretation that it is an effort by shippers to avoid being forced by competitive pressures to assume the cost of brokerage.

² I note in passing that Section 2(c) exempts from its proscription payments made "for services rendered in connection with the purchase or sale of goods."

Citation by the staff of the *Herzog* case (memo, p. 21) is instructive. Accepting for present purposes the staff's assertion that "The parallel between *Herzog* and the field broker herein is obvious and complete," it is questionable whether the Commission would again want to follow the path it trod in *Herog*. It is true that the Commission "won" the *Herzog* case in the Court of Appeals, largely because respondent had filed an admission answer which the court regarded as constituting a stipulation that *Herzog* was the buyer's agent and not an independent broker like those in the instant matters. Subsequently, however, it became clear that resident buyers (brokers) in the fur industry perform a useful economic function, beneficial to buyers and sellers, and that who paid their commission is a matter of indifference to the public interest. As a result, the Commission, by minute of November 22, 1966, adhering to a position taken on April 2, 1951, determined that enforcement of the *Herzog* order would not be in the public interest. Which raises the question whether, if the instant matter parallels *Herzog*, as the staff asserts, and the Commission eventually issues an order after arduous and expensive litigation on the ground that there has been a technical violation of Section 2(c), the public interest and economic realities will dictate that this order, too, not be enforced.

Another factual allegation that troubles me is the claim that all buyers pay the same price for produce regardless of whether they use a broker compensated by the seller, as the respondent food chains do, or themselves hire and pay an employee to perform this function as the larger national chains (Safeway, Kroger and A&P) do. Is it not somewhat bewildering to learn that Bohack with annual sales of \$207 million procures its produce at a lower net cost than Safeway, Kroger and A&P? "Facts" like these are troublesome and suggest the need for a fuller economic analysis of the industry before the Commission jumps in with both feet.

More fundamental than these objections is my doubt as to what would be accomplished even if the Commission should establish, after years of litigation, that these brokers are buyer's agents whose fees should be paid by the buyers and not the sellers.³ Suppose the Commission wins this case, what will be the result? Right now, according to the staff, these food chains pay, let us say, \$1 for lettuce; the seller subtracts, let us say, 5 cents which he pays the broker and he retains the remaining 95 cents. If conditions of oversupply persist, an assumption which the staff tacitly denies when it concludes that the broker performs no services for the seller, after an order is entered the buyers will still have leverage vis-a-vis the sellers in this industry. The probable result? Buyer pays 5 cents to the broker plus 95 cents to the seller; in sum, the same net effect as now prevails except that by shuffling a few papers the source of the broker's payment is changed and except that it will have cost the Commission a considerable sum in time, money and manpower to get those papers shuffled. The economic impact would be nil. But, let us assume that the staff's implicit assumption is correct and conditions of scarcity prevail so sellers have some leverage. In that case the buyer will probably continue to pay the seller \$1 and he will have the added cost of 5 cents to the broker. Will the retail food chain bear this added cost? Obviously not. The added costs will be passed on to consumers in the form of higher prices, adding to the inflationary spiral that has already become the principal concern of those charged with maintaining price stability in our economy.⁴

It is is questionable whether an enforcement policy calculated to achieve, on the one hand, useless or, on the other, negative and deleterious results is sensible or whether it comports with the economic policies of the Congress or the President. Recently, the antitrust agencies have been reminded of their obligation "to strive for realistic—as well as vigorous—enforcement, and . . . [to] avoid dissipating their resources on matters of minor importance."⁵ There is a great danger, it seems to me, that action by the Commission on the instant complaints will be neither realistic nor significant but will be quixotic and wasteful. Before taking any action, the Commission should have the personal views of the Director of the Bureau of Economics on the economic policy questions involved.

I so move.

³ But cf. *Flotill Products, Inc.*, Docket No. 7226, 8-9 (separate opinion).

⁴ See, e.g., Council of Economic Advisers, 1969 Annual Report.

⁵ Staff of the Cabinet Committee on Price Stability, Study Paper Number 2, 84 (1969).

APRIL 12, 1967.

Re Beatrice Foods Co., File No. 661-0053.

From: Commissioner Jones.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

APRIL 12, 1967.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Beatrice Foods Co., File No. 661-0053.

This matter involves an investigation of alleged violation of Section 2(d) of the Clayton Act as amended in connection with the granting of preferential advertising allowances in the sale of dairy products. This matter is an outgrowth of the Commission's order dismissing the complaint in Docket 7599 involving Beatrice in which the Commission noted that in view of the length of time which had elapsed since the occurrence of the alleged discriminatory advertising allowances an order was inappropriate. The Commission further directed, however, that a new investigation be instituted to determine whether the practices were currently being used.

The activities involved Beatrice's promotional allowance activities in Colorado and Wyoming. The investigation disclosed that no promotional allowances were paid by Beatrice in Colorado and Wyoming in 1965 and 1966 because of state milk control regulations prohibiting such payments. Accordingly, in the two states involved, payment of all promotional allowances has been discontinued.

The investigation also encompassed Beatrice's relations with its Nebraska customers. It found that no advertising allowances have been paid in any form since January 1966. Prior to that time a 10 cents per gallon ice cream allowance had been granted from one plant to three stores; however, these payments were made to meet good faith advertising allowances offered by competitors.

Based on the above, the staff recommends that the file be closed without further action. I concur in the staff recommendations and move their adoption.

January 24, 1967.

Re (1) Compliance of Power Carbonic with 1948 order; (2) Competitors' complaint against Hygrade Compressed Gas Corp. and Pure Carbonic, Inc. of Air Reduction.

From: Commissioner Jones.

To: Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

January 24, 1967.

To: The Commission.

From: Commissioner Jones.

Subject: (1) Compliance of Pure Carbonic with 1948 order; (2) Competitors' complaint against Hygrade Compressed Gas Corp. and Pure Carbonic, Inc. of Air Reduction.

A Commission order of June 17, 1948 prohibited Pure Carbonic, Air Reduction Co., Liquid Carbonic, and Michigan Alkali (now Wyandotte Chemicals) from concerted action in fixing prices and in geographical price discrimination in the sale of solid or liquid carbon dioxide.

On January 6, 1966, the Commission directed a compliance investigation to determine whether the 1948 order was being violated. At that time the Division of General Trade Restraints was conducting three investigations of alleged anti-competitive pricing practices in the carbon dioxide industry.

By Commission minute of April 7, 1966, the Division was directed (1) to investigate compliance with the 1948 order; (2) to combine this investigation with its three on-going investigations in the industry; (3) to consult with the Division of Compliance when each investigation is completed; and (4) to inform the Commission of possible non-compliance.

The Division has now completed one of its three outstanding investigations in this area, the one involving Hygrade Gas Corp. and Pure Carbonic.

HYGRADE GAS CORP.

Four applicants complained that Hygrade and Pure Carbonic were involved in a conspiracy to forestall competition at the wholesale level and to sell compressed gas below cost. Attorney for three of the applicants informed staff that (1) the challenged practices had been stopped; (2) his clients had settled their differences with Hygrade and Pure Carbonic; and (3) he had no proof of conspiracy. The fourth applicant also could offer no proof of either conspiracy or competitive injury.

I move acceptance of staff's recommendation that (1) the files be closed with respect to the allegations of conspiracy to eliminate competition and sales below cost; (2) closing letters be sent to Hygrade and to the attorney for the three applicants; and (3) no closing letters be sent to the fourth applicant because he has no interest in pursuing his complaint and to Pure Carbonic because it will probably be the subject of a continued investigation.

PURE CARBONIC

Although the alleged conspiracy between Hygrade and Pure Carbonic did not prove out, a by-product of this investigation was the possibility of price discrimination by Pure Carbonic. The attorney-examiner discovered that the company's invoices showed sales to customers at different unit prices. Counsel for the company explained these differences by general reference to its schedule of volume discounts, varying transportation charges, rental charges for different types of equipment which Pure Carbonic is under a consent decree to include in the price or to charge separately at request of buyer, and attempts to meet competition. The attorney-examiner suggested an investigation.

The Division of Discriminatory Practices recommends against an investigation on the grounds that the file evidence (essentially the invoices) is inconclusive; that Pure Carbonic is not only an investigated firm in a much investigated industry (by both Justice and the Commission) but it as well as others in the industry are presently under an order and consent decrees prohibiting concerted action; and that no complaints have been received. On the basis of the file it is difficult to determine the probability of a successful case against Pure Carbonic. I am, however, influenced by the absence of a complaint and by the fact that Pure Carbonic submitted a four volume special report covering price data to the Commission in August 1962, which apparently indicated no improper pricing activity. I would accept the recommendation of the Division of Discriminatory Practices against investigation. I so move.

THE ON-GOING INVESTIGATION

The Division of General Trade Restraints had three on-going investigations involving (1) Hygrade and Pure Carbonic, (2) Liquid Carbonic of General Dynamics, and (3) Cardox of Chemtron. As we have noted, staff recommends that the first investigation be closed. The other two are still in the field although completion is now estimated for March 1967 and April 1967. In the meantime, staff recommends that no further action be taken in the investigation of compliance with the 1948 order until the remaining two field investigations have been completed. I move this recommendation as well.

APRIL 30, 1965.

Re General Filters, Inc., File 641 0277
 From Commissioner Jones.
 To Bur. of Restraint of Trade.

I move that this be treated as a non-agenda matter.
 See attached memorandum.

MEMORANDUM

APRIL 30, 1965.

To: The Commission.
 From: Mary Gardiner Jones.
 Subject: General Filters, Inc., File 641 0722.

I concur in the staff's recommendation to close although it should be noted that the field office recommended complaint. In view of that recommendation I am setting down briefly my reasons for concurring with the staff recommendation to close.

The industry consists of some 30 manufacturers of whom General is the largest. However there are other large companies in the industry. The applicant is apparently very small and was a defendant in a suit brought by General to stop the applicant from packaging its product in a fashion so as to appear to be General's. Part of the advertising in question was put out by General during that controversy which was disposed of by a court injunction prohibiting the applicant from packaging its product in a manner imitating General.

Accordingly, while initially I thought we might have a disparagement case here as part of a larger policy to maintain its market position in the face of a declining market, I am now of the opinion that this is not the situation and that we might be interjecting ourselves into what may be essentially a private battle between the applicant and General. I do not agree with staff counsel who based his recommendation for closing this phase of the case on the absence of competitive injury and failure to deceive. I do not agree that these criteria must be present to prove a charge of disparagement.

I agree with the staff memo in its discussion of the 2(a) allegation.

I move that the investigation be placed on suspense for ultimate closing. I think that it would be worth while to check General's advertising again after some reasonable period to see whether it is still directed toward disparaging imitations when presumably the District Court's injunction should have been effective to halt the original copying which apparently gave rise to this advertising.

MEMORANDUM

MARCH 8, 1965.

To: Commission.

From: Division of Discriminatory Practices, Bureau of Restraining of Trade.

Subject: File No. 641 0277, General Filters, Inc.

Closing recommended: Insufficient evidence of violation.

Statute: Section 2(a), Clayton Act; section 5, FTC Act.

Charge: Price discrimination, disparagement of competitor's product, interfering with competitor's source of supply, and false and misleading advertising.

Commodity involved: Oil filter refills for domestic oil heating units.

On March 10, 1964, Durable Manufacturing Company, Bensenville, Illinois, complained to the Commission's Chicago Office that its principal competitor, General Filters, Inc., was violating several federal statutes. Durable complained that as of April 6, 1964, Pittsfield Products, Durable's only source of cylinders, refused to sell cylinders to Durable. Mr. Edward H. Sowin, president of Durable, stated that Pittsfield's actions were due to General's pressure, and that Durable had no other practical source of supply. Durable further complained that General was engaged in false and misleading advertising and was disparaging Durable's product. Durable finally complained that General was engaged in discriminatory pricing which caused Durable to lose a number of customers. On April 24, 1964, a field investigation was initiated in this matter. On August 27, 1964, the Chicago field office submitted a final report, recommending that complaint issue, charging General Filters, Inc. with violation of § 2(a) of the Clayton Act and § 5 of the Federal Trade Commission Act.

Both General and Durable manufacture oil filter refills for use in domestic oil heating systems. These filters are Durable's only product. Durable's sales in 1962 totaled \$43,000 and 1963 they totaled \$37,000. General manufactures filters, cartridges and related products. General's filter sales in 1962 totaled \$434,626 and in 1963 they totaled \$475,482. Regarding the industry as a whole, the final report states:

"It should be noted that various informants from various areas stated unanimously that the oil heating business is a dead line because the majority of the furnaces and stoves are heated by gas. That means that the oil filters, refills and cartridges are also going out of use. That change resulted in repeated statements: *that the entire oil filter business is unimportant and insignificant.*" (TPF, p. 3) (Emphasis added.)

I. SECTION 5 CHARGE OF INTERFERING WITH COMPETITOR'S SOURCE OF COMPONENT PARTS

Pittsfield Products supplies Durable and General with steel cores for use in oil filters. Sales to General in 1962 amounted to \$31,000 and in 1963 they amounted to \$45,000. Sales to Durable in 1962 amounted to \$3,700 and in 1963 they amounted to \$1,500. Pittsfield stated that it was unable to meet Durable's order of 12/20/63. The reason was stated to be that there was a material shortage. Pittsfield denied that there was any pressure by General.

Pittsfield stated that Durable was difficult to serve because its orders were "made orally, on very short notice, and with quick delivery dates." (TPF, p. 13) Pittsfield, competitors of Durable, and even Durable, state that there are a number of alternate sources of cores.

The final report concluded, regarding this charge that "there is no evidence that proposed respondent interfered with competitor's source of component parts." (TPF, p. 15) This Bureau agrees with that conclusion and recommends that this aspect of the matter be closed.

II. FALSE AND DISPARAGING ADVERTISING

A. "The applicant complained that the advertising of proposed respondent: 'General's filter replacement cartridge is approved by the Underwriters Laboratories'; injured him." (TPF, p. 13). The investigation revealed that the Underwriters Laboratories approved General's filters. The filter replacement cartridges are identical to those used in the approved filter.

The final report concluded, as to this aspect of the case, that "the replacement cartridges are the same as the original filter cartridges; therefore, the statements of proposed respondent's advertising can be considered as approved by Underwriters Laboratories, Inc., and in this respect the advertising of proposed respondent is not false." (TPF, p. 16). Accordingly, this Bureau recommends that this aspect of the matter be closed.

B. "The applicant complained that General's advertising that 'imitations do not remove lint and imitations do not include a heavy-duty leakproof gasket' injures him . . .". (TPF, p. 14).

1. The advertising was in trade journals and directed to wholesalers and large retailers. The advertising was not directed to the consumer market.

2. There is no evidence that the readers of the advertising were misled.

3. The readers of the advertising are professionals and it is unlikely that they would be misled, even if the advertising was false.

4. The advertising refers to "cheap imitation" or "imitations" and, therefore, has little effect on Durable, as Durable does not admit that it produces a "cheap imitation" or "imitations" of the General filter.

For the above noted reasons, it is recommended that the field's recommendations of a Section 5 complaint not be approved. The advertising is not necessarily false and does not apply to, or disparage, the applicant's product.

III. PRICE DISCRIMINATION

A. *Claims by Durable that it lost customers to General due to General's price discrimination*

Durable claimed that it lost several of its customers to General because General offered Durable's customers a lower price than it offered its own regular customers. Durable claimed that this pricing activity constitutes illegal price discrimination.

The investigation revealed that General did not take any customers away from Durable (TPF, pp. 11, 12). The competitors of General were interviewed and they "stated unequivocally that they did not suffer any injury from the business policy and sales methods of proposed respondent." (TPF, p. 12).

B. *Secondary line injury due to General's pricing*

Although there was no complaint regarding the secondary line injury issue, this issue was investigated. The investigation revealed that General's price list shows several prices for each part number. The prices are based on the number of parts ordered. These prices are available to all customers. It was also noted that if a customer gave a blanket order, he would be allowed the quantity price even though an individual shipment did not make the quantity. Often, even the individual shipments involved quantities sufficient to qualify for the quantity price. The price differences in question are clearly illustrated on pages 5-10, TPF. The following are examples of the differences in the price of the fastest moving parts:

Part No.	Favored price	Nonfavored price
1A-25A.....	\$1.80.....	\$2.16.....
1A-30.....	42 cents.....	46 and 50 cents
2A-311.....	70 cents.....	73 and 78 cents.
2A-710.....	63 cents.....	68 and 74 cents.

The Milwaukee, Wisconsin, Chicago, Illinois, and Indianapolis, Indiana, trade areas were utilized for the secondary line injury investigation.

1. *Milwaukee, Wisconsin.* (TPF, pp. 6, 7). Three favored and two non-favored customers are located in Milwaukee. Rundle-Spence Manufacturing Company and Schwab Furnace Company are the non-favored purchasers. Rundle-Spence purchases from General in 1962 totaled \$30.00; in 1963, they totaled \$200.00. Schwab purchases from General in 1962 totaled \$975.00; in 1963, they totaled \$2,900.00.

Milwaukee Stove, Auer Steel, and Delzell Supply are the three favored customers in the Milwaukee area. Milwaukee Stove purchases approximately 25% of its filter needs from General. Auer Steel purchases approximately 35% of its filter needs from General. Delzell purchases approximately 45% of its filter needs from General.

None of the non-favored customers have complained regarding General's pricing. None of the non-favored customers have complained about being injured by their favored competitors. There is no evidence of actual competitive injury. If any injury exists, it must be inferred. In general, the individual orders of the favored customers are substantially larger than those of the non-favored customers.

2. *Chicago, Illinois.* (TPF, pp. 7-9). Three favored and two non-favored customers are located in Chicago. O.K. Oil and Chicago Furnace are the non-favored purchasers. O.K. Oil purchases from General in 1962 totaled \$960.00; in 1963, they totaled \$300.00; no purchases were made in 1964. Chicago Furnace purchases from General in 1963 totaled \$200.00 and no purchases were made in 1964.

Ace Hardware Corporation, Crane Supply Company, and Max Gerber, Inc., are the three favored customers in the Chicago area. Ace Hardware purchases nearly as many filters from Durable as it does from General. Half of the invoices establishing purchases by Ace indicate that the products were drop shipped to stores outside of the Chicago area. Although no percentages are given, Ace indicated that it buys its "supply needs" from Commercial Filter. None of the Crane invoices indicate shipments to the Chicago area. In fact, none of the Crane invoices indicate shipments of General filters for the Crane account into Illinois. As of July 14, 1964, Max Gerber had made no purchases from General in 1964.

Neither of the non-favored customers has complained regarding General's pricing. Neither of the non-favored customers complained about being injured by the favored customers. There is no evidence of actual competitive injury. If any injury exists, it must be inferred. Injury would be difficult to infer in light of such statements as "the oil filter business is extinct . . . the oil filter business makes no more than a 1/1000th of their total business." (Field Report of non-favored customer, Chicago Furnace Supply Company, TBF, p. 365). The testimony throughout the file is of this general nature.

3. *Indianapolis, Indiana.* (TBF, pp. 9-11). Two favored and two non-favored customers are located in the Indianapolis area. Hoover-Bowers and Duncan Supply are the non-favored purchasers. Hoover-Bowers purchases 35% of its filters from General. Purchases totaled \$300.00 in 1963 and \$27.54 in 1964. "Informant stated that the oil filter business is not too important related to her total business." (TBF, p. 450). Duncan Supply purchases from General totaled \$515.00 in 1962; \$1060.00 in 1963; and, \$720.00 in 1964. Duncan's oil filter business constitutes approximately 1/2% of his total sales.

Langsenkamp and Berkheimer are the two favored customers in the Indianapolis area. As of July 28, 1964, Langsenkamp's total purchases from General in 1964 totaled \$60.00. Berkheimer purchases filters from five suppliers. The filter business does not amount to 1% of his total sales. (TBF, p. 532).

None of the non-favored customers have complained regarding General's pricing. None of the non-favored customers have complained about being injured by their favored competitors. The closest thing to actual injury in the entire file is a statement by Hoover-Bower (1964 purchases from General, \$27.54) "that she believes that they have lost customers to G. W. Berkheimer in the last few years." (TBF, p. 450) (Emphasis added). The lost customers were not named.

CONCLUSIONS

I. INTERFERING WITH COMPETITOR'S SOURCE OF COMPONENT PARTS

The applicant claimed that Pittsfield supplied General and Durable with cores. The applicant alleged that Pittsfield cut off Durable due to General's pressure. The investigation revealed that the shipment in question was not delivered due to material shortage; there was no evidence that General had anything to do

with it. The field office recommended that this aspect of the matter be closed. This Bureau agrees with the recommendation because there is no evidence to support Durable's charges, and there is evidence to the contrary.

II. FALSE AND DISPARAGING ADVERTISING

A. The applicant charged that General advertised that its filters were approved by the Underwriters Laboratories, and that this was false. The investigation revealed that it was true. Therefore, this Bureau recommends that this aspect of the matter be closed.

B. The applicant alleged that its product was disparaged by the proposed respondent. The disparagement involved publications by General warning prospective customers to beware of cheap and faulty imitations. There is no evidence that anyone other than Durable, related these statements to Durable. Due to the nature of the advertisements, the nature of the publications (trade journals), the nature of the readers (heating supply houses), and the fact that the advertising in no way relates to Durable, this Bureau recommends that this aspect of the file be closed.

III. PRICE DISCRIMINATION

A. Durable claims that it lost customers to General due to General's price discrimination. The investigation revealed that this was not true. General's competitors were interviewed and, except for Durable, they all stated that they did not suffer any competitive injury as a result of General's policies and sales methods.

B. Although there is no application regarding secondary line injury, a secondary line injury investigation was undertaken. It revealed that price differences existed due to quantity pricing and blanket orders. However, the investigation revealed that the industry has nearly disappeared due to oil becoming obsolete in domestic heating. The purchases were minor and no actual injury existed. The field recommended complaint, but based on inferred injury. The relative unimportance of oil filters, and the minor purchases, makes this Bureau conclude that it would be improper to infer injury in this situation. The discriminations in question are due in part to General's single-order volume prices and its extension of these prices on blanket orders. General contends that this type pricing is cost justified.

Due to the lack of injury and the minor nature of the purchases involved, this Bureau recommends that this aspect of the matter be closed.

It is recommended that the file be closed, without prejudice to the right of the Commission to reopen the same if and when warranted by the facts. It is recommended that a closing letter be sent to the applicant. It is further recommended that a closing letter not be sent to the proposed respondent, because all the elements of a possible law violation exist except for injury to competition and possible statutory defenses, since such might be construed as approval of the proposed respondent's practices where the other elements of a Section 2(a) case were present.

Respectfully submitted.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

Approved :

CECIL G. MILES,
Assistant Director, Bureau of Restraint of Trade.
JOSEPH E. SHEEHY,
Director, Bureau of Restraint of Trade.

FEDERAL TRADE COMMISSION,
Washington, D.C.

Re File No. 641 0277, General Filters, Inc.

MR. EDWARD H. SOWIN,
Durable Manufacturing Co.,
Bensenville, Ill.

DEAR MR. SOWIN: The Commission has conducted an investigation involving alleged violation of the Federal Trade Commission Act and the Clayton Act by General Filters, Inc., through alleged use of false and misleading advertising, interfering with a competitor's source of component parts, disparagement of a competitor's product, and price discrimination, in connection with the sale of oil filter refills.

On the basis of the information developed in the investigation, it does not appear that further action by the Commission is warranted. Accordingly, the matter has been closed. The Commission may at any time take such further action as the public interest may require.

Sincerely yours,

JOSEPH W. SHEA, *Secretary.*

JANUARY 11, 1965.

Re Idaho Beverages, file No. 641 0260.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter. See attached memorandum.

MEMORANDUM

JANUARY 11, 1965.

To: The Commission.

From: Mary Gardiner Jones, Commissioner.

Subject: Idaho Beverages, file No. 641 0260.

This matter concerns the staff recommendations, with which I concur, for closing the Commission investigation of Idaho Beverages for alleged discriminatory acts and false and misleading advertising in connection with the sale of soft drinks on grounds of insubstantiality of the practice and abandonment.

The staff recommends against sending a closing letter to the proposed respondent. I disagree. Idaho Beverages evinced willingness to take a consent order and stated to Commission attorneys that it had discontinued the challenged practices. In view of this statement, it seems to me that we should in fact send a closing letter to Idaho stating specifically that the matter is being closed because of and conditioned upon Idaho's abandonment of the challenged acts. My proposed closing letter to respondent is attached.

The staff recommends that a closing letter be sent to Alton Ryon, the complainant in this case, who is President of the 7-UP Bottling Company, one of Idaho's principal competitors. The staff report indicates that the information supplied by Ryon was in some case outright fabrication and the staff report conveys the impression that the staff believes that Ryon is running some kind of private vendetta against this company. Accordingly, I have doubts whether in this situation Ryon is entitled to any closing letter.

Accordingly, I move that the investigation be closed as recommended by the staff, that the proposed respondent be sent a closing letter in the form attached and that no closing letter be sent to Ryon, the complainant.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re File No. 641 0260.

Mr. JOHN H. EVANS,
Vice President and General Manager,
Idaho Beverages, Lewiston, Idaho.

DEAR MR. EVANS: The Commission has conducted an investigation involving your alleged violation of the Federal Trade Commission Act and the Clayton Act, as amended, through alleged discriminatory practices and other unfair acts and practices in commerce in connection with the sale of soft drinks.

On the basis of your statements made to Attorney Walter W. Harris of our Seattle Field Office in August 1963, that the practices under investigation have been discontinued, the matter has been closed. In the event these practices should be reinstituted, the Commission may take such further action as the public interest may require.

Sincerely,

JOSEPH W. SHEA, *Secretary.*

MARCH 19, 1965.

Re File No. 611 0556, Sanna Dairy Products, (Sanna Dairies, Inc.), Madison, Wis.

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I move that this be treated as a no-agenda matter, and that the staff recommendation, in which I concur, be approved.

MEMORANDUM

JANUARY 28, 1965.

To: Commission. John W. Greene, Attorney.

From: Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: File No. 611 0556, Sanna Dairy Products (Sanna Dairies, Inc.), Madison, Wis.—Closing recommended, insufficient evidence of violation: Discrimination in advertising and promotional allowances, section 2(d), amended Clayton Act; dry and canned dairy products.

This matter arose out of the Commission's Section 6(b) investigation of suppliers of large grocery chains operating in the States of Florida, Georgia and South Carolina, looking towards possible violations of Section 2(d) of the amended Clayton Act. The period covered by the Commission's Order to File Special Report was *calendar year 1960*.

The Special Report, dated July 7, 1961, subscribed and sworn to by A. Q. Sanna, Vice President, Sanna Dairies, Inc., discloses that proposed respondent sold only to grocery chains and wholesalers. Annual sales for 1960 amounted to \$11,447,600.

Proposed respondent participated in solicited special promotions with Winn-Dixie Stores, Inc., on four occasions during the year in the way of free cases of its product Sanalac for gift baskets used in new store openings for a total dollar value of \$163.28; and one "bonus" trading stamp promotion in November to the extent of \$143.30.

While the report shows some substantial amounts paid to Food Fair Stores, Inc., Miami; Winn-Dixie Stores, Inc., Miami; Colonial Stores, Inc., Greenville and Atlanta; and Publix Super Markets, Inc., Lakeland, the report states these all were proposed respondent's own programming and that food brokers representing proposed respondent were instructed to offer all customers in their markets the same or equivalent promotions on a proportionately equal basis. It is stated these instructions were transmitted verbally.

Also, the report states with respect to customers, other than the listed chains, no formal record is kept which documents each offer. "It has been the Corporation's policy to present for buyers' consideration two or three times a year merchandising promotions such as those [offered to the listed chains] or their equivalent."

In the circumstances, it is recommended that this matter be placed in a closed status at this time, subject to the right of the Commission to reopen the same if future conditions warrant. Also, since this inquiry was of a very limited nature, it is recommended that no closing letter be sent.

Since there appears there are no major involvements with open buyer matters, it would appear that the Commission's directive of April 17, 1962, that closed supplier cases be related to buyer files, is not applicable here.

Respectfully submitted.

JOHN W. GREENE.

Attorney, Division of Discriminatory Practices.

Approved:

FRANCIS C. MAYER.

Chief, Division of Discriminatory Practices.

CECIL G. MILES.

Acting Director, Bureau of Restraint of Trade.

JANUARY 23, 1967.

Re Long Island Auto Parts Warehouse, Inc., file No. 661 0129.

From: Mary Gardiner Jones.

To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

JANUARY 23, 1967.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Long Island Auto Parts Warehouse, Inc., file No. 661 0129.

This matter involves alleged violation of Section 2(f) of the Clayton Act through inducement of discriminatory prices via an auto parts buying group. The staff has obtained an affidavit of discontinuance and recommends that the file be closed.

The subject of the investigation was organized in 1965 by twelve auto parts jobbers as a means of obtaining lower prices from suppliers. Although a warehouse was maintained, only a single salesman and a truck was operated. Non-stockholders were allowed to make purchases but no real efforts was made to solicit their business.

As a result of the investigation, the following changes have been made in the operation:

- (a) Non-stockholder jobbers will receive the same prices as stockholders;
- (b) Any jobber will be allowed to purchase stock in the corporation although no one will be allowed more than 10 shares;
- (c) The corporation policy will be to actively solicit the business of other jobbers;
- (d) The warehouse and sales force will be expanded to become a legitimate warehouse distributor;
- (e) Drop shipments will only be used in very real emergencies;
- (f) Jobber stockholders will receive no dividends or preferential treatment of any kind from the corporation.

The above arrangements are incorporated into the affidavit of discontinuance. The staff observes that all parties were extremely cooperative throughout the inquiry and appear to be acting in good faith.

Under the circumstances, I agree with the staff that the affidavit of discontinuance is adequate for disposition of the matter and move that the file be closed.

MAY 19, 1969.

Re Pacific Gamble Robinson Co., Docket No. C-1177.

(For information)

From: Commissioner Jones.

To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MAY 19, 1969.

To: The Commission.

From: Mary Gardiner Jones.

Subject: Pacific Gamble Robinson Co., Docket No. C-1177.

Staff urges that the Commission retract its instruction to notify respondent in this matter that the Commission cannot determine compliance from the report and that therefore it is instituting a compliance investigation.

Staff had originally recommended that the Commission approve respondent's compliance report *but that* simultaneously with such approval, it be authorized to conduct a compliance investigation. Staff argues that the Rules provide that the Commission will review compliance reports and advise respondents "whether the actions set forth *therein* evidence compliance . . ." (§ 3.61(a)). Staff believes that the word "therein" requires the Commission to predicate its action on a compliance report solely upon the matters contained in the report.

I have the feeling that the problem posed by the staff in the attached memorandum appears to be primarily semantic. I still believe that it is improper for the Commission to accept a report which it has sufficient doubts about to recommend to the Commission that it authorize a compliance investigation. If staff's doubts turn out to be true, the Commission would look very inconsistent in having accepted the report. I do not believe the Commission's instructions should be rescinded.

JUNE 23, 1965.

Re Abbott Laboratories, File 621 0127
 From : Everette MacIntyre, Commissioner.
 To : Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

JUNE 23, 1965.

MEMORANDUM

To : The Commission.
 From : Everette MacIntyre, Commissioner.
 Subject : Abbott Laboratories (Abbott), File 621 0127.

The Commission resolution of July 13, 1961, directed investigation of the pricing practices, etc. of corporations engaged in the manufacture and sale of drugs and drug products. Abbott, with other corporations, filed a special report. Much of the material in the file was furnished in response to the Section 6 questionnaire. Supplemental field investigation was also conducted by the Chicago Office.

Abbott is an Illinois corporation engaged in the manufacture and distribution of drugs, drug products, pharmaceutical and agricultural chemicals, and chemical intermediates. It is one of the largest domestic drug manufacturers, with sales averaging approximately \$79,000,000 annually (1960).

The investigation established that Abbott classifies its direct customers based on total purchase volume as either "D", "A", or "F" accounts, and designates its products as "A", "B", and "C". Its pricing policy to retail druggists follows: "D" customer, 40% off list on "A", "B", and "C" products; "A" customer, 40% off list on "C" products, 40% off list and a cumulative discount of 10 to 15% on "B" products, and 40 and 15% off list on "A" products; and "F" customer, 40% off list on "C" products, and 40 and 15% off list on "A" and "B" products. The above cumulative discounts applicable to "A" customers on the purchase of "B" products are as follows:

	Percent
0 to 299-----	0
300 to 599-----	10
600 to 999-----	11
1,000 to 1,999-----	12
2,000 to 2,999-----	13
3,000 to 3,999-----	14
4,000 and over-----	15

The staff notes that it is apparent from Abbott's pricing policy that price differences exist between the various retail customer classifications on certain categories of products. However, no injury interviews have been conducted and no determination has been made as to the actual dollar amount on which price differences are involved between competing retailers. The most aggravated feature of the pricing policy is that it apparently ships to the individual outlets of chain drug stores and combines the purchases of each unit for the purpose of determining customer classification and applicable discounts. Under this policy most drug store chains would receive the maximum discounts, while the individual outlet to whom shipment was made did not independently qualify. The resulting price differences under this policy undoubtedly could not be cost justified as shipments are made in various, and frequently in minimal, amounts to chain outlets.

On July 31, 1964, the Secretary of the corporation executed an affidavit of discontinuance (see copy attached), which according to the staff clearly corrects the most objectionable features of the pricing policy.

Based on the assurance of discontinuance and the apparent lack of reliable evidence that substantial injury to competition resulted from proposed respondent's classification of retail customers, the Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed and that closing letters be omitted.

I concur in the recommendation and so move.

EVERETTE MACINTYRE, *Commissioner*.

MAY 28, 1964.

Re Holloway House, Inc., file 611 0538.

From : Everett MacIntyre, Commissioner.

To : Bureau of Restraint of Trade.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed based on insufficient evidence of violation.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MAY 28, 1964.

MEMORANDUM

To : The Commission.

From : Everett MacIntyre, Commissioner.

Subject : Holloway House, Inc. (Holloway), file 611 0538.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed based on insufficient evidence of violation.

The matter was initiated under a 6(b) investigation of the suppliers of grocery chains operating in Florida, Georgia, and South Carolina, looking towards possible violations of Section 2(d) of the Clayton Act, as amended. The special report filed by Holloway disclosed that the corporation used a formal cooperative advertising agreement and periodic promotions involving particular products.

In reviewing the report, the staff is of the opinion that there is insufficient evidence in the file to support a violation of Section 2(d) of the Clayton Act, as amended, and recommends that the file be closed, and that closing letters be omitted.

I concur in the recommendation and so move.

EVERETTE MACINTYRE, *Commissioner*.

MAY 28, 1965.

Re McKesson & Robbins, Inc., file 621 0283.

From : Everett MacIntyre, Commissioner.

To : Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

To : The Commission.

From : Everett MacIntyre, Commissioner.

Subject : McKesson & Robbins, Inc. (McKesson), file 621 0283.

This matter involves McKesson's drug wholesaling operation which accounts for approximately two-thirds of the company's total annual gross volume of approximately \$700,000,000. It has been alleged that McKesson is engaged in territorial price discrimination, and price discrimination between competing customers in violation of Section 2(a) of the Clayton Act in the wholesale distribution of pharmaceuticals and drug sundries. The Bureau of Field Operations recommends that complaint issue, while the Bureau of Restraint of Trade recommends that the file be closed because of insufficient evidence.

Concerning territorial price discrimination, McKesson's wholesale drug outlets in Lexington, Kentucky, and Cincinnati, Ohio, are distributing "discount sheets" to all retailers in this area, offering 10% discounts from pharmaceutical prices on fast moving pharmaceuticals and sundries. These discounts are effective for two weeks and are superseded by another discount offering. The wholesale drug divisions adjacent to Lexington and Cincinnati located in Huntington, West Virginia, and Louisville, Kentucky, do not circulate comparable discount sheets. The Bureau of Field Operations takes the position that the sales of the discounted items in Cincinnati and Lexington are subsidized by sales of identical items at normal or higher prices by the Huntington and Louisville divisions. The Bureau of Restraint of Trade disagrees with this theory and concludes that the facts do not support the "subsidy" theory applicable to previously decided territorial pricing cases, as the discounts are not subsidized by sales of the same items at higher prices by other divisions but rather are subsidized by sales of other items at regular prices; and that the evidence in the file is insufficient to establish anticompetitive effects, as competing wholesalers in the area claim that the only loss of sales they suffered was attributed to the establishment of new wholesale drug outlets in the area or by the effects flowing from McKesson's so-called "Cooperation Plus" or "CP" Plan which permits customers to earn quarterly rebates.

The investigation of the "CP" Plan shows that normally retail druggists order their requirements by making several telephone calls per week, each time ordering a few items for immediate delivery. McKesson's salesmen also make regular calls on retailers and assist the customers in anticipating immediate needs and in writing orders. The plan was initially offered only to McKesson's largest customers and was offered to smaller customers only after the passage of several months and the institution of the Commission's investigation. Recently Counsel for McKesson have advised the staff that the company has now adopted and implemented a policy of offering the plan to all customers simultaneously wherever it is introduced by one of the wholesale divisions. Under the plan, the customer is furnished with a 24 page form on which he can order any of 2,400 fast moving items. Customers are allowed to mail one "CP" Plan order to McKesson every two weeks and deliveries are made within three days. At the end of each quarter, customers are given a rebate determined by the average line extension of their orders. Line extension is based on the number of units ordered on the invoice line and the unit price. The maximum rebate possible is 10% based on a full line basis, while the average discount earned by customers not using the plan is $2\frac{1}{2}\%$ or a price differential of $7\frac{1}{2}\%$. On an individual product basis, the maximum rebate is 10% as compared to a customer not participating in the plan who earns a 2% discount on items not subject of any promotional discount or a difference of 8%.

McKesson takes the position that the rebates are cost justified, while the Division of Accounting concludes that McKesson has failed to demonstrate cost savings under accepted accounting principles. The legal staff of the Bureau of Restraint of Trade, however, takes the position that there is a substantial probability that McKesson can justify these rebates and sets forth its reasoning on pages 6 and 7 of its memorandum. Under the "CP" Plan, a cumulative volume discounts was included by which a customer in the highest bracket could earn a 2% greater rebate than a customer in the lowest bracket, but with the same line extension. There is also a middle bracket carrying a 1% differential as compared to the other brackets applicable to the same line extension. Although not developed in the file, the legal staff is of the opinion that only large customers such as drug chain warehouses can reach the top bracket, while most other customers can reach the middle bracket by purchasing exclusively from McKesson. The legal staff is not satisfied that this cumulative volume discount is subject to the same cost justification as the basic rebate predicated on average line extensions, although McKesson claims it is, arguing that there are cost savings in dealing with high volume purchasers. The legal staff disposes of this pricing practice based on the relatively small price differential (2% at most) which can arise after considering the cumulative volume feature independently of the overall "CP" Plan; and that most of McKesson's suppliers engage in dual distribution, selling direct to many of the largest retailers in the industry. Thus, in a limited way, McKesson is forced to compete with its own suppliers, and there is little doubt that many of the larger retailers buying under the "CP" Plan would otherwise buy direct from McKesson's suppliers and derive a price advantage over

the other customers irrespective of existing pricing practices. The Bureau of Restraint of Trade concludes that there is insufficient evidence to warrant the issuance of complaint and recommends that the file be closed.

It is difficult for me to agree with the conclusions reached by the Bureau of Restraint of Trade and its recommendation that the file be closed. However, due to that Bureau's disagreement with the Bureau of Field Operations on a number of vital points, I am of the opinion that it would be unwise to undertake the issuance of a complaint here. Also, I have noted the words of caution set forth in the proposed closing letter the Bureau of Restraint of Trade has submitted. I think these words of caution should be included in any closing letter. In view of all of these circumstances, I move that the file be closed and that appropriate closing letters along the lines suggested, be sent to the parties involved.

EVERETTE MACINTYRE, *Commissioner.*

MARCH 12, 1965.

MEMORANDUM

To: Commission.

From: Stanley M. Lipnick, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: File No. 621 0283, McKesson & Robbins, Inc., closing recommended, insufficient evidence of violation. Section 2(a), Clayton Act, as amended; territorial price discrimination and price discrimination between competing customers. Pharmaceuticals and drug sundries.

Proposed respondent is McKesson & Robbins, Inc., (hereinafter referred to as McKesson), a Maryland corporation with its principal office in New York City. McKesson manufactures pharmaceutical and proprietary drug products, and is engaged in the wholesale distribution of pharmaceuticals, drug sundries, chemicals and liquor. Total gross sales exceed \$700,000,000 annually, and consolidated net income exceeds \$9,000,000 per year. This matter is concerned with McKesson's drug wholesaling operation which accounts for approximately two-thirds of the company's total gross volume.

The Bureau of Field Operations, after a fairly comprehensive investigation, has recommended that complaint issue charging McKesson with violating Section 2(a) of the amended Clayton Act in two respects: (1) by selling certain products at different prices in different areas thereby injuring primary line competitors (i.e., other drug wholesalers); and (2) by granting rebates to certain retailer customers, thereby injuring customers competing with the recipients. As the caption indicates, we disagree with that Bureau's recommendation. For convenience, the two aspects of this matter will be discussed separately.

TERRITORIAL PRICING

The alleged territorial pricing violation may be summarized as follows. For some time McKesson's divisions (i.e., wholesale drug outlets) in Lexington, Kentucky and Cincinnati, Ohio have been distributing "discount sheets" to all retailers in their respective areas, offering 10% discounts from normal prices on various fast-moving pharmaceutical and sundries. Each discount sheet is in effect for about two weeks, after which it is superseded by another discount offering.

The Lexington division usually offers thirty items in each sheet, while the Cincinnati division generally offers ninety. Each McKesson division regularly carries about 25,000 different items, 2,400 of which are considered fast-moving. There is no question that the discounted items are among the best-selling products in McKesson's stock. The list of items most frequently discounted by the Lexington and Cincinnati divisions includes Alka Seltzer, Breck shampoo, Brylcream, Bufferin, Kodak film, Bayer aspirin, Kleenex, Kotex, Tampax, Pepsodent, Anacin, Rise, G.E. and Sylvania flashbulbs, Murine eye drops, Vitalis, Bromo Seltzer, Dristan, Librium, Miltown, Diuril, and Achromycin.

Two other McKesson drug divisions selling in adjacent territories and located in Huntington, West Virginia and Louisville, Kentucky refrained from circulating comparable discount sheets. The theory underlying the recommendation of the Bureau of Field Operations that complaint issue is that sales of discounted items at low prices by the Cincinnati and Lexington divisions are subsidized by sales of the same items at normal (higher) prices by the Huntington and Louisville divisions.

We conclude that the facts of this matter are not within the "subsidy" theory underlying previously decided territorial pricing cases and that the evidence obtained is insufficient to establish the requisite anticompetitive effect.

The managers of the Cincinnati and Lexington divisions stated that they authorized circulation of the discount sheets to build increased volume, to gain new customers, and to divert business from competitors, for the ultimate purpose of increasing net profits. The managers of the Huntington and Louisville divisions professed themselves satisfied with their respective volumes and net profits and consequently said they had no reason to circulate discount sheets.

Profit-loss figures in the files indicate that the volumes of the Lexington and Cincinnati divisions did indeed increase after the introduction of discount sheets and that net profits also increased although at a somewhat slower rate.

We think these increases in gross sales accompanied with slower increases in net profits indicate that the discount sheets are really a type of "leader" selling. This approach was mentioned by the managers of both divisions involved who said the main purpose of the discount sheets was to induce retail druggists to buy other items from McKesson at regular prices. We conclude that the discount prices are not subsidized by sales of the same items at higher prices by other divisions, but rather are subsidized by sales of other items at regular prices by the discounting division. This approach is further supported by interviews with retail druggists, several of whom said they were told by McKesson salesmen that they could not buy discounted items unless they bought other items simultaneously and that, when they continued to order only discounted items, McKesson stopped sending them discount sheets.

We therefore conclude that whatever competitive injury may be caused to McKesson's competitors, although the direct result of the low prices, cannot be said to result from price discrimination since subsidy of the low prices by the higher prices of the same items elsewhere can neither be proved nor inferred.

It is also noted that we are not satisfied that the information in the files would be productive of sufficient evidence of injury to competition on the primary line. Several competing wholesalers stated that the only loss of sales they suffered was attributable solely to the establishment of new wholesale drug outlets in the area. Other competing wholesalers also increased their own gross sales during this period, since wholesale drug sales generally have been increasing. The only drug wholesalers claiming the loss of substantial business to McKesson referred to the business of certain chains which was diverted, not by the discount sheets which the chains did not use, but rather by the McKesson's rebate plan which will be discussed later.

It is further noted that circulation of the discount sheets by McKesson's Cincinnati and Lexington divisions represent the first price competition among drug wholesalers in those areas. Previously all drug wholesalers had adhered to suppliers' suggested resale prices, and most wholesalers in the area made up their price lists simply by binding together sheets supplied by their own suppliers which contained the suppliers' suggested resale prices. In fact the applicant, a wholesaler competing with McKesson's Lexington division, had never even advised his customers of promotional discounts and free goods offered by suppliers until McKesson began using discount sheets. Now the applicant circulates mimeographed sheets to his customers listing special supplier deals.

SECONDARY LINE DISCRIMINATION

This aspect of the investigation involves the "Cooperation Plus" or "CP" Plan by which customers can earn quarterly rebates from McKesson. Although the investigation itself was directed solely to the CP Plan in use by the Lexington and Cincinnati divisions, we have been informed by McKesson's house counsel that the CP Plan is in use by many other McKesson divisions as well and is expected ultimately to be in general use by substantially all McKesson wholesale drug divisions.

Retail druggists' normal method of ordering consists basically of making several telephone calls per week each time ordering a few items as needed for immediate delivery. McKesson's salesmen also make regular calls on retail druggists at which time they assist the customer in anticipating immediate needs and in writing orders. Under the CP Plan, the customer is given a twenty-four page form on which he can order any of 2,400 fast moving items. CP orders are filled out by the customer and mailed to McKesson. Customers are permitted to send one CP order every two weeks, and McKesson requires three days in which to make delivery.

At the end of each quarter customers using the CP Plan are given a rebate determined by the average line extension of their CP orders. (Line extension is the product of the number of units ordered on the invoice line and the unit price.) Orders submitted on CP forms do not qualify for the discounts which are extended to customers purchasing regularly. Those discounts include promotional discounts granted by McKesson's own suppliers, a 2% cash discount granted by McKesson, and the 10% promotional discounts granted by the discount sheets which have already been discussed. The maximum rebate possible under the CP Plan is 10% of CP purchases.

We are satisfied that the CP Plan has resulted in sales of products of like grade and quality to different customers at different prices. The maximum price discrimination may be stated, alternatively, as follows:

1. On a full line basis, the maximum CP rebate is 10%, while the average discount earned by customers not using the CP Plan is $2\frac{1}{2}\%$, a difference of $7\frac{1}{2}\%$.
2. On an individual product basis, the maximum CP rebate is 10%, while a customer not participating in the CP Plan earns a 2% cash discount only on items not the subject of any promotional discount, a difference of 8%.

The evidence now in the files of injury to competition among competing CP and non-CP customers is weak. However, we are satisfied that sufficiently probative evidence is readily available on this point. Although a few of McKesson's competitors claimed to have lost some accounts because of the CP Plan, the evidence now in the files does not satisfy us that primary line injury can be established. Further information was requested of these competitors by this Bureau, and, from their failure to furnish it, we conclude that no further evidence on this point is available.

It is McKesson's position that the CP rebates are cost justified. The CP rebate schedule is actually based upon a cost study and purports to return to participants McKesson's cost savings. The theory used is that all costs of a wholesale drug operation may be allocated on an invoice line basis. Although this method of allocation, upon scrutiny, does not conform to accepted cost accounting principles in some respects, it is in common use among drug wholesalers and has been used for all purposes by McKesson for many years prior to formulation of the CP program.

A McKesson division planning to introduce CP to its customers computes its cost of doing business on an invoice line basis by dividing total operating costs for the most recent year by total invoice lines handled during the year. The result is a computed dollar cost of doing business per invoice line. The division next computes its average gross markup on merchandise, approximately 20%, from which is deducted the net profit rate desired by the manager (usually about 3%—4% of sales). The CP schedule is then calculated on a basis which will rebate to the customer all computed gross profits in excess of McKesson's computed cost per line plus desired net profit. The minimum CP rebate is set at 3% because customers not using CP earn an average discount of $2\frac{1}{2}\%$ without incurring the inconvenience of ordering discounted items only once every two weeks.

McKesson has submitted various accounting data in support of its claim of cost justification. The Division of Accounting has studied McKesson's submission and concludes that McKesson has failed to actually demonstrate cost savings measured in accordance with accepted accounting principles. The three basic objections to McKesson's submission are:

1. Some 24 expense items are not fully or in part allocable on an invoice line basis.
2. Some 6 expense items are totally unrelated to the distribution of merchandise.
3. State and local income taxes are included as expense items but are not expense items at all since they are a distribution of profits.

Despite the failure of McKesson to make an actual showing of cost justification at this time, it is our conclusion that, in the event of litigation, there is a substantial probability that McKesson could cost justify its CP rebates. We base that conclusion on the following:

1. Many of the costs incurred by McKesson are properly allocable on an invoice line basis. Therefore, McKesson would doubtless be able to demonstrate some cost savings in handling large line extensions as compared to low line extensions.
2. The CP Plan generates some cost savings which are unstated by McKesson's computation based solely on invoice line allocations. For example non-CP orders

are placed for immediate delivery, while CP orders are placed for three day delivery, with customers instructed to mail their orders in such a manner that the three days for filling will fall in the middle of the week rather than on Monday and Friday which are peak days. Thus, McKesson is able to fill CP orders during slack time, not only because they are scheduled for normally slow days, but also because they may be filled during lulls in the day.

In this regard, we are inclined to resolve doubts in McKesson's favor for two reasons. First, the CP Plan is based on a cost study, made in advance, and based on a method of accounting in general use in the industry as well as by McKesson itself in its general operations. Although the technical adequacy of the study is open to question, we consider these circumstances much more deserving of all possible favorable consideration than the usual price discrimination situation before the Commission where prices are rarely if ever predicated in advance upon any concept of cost saving. Second, McKesson has taken the initiative in introducing price competition to drug wholesaling. On June 17, 1964, McKesson's counsel submitted additional information to us including current lists of customers of the Lexington and Cincinnati divisions participating in the CP Plan. The large number of customers listed is an indication that the CP Plan operates to extend to retailers generally lower prices than were available previously. We think this should be encouraged by the Commission, particularly since many of the larger drug retailers buy much of their inventory directly from McKesson's own suppliers, thus placing McKesson's customers at a competitive disadvantage quite aside from price differences arising from the CP Plan.

A final factor weighing against remedial proceedings in this matter is the fact that most of McKesson's own suppliers engage in dual distribution, selling direct to many of the largest retailers in the industry. Thus, McKesson, to some extent, is forced to compete with its own suppliers. Under such circumstances, we have little doubt that many of the larger retailers buying from McKesson under the CP Plan would otherwise buy direct from McKesson's suppliers and thus would derive a price advantage over McKesson's other customers irrespective of the pricing practices of McKesson.

On the basis of the foregoing, we recommend that the files in this matter be closed, without prejudice to the Commission's right to take such future action as the public interest may require. Drafts of closing letters to McKesson and to the applicant are submitted herewith, as are the files. Because of two aspects of this matter, discussed below, the proposed closing letter to McKesson contains specific *caveats*.

The files indicate that the CP Plan, as originally introduced by the Lexington and Cincinnati divisions were initially offered only to McKesson's largest customers, and were offered to smaller customers only after the passage of several months and the institution of this investigation. We are of the view that no cost justification could succeed where the disfavored customers were denied the opportunity of generating comparable cost savings to the suppliers. However, we are advised that the CP Plan has now been offered to all customers of the Lexington and Cincinnati divisions. That advice is substantiated by lists of customers now participating in the CP Plans in use by those divisions, which lists indicate that thirty-six additional retailers have begun participating in the Lexington division's plan, while ninety-five additional retailers have been enrolled by the Cincinnati division. Those lists include most of the retailers who were interviewed by the investigating attorney as non-favored customers.

We are further advised by McKesson's attorney that the company has now adopted and implemented a policy of offering the CP Plan to all customers simultaneously wherever it is introduced. This is done by inviting all customers to attend meetings at which the CP Plan is explained by home office personnel and by encouraging salesmen to make every effort to enroll customers in the plan. In view of the fact that small customers were initially excluded from participating in the CP Plans introduced by the Lexington and Cincinnati divisions, we recommend that the closing letter to McKesson contain a specific *caveat* against such future exclusion.

The CP rebate schedule adopted by the Cincinnati division (but not by the Lexington division) includes a cumulative volume feature by which a customer in the highest bracket earns a 2% greater rebate than a customer in the lowest bracket but with the same average line extension. There is a middle bracket carrying a 1% differential as compared to the other brackets applicable to the same average line extension. Although not developed in the files, we believe that

only the larger customers, such as drug chain warehouses, can reach the top bracket; we also believe that most other customers can reach the middle bracket by purchasing almost exclusively from McKesson.

We are not satisfied that this cumulative volume feature is subject to the same cost justification considerations as the basic rebate predicated on average line extensions, although McKesson claims the contrary. McKesson's position is that there are real cost savings in dealing with high volume purchasers, although no attempt has been made to document such claim. Our recommendation that no action be taken on this aspect of McKesson's pricing is based primarily on the relatively small price difference (2% at most) which can arise by considering the cumulative volume feature independently of the over-all CP plan of which it is a part. In view of the general weakness of the evidence of competitive injury now in the files relating to the CP Plan generally, we have no sound basis for anticipating the development of persuasive evidence of a substantial anticompetitive effect flowing from 1% and 2% price differentials arising from the operation of the cumulative volume feature. It is also noted that, since the CP Plan permits the submission of orders only once every two weeks, customers maintaining higher cumulative volume probably maintain larger individual orders. On this basis, cost justification might be possible, but such an analysis, in and of itself, is considered too speculative to support a recommendation for closing absent the consideration of competitive injury noted above.

However, we do recommend that the closing letter to McKesson caution that the Commission's action is expressly predicated upon the precise facts disclosed by this investigation and that, generally, sellers have been unable to justify price differences based upon varying cumulative volumes of purchases by different customers.

Respectfully submitted.

STANLEY M. LIPNICK,
Attorney, Division of Discriminatory Practices.

Approved:

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.
CECIL G. MILES,
Assistant Director, Bureau of Restraint of Trade.
JOSEPH E. SHEENY,
Director, Bureau of Restraint of Trade.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Attention: Lawrence M. Pierce, Esq.

Re: File No. 621 0283.

McKESSON & ROBBINS, INC.,
155 East 44th Street,
New York, N.Y.

GENTLEMEN: The Commission has conducted an investigation involving your alleged violation of Section 2(a) of the Clayton Act, as amended, through alleged sales of products of like grade and quality to different customers at different prices in connection with the sale of pharmaceuticals and drug sundries.

On the basis of the information developed in the investigation, it does not appear that further action by the Commission is warranted. Accordingly, the matter has been closed. The Commission may at any time take such further action as the public interest may require.

The Commission, however, does wish to caution you that its disposition of this investigation was predicated upon the precise facts developed by its investigation. One of these facts is the information given by your counsel to Commission personnel that the Cooperaton Plus rebate plan has been offered to all customers of your Lexington and Cincinnati divisions, and that future introduction of this plan by other divisions will be accomplished by a simultaneous offering to all customers. The Commission also cautions that, while further action is considered unwarranted by the precise facts disclosed by this investigation, sellers have rarely if ever been able to defend successfully price discriminations based upon differences in cumulative sales volumes to customers.

Sincerely,

JOSEPH W. SHEA, *Secretary.*

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re: File No. 621 0283, McKesson & Robbins, Inc.

W. KELL. Co.,
Lexington, Ky.

GENTLEMEN: The Commission has conducted an investigation involving alleged violation of Section 2(a) of the Clayton Act, as amended, by McKesson & Robbins, Inc., through alleged sales of products of like grade and quality to different customers at different prices in connection with the sale of pharmaceuticals and drug sundries.

On the basis of the information developed in the investigation, it does not appear that further action by the Commission is warranted. Accordingly, the matter has been closed. The Commission may at any time take such further action as the public interest may require.

Your interest in calling this matter to the attention of the Commission is appreciated.

Sincerely,

JOSEPH W. SHEA, *Secretary.*

OCTOBER 26, 1969.

Re Corken's Inc., File 621 0873.

From: Everette MacIntyre, Commissioner.
To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

OCTOBER 26, 1964.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Corken's Inc. (Corken) File 621 0873.

Proposed respondent is alleged to be engaged in exclusive dealing, customer allocation, price discrimination, and tie-in sales in violation of Section 5 of the Federal Trade Commission Act and Sections 2(a) and 3 of the Clayton Act, as amended.

Corken is engaged in manufacturing and selling pumps and compressors used in transferring liquefied petroleum gas from railroad tank cars to other containers. Net sales during 1962, averaged \$1,250,000. Sales are made primarily through dealers, nonstocking distributors, stocking distributors, and OEM, at the following discounts: "B" Buyer (dealer), 20% discount; "C" Buyer (nonstocking distributor), 20%-15% discount; "D" Buyers (stocking distributors), 20%-15%-15% discount; and "OEM" Buyer, 20% 20% discount. Corken granted exclusive territories to seven distributors located in the United States, and allocated markets in Japan, Canada, Mexico, and Australia, notifying other distributors not to accept orders from these countries, because of servicing required by its equipment. Distributors resisted making the expenditures necessary to perform the service without assurance that they would not be called upon to service equipment which they had not sold.

Applicant is the only domestic distributor maintaining an export business, and Corken refused to fill an order received from applicant for shipment to Japan. The evidence in the file strongly suggests that each distributor granted an exclusive territory agrees not to sell Corken's products in any other distributor's exclusive territory. The staff concludes that up to the present time there has not been any actual elimination of competition because the exclusive territories generally exceed the distributor's trading areas, and distributors are averse to seek business in one another's territory.

Corken has practiced a form of tie-in selling, requiring distributors to handle compressors and pumps to the exclusion of competitive products. The staff notes that under ordinary circumstances, it would consider the practice unlawful. However, it is of the opinion that the public interest does not require the Commission to take remedial action as compressors are declining in importance because of the extension of oil pipelines and shipments are no longer made in railroad cars.

In discussing price discrimination, the staff notes that distributors having exclusive territories are granted larger discounts as an inducement to make expenditures necessary to perform the servicing of the compressors and pumps. Since Corken reserves the right to continue selling other pre-existing distributors in an exclusive territory, the functional discounts result in substantial price differentials and the disfavored distributors have been foreclosed from competing for sales to original equipment manufacturers and sub-distributors. However, the staff states that actual injury to the disfavored competitors cannot be equated with actual or probable substantial injury to competition, as Corken offered exclusive territories to all distributors on condition that they undertake the servicing of the products and the disfavored distributors refused to undertake the servicing. At present it appears that Corken is in the process of eliminating distribution through distributors who do not maintain service facilities and continues to sell them mainly as an accommodation. Purchases are declining as these distributors are switching suppliers. The staff concludes that a cease and desist order would have the effect of abruptly discontinuing these sales to the disfavored distributors and would not promote competition.

In allocating foreign markets, it appears that applicant is the only distributor engaged in the export business. Applicant has no exclusive territory and his purchases have declined as he has switched his business to other suppliers. Under the circumstances, the staff doubts that applicant will continue handling Corken equipment and hence the entry of a cease and desist order will do little if anything to promote competition.

In conclusion, the staff points out that the limited dollar volume enjoyed by Corken despite its national and world-wide distribution indicates that substantial intra-brand competition does not exist, and the investigation did not disclose examples of direct and intense intra-brand competitive relationships. Such "secondary line" competition as was disclosed occurs on the fringes of distributors' trading areas or in the course of incidental sales activity.

Based on these circumstances, the staff recommends that the file be closed and that closing letters be omitted.

I concur in the recommendation and so move.

EVERETTE MACINTYRE, *Commissioner.*

AUGUST 14, 1964.

Re Unnamed Liquor Distilleries & Wholesalers of New Orleans, File 621 0873.
 From: Everett MacIntyre, Commissioner.
 To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

The Division of Discriminatory Practices, Bureau of Restraint of Trade, recommends that the file be closed based on insufficient evidence of jurisdiction. The matter involved alleged violations of Section 2(a) and (f) of the amended Clayton Act. The investigation was initiated upon the complaint of the President of the Alcohol Beverage Retailers Association of Louisiana, Inc., a trade association of small retailers. The gravamen of the complaint was that large retailers were pressuring wholesalers into granting discriminatory prices on liquor in the form of one case free with each four purchased and that the wholesalers bore part of the cost and received free goods from the distilleries, which permitted large retailers to sell liquor at prices below the small retailer's cost. The investigation failed to disclose that free goods were given by distilleries to wholesalers and passed on to specified retailers. A secondary basis for closing the file is based on the private controversy existing between the applicant and James E. Comiskey, the principal wholesaler involved. Comiskey fired the applicant after discovering that the applicant was using his status in the Comiskey organization to organize Comiskey's smaller customers into a trade association, and after Comiskey discovered that the applicant was stealing whiskey from him. Applicant was subsequently arrested and convicted of the charge. The staff also notes that the applicant filed his complaint with the Commission only after unsuccessfully petitioning the Alcohol Tax Unit of the Treasury Department, the Anti-trust Division of the Department of Justice, as well as state and local officials. Based on these circumstances, the Bureau recommends that the file be closed

and that no closing letter be forwarded to proposed respondent. See attached memorandum by the Bureau of Restraint of Trade dated June 26, 1964, and draft of a letter for the signature of the Secretary to the applicant advising him of the Commission's action.

SEPTEMBER 14, 1965.

Re E. R. Moore Co., File 631 0091.
From: Everett MacIntyre, Commissioner.
To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

SEPTEMBER 14, 1965.

To: The Commission.
From: Everett MacIntyre, Commissioner.
Subject: E. R. Moore Co. (Moore), File 631 0091.

Moore manufactures and sells or rents girls' gym suits, academic caps and gowns, and choir robes, and is charged by Harry G. Stanley, a former salesman, of violating Section 2(a) of the amended Clayton Act by discriminating in price in the sale of girls' gymwear; and violating Section 5 of the Federal Trade Commission Act by disparaging and misrepresenting Stanley's business capacity.

The investigation established that gym suits, the principal commodity involved in this case, are generally sold to school physical education directors or school bookstores by salesmen of the manufacturers. The applicant, prior to his resignation was employed by Moore as a sales representative for approximately ten years. The sales territory covered public schools in central and northern New Jersey.

In January 1962, before resigning, Stanley completed arrangements with a Baltimore manufacturer of gym suits to supply these suits under his own label. In February of 1962, Stanley began soliciting business from the same customers whom he had previously solicited on behalf of Moore. Moore sent several sales representatives into Stanley's former territory and when confronted with Stanley's lower prices, either met or went below these prices. Moore also followed this practice in meeting the competition of other competitors.

While the Bureau of Field Operations recommends that complaint issue charging violation of Section 2(a) of the amended Clayton Act, the Bureau of Restraint of Trade states that the evidence is insufficient to prove competitive injury as the file indicates that there is a lack of evidence tending to show that the sales by the applicant, attempting to break into the market, and Moore's attempting to retain its business, have had an adverse effect upon competition. Several of Moore's larger competitor's testified to the vigorous nature of the competition in the industry and that no competitive injury resulted from Moore's pricing practices.

Concerning the Section 5 charge, the investigation disclosed that Moore's salesmen in several instances made comments to their customers regarding the business ethics and abilities of Stanley. At no time were there any derogatory comments made concerning the quality of the applicant's gymwear. The Bureau states that the investigation failed to establish competitive injury resulting from the character statements made by Moore's salesmen.

Accordingly, the Bureau of Restraint of Trade recommends that the file be closed and the respective parties be advised of this action.

The age of this case is another factor which I have taken into consideration in concurring with the Bureau's recommendation that the file be closed.

EVERETTE MACINTYRE, *Commissioner*.

OCTOBER 14, 1965.

Re Dumas of California, File No. 641 0076.
From: Everett MacIntyre, Commissioner.
To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

OCTOBER 14, 1965.

To: The Commission.
 From: Everette MacIntyre, Commissioner.
 Subject: Dumas of California, File No. 641 0076.

This is another of the wearing apparel cases initiated by resolution of the Commission directing an investigation of practices employed by corporations engaged in the manufacture, purchase, sale, distribution and resale of merchandise sold in department and specialty stores. Dumas was required to file a special report relating to its advertising and promotional practices which possibly were violative of Section 2(d) of the amended Clayton Act.

Dumas reported that during 1959-1962 the corporation had an advertising program with the Milium Division of Deoring-Milliken Company, a supplier, but did not disclose the details of the program as a corporate officer who handled it was deceased and corporate records were unavailable. Subsequently, a field investigation established that Dumas had participated in and advertising allowance program with the Milium Division for several years. Milium agreed to pay 25% of the cost of advertisements placed by retail customers of Dumas, who agreed to include the Milium trade name in the advertising copy. Examination of corporate records and documents showed that Dumas had offered the Milium program to all competing customers. It was also established that during the calendar year 1963 up to the present time, Dumas had not participated in any advertising program and had not granted any advertising or promotional allowances.

Accordingly, the staff recommends that the file be closed and that counsel for Dumas be advised of this action. I concur and so move.

EVERETTE MACINTYRE, *Commissioner*.

MAY 28, 1969.

Re American Radiator & Standard Sanitary Corporation, file 651 0093. Day & Night Manufacturing Co., Division of Carrier Corp., file 651 0094. Crane Co., file 651 0095.

From: James M. Nicholson.
 To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

The staff's proposed closing letter to Carrier Corp. contains this intriguing language—

The Commission has rejected your Assurance of Voluntary Compliance as legally insufficient and has determined that no further action is required at this time."

This is no way to impress a proposed respondent with the gravity of submitting a "legally insufficient" Voluntary Assurance. I move for the stronger sanction—no closing letters at all, to anyone. This would be an appropriate finale to this classic piece of trivia. A case initiated on the basis of an irresponsible (and apparently unevaluated) complaint, a case subsequently over-investigated in Colorado, New Mexico and other picturesque settings, and a case which ultimately wasted over 2,500 man-hours.

My sympathies are all with Miss Kloze who did yeoman service in disposing of (she did *not* initiate) these five year old dogs.

JUNE 2, 1969.

Re File No. 661 0058. Armour Agricultural Chemical Co.
 From: Commissioner MacIntyre.
 To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

JUNE 2, 1969.

MEMORANDUM

To : Commission.

From : Everett MacIntyre, Commissioner.

Subject : File No. 661 0058, Armour Agricultural Chemical Co.

A lengthy investigation was conducted here in connection with alleged selling below cost by Armour Agricultural Chemical Company, a former wholly owned subsidiary of Armour & Co., Chicago, Illinois. It was developed that, although Armour reduced its price in 1965 in a restricted area in South Central Kentucky to \$4.00 per ton, the reduced price was not below Armour's cost for relevant grades and, in the view of the staff investigator, not unreasonably low. The price reduction was feathered so that apparently no "secondary" line injury between competing customers occurred.

The investigation uncovered no direct evidence of predatory intent, and such intent, it seems, cannot be inferred from the circumstances. There is evidence that competitors of Armour, Commonwealth and possibly Southern States Cooperative, may have suffered some loss of sales and reduced profits, but that is about the sum of the showing relating to injury. Additionally, the area price reduction was in effect only for a short time in a single selling season. Thus, the possibility of showing statutory injury seems slight.

At the same time, the file reveals that Armour sold the U.S. assets of its agricultural chemical subsidiary to U.S.S., Agri-Chemicals, Inc., a wholly owned subsidiary of United States Steel Corp. There is also evidence that the applicant (Commonwealth) sold his business to the Borden Company.

In all the circumstances stated, there would appear to be no basis for pursuing this matter further. I therefore move the staff's recommendation to close the file, and to withhold the sending of closing letters to either the applicant or the proposed respondent.

I move the approval of the attached letter to Congressman Stubblefield in lieu of that prepared by the staff.

EVERETTE MACINTYRE, *Commissioner.*

FEDERAL TRADE COMMISSION,
Washington, D.C.

Hon. FRANK A. STUBBLEFIELD,
House of Representatives,
Washington, D.C.

Re File No. 661 0058.

DEAR CONGRESS STUBBLEFIELD: This is in reference to the complaint of Mr. Josep A. Hicks, President of Commonwealth Fertilizer Company, Russellville, Kentucky, which was forwarded by your office.

The Commission has completed its investigation of the questionable pricing practices allegedly engaged in by the Armour Agricultural Chemical Company. The facts as developed by the investigation do not warrant corrective action on the part of the Federal Trade Commission.

Additionally during the interim, Mr. Hicks sold his business to the Borden Company and Armour disposed of its business to the United States Steel Corporation.

In view of these developments our files in this matter have been closed.

With kind regards, I remain

Sincerely yours,

JOSEPH W. SHEA,
Secretary and Congressional Liaison Officer.

AUGUST 6, 1968.

Re File 661 0118, in the Matter of Allied Supermarkets, Inc., Humpty Dumpty Supermarkets, Inc.

I move that this matter be returned to the staff for revision of respondent's affidavit of voluntary compliance relating to violations of Section 5 of the Federal Trade Commission Act involving the inducing or receipt of promotional allowances violative of Section 2(d). I believe that respondent's specific denials that it violated the law should be eliminated from the affidavit. These state as follows:

Humpty Dumpty Super Markets entered into the aforesaid contracts and received promotional considerations from its suppliers in reliance upon and in the belief that the considerations furnished or their equivalent, were in fact being made available upon proportionately equal terms to the competitors of Humpty Dumpty, or to the independent wholesalers servicing such competitors.

From : Everette MacIntyre, Commission.
To : Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved :

Humpty Dumpty denies that it knowingly received discriminating allowances or that such receipts (if any there were) constitute a violation of Section 5 of the Federal Trade Commission Act or of any other law or statute of the United States. If, however, any considerations received by Humpty Dumpty were discriminatory, they were received inadvertently and not in violation of any law. (Emphasis supplied)

Such self-serving statements in my view make the assurance internally inconsistent since respondent in effect promises to stop practices which it claims it has never engaged in. Respondent's interests are adequately and appropriately safeguarded by the following statement in paragraph 9 of the affidavit :

The within information is furnished for purposes of voluntary settlement only, does not constitute an admission of liability and shall not be used as evidence or have any legal effect in any legal or administrative proceeding whatsoever.

JANUARY 28, 1969.

Re Interstate Bakeries Corporation and Continental Baking Co., file No. 661 0116.
From : James M. Nicholson.
To : Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See Memorandum attached.

JANUARY 28, 1969.

MEMORANDUM

To : The Commission.
From : James M. Nicholson.
Subject : Interstate Bakeries Corp. and Continental Baking Co., file No. 661 0116.

The staff memorandum vividly demonstrates one of the difficulties we have with enforcement of the Robinson-Patman Act. Whether there was an attempt to steal a part of the Sacramento (or Reno) bread market through the use of discriminatory prices, or whether, on the other hand, Safeway and other big buyers induced some suppliers to offer discriminatory prices in a manner to provide a defense to the seller from whom they intended to purchase at that lower price, we cannot tell. Perhaps the tale recounted by the staff is nothing but hard competition which we all should favor.

It does not seem to me, however, that we can ever act effectively in many areas of concern under the Robinson Patman Act. Perhaps it is true, as Commissioner MacIntyre has suggested, that the court decisions under the Act have so hampered its enforcement that it is virtually nugatory. Perhaps, as others have suggested, our efforts are aimed at the formal violations of the Act rather than at instances in which its violations have substantial adverse competitive impact and are intended, like flagrant advertising deceptions, to steal unfairly a part of a market. Perhaps the mere existence of the Act and the treble damage remedy and our fitful efforts at enforcement are sufficient to prevent gross and wide-scale violations. Despite a year on the Commission, the answers to these very challenging questions are no more clear to me today.

Whether the staff is chasing mirages or is being given a Model T to chase down an NKE, the fault does not lie with them. The policy is established by the Commission, and I, for one, am not satisfied to continue to devote the talents of the Division of Discriminatory Practices to either mirages or Model T's. We are misleading ourselves if we contend that our programs in this area are meaningful and effective exercise of our public responsibility.

With respect to this particular matter, I am in agreement with the staff recommendation that it be closed and only the closing letter recommended by the staff be sent.

AUGUST 22, 1968.

Re New York American Beverage Co., File No. 671 0159

See attached memorandum.

From: James M. Nicholson.

To: Bureau of Restraint of Trade.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

MEMORANDUM

AUGUST 22, 1968.

To: Commission.

From: James M. Nicholson.

Subject: New York American Beverage Co., File No. 671 0159.

The respondent here sells its soft drinks solely to retailers located within the State of New York, some of which apparently received promotional and other assistance while others did not. Respondent also sells the extract and certain beverages to Royal Crown, an independent bottler in New Jersey and the extract only to Little Rock Spring Water Co., an independent bottler in Connecticut. Both of these bottlers resell to retailers in their states and the evidence establishes that both are truly independent franchisees and that no indirect customer relationship exists between their retailer customers and respondent. Therefore, the staff concludes that the alleged discriminations between retailers do not come under Sections 2(a) and (d) of the Clayton Act, as amended.

I concur. Further, while the staff did not inquire into the question of injury to competition due to the jurisdictional aspects, it does not appear that the *Fred Meyer* doctrine would have application to this situation as it is not likely that competition exists between the retailers located in New York and those located in New Jersey and Connecticut. Were it otherwise, a very intriguing application of the *Fred Meyer* principle would be involved to establish jurisdiction where none existed before. I do not, however, think the existence of competition among these retailers in the sale of soft drinks is sufficiently probable to warrant further investigation along those lines.

I therefore move approval of the staff recommendation that this matter be closed and that no closing letters be sent.

MAY 28, 1968.

Hon. PAUL J. TIERNEY,
Chairman, Interstate Commerce Commission,
Washington, D.C.

Re FTC File Nos. 631 0214, Southern Railway System,
651 0145, Baldwin-Lima-Hamilton Corp.,
651 0146, W. R. Minor, Inc.
651 0147, Morton Manufacturing Co.,
651 0148, Amsted Industries Inc.,
651 0149, Standard Car Truck Co.,
651 0150, American Seal-Kap Corp., of Delaware,
651 0151, William S. Hansen,
651 0152, Crucible Steel Co. of America, and
651 0153, Universal Marion Corp.

DEAR CHAIRMAN TIERNEY: I am writing to bring to your attention action which this Commission has recently taken in connection with the several captioned matters which involve the inducement and receipt of secret or confidential rebates by the Southern Railway System from those railroad car component parts suppliers named in the captioned File Nos. 651 0145 through 651 0153.

File No. 651 0150, American Seal-Kap Corporation of Delaware, was closed without prejudice to the right of the Commission to reopen the same if and when warranted by the facts. This action was premised on the fact that, except for sales of track washer springs which product has not concerned in the investigation, American Seal-Kap had not been engaged in transacting any business with railroads or railroad car builders since November 1, 1965, when it sold all of the assets, properties and business of its Chicago Railway Equipment Company division to the Evans Products Company, Plymouth, Michigan.

In File Nos. 651 0145, W. R. Minor, Inc.; 651 0148, Amsted Industries Inc.; 651 0151, William S. Hansen, A. Stucki Company; 651 0152, Crucible Steel Co. of America; and 651 0153, Universal Marion Corp., the Commission noted its acceptance of consent agreements filed by the several suppliers concerned in these matters but returned the agreements to its staff for renegotiation in the form required by the Commission's and Rules of Practice.

Finally, in the three remaining files the Commission directed that formal complaints be served pursuant to its consent order procedure; the Commission having reason to believe that Baldwin-Lima-Hamilton Corporation and Standard Car Truck Company, File Nos. 651 0145 and 651 0149, respectively, had violated the provisions of Section 5 of the Federal Trade Commission Act, and that Morton Manufacturing Company, File No. 651 0147, had violated the provisions of Section 5 of the Federal Trade Commission Act and Section 2(c) of the amended Clayton Act.

As you are most likely aware, members of the staff of this Commission's Division of Discriminatory Practices have been conferring and cooperating concerning these several matters with members of the staff of your Commission's Bureau of Enforcement since April, 1965, only, since November, 1966, have made available to the Bureau of Enforcement copies of all memoranda of facts and/or evidentiary materials developed in the captioned investigations concerning possible violations of Section 2(c) or Section 2(f) of the amended Clayton Act by the Southern Railway System. I take this opportunity to note that the Commission shall be pleased to continue to make all of our files concerning these matters available for examination by the Bureau of Enforcement.

Each of these complaints allege that the supplier companies named as respondents made secret payments to the Southern Railway System in exchange for which Southern specified the use of respondents' products in its purchase contracts with independent railroad car builders. We have not filed a complaint against Southern Railway for its role in these arrangements. Since jurisdiction over Southern lies exclusively with your Commission, we have not pursued the question of Southern's culpability for allegedly inducing these secret rebates. Our complaints against the supplier companies are based upon a "reason to believe" that these companies have violated the law by making such payments. We are inviting your attention to this matter inasmuch as only your Commission is empowered to take any regulatory action against Southern which might be warranted in this regard.

By direction of the Commission, with Commissioner ELMAN not concurring.

PAUL RAND DIXON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington 25, February 13, 1963.

MR. WATSON ROGERS,
President, National Food Brokers Association,
Washington, D.C.

DEAR MR. ROGERS: This is in reply to your letter of January 31, 1963, requesting a statement from me as to the significance of the Commission's recent dismissal of its complaint against Edward Joseph Hruby, an individual doing business as Hruby Distributing Company. You state that various writers have referred to this as a "very far-reaching decision which would seriously damage future enforcement of the Robinson-Patman Act and particularly the brokerage section."

I am sure you are aware of the fact that the Chairman of the Federal Trade Commission, like each of the other four Commissioners, has but a single vote on adjudicative decisions. Therefore, the views which I express in this letter must be considered as the personal views of a single Commissioner and not as an official statement of the Commission. On the other hand, I was one of the architects of the majority opinion in the Hruby case, and as such I feel that I am in a particularly favorable position to explain the meaning of the agency's action.

It seems quite apparent from your letter that much of the apprehension to which you refer stems from a failure to carefully study the decision and, hence, to fully understand the actual holding in the Hruby case. Thus, in your letter you state: "It is indeed the first case we can recall in which a buyer of any kind was permitted to receive brokerage payments." If this actually reflected the holding of the Commission. It would indeed be an anomaly, for, as you know, the statute explicitly and categorically prohibits the receipt by a buyer of broker-

age, or any allowance or discount in lieu thereof, from his seller. This, however, contrary to the impression left by the dissenting opinion, was not the holding. Nor did the Commission read into Section 2(c) any test of competitive injury, or a likelihood thereof, such as that embodied in Section 2(a) of the statute, so as to modify the absolute character of Section 2(c). Neither did the Commission hold that a price concession which otherwise would be in violation of Section 2(c) was rendered lawful because of the buyer's performance of storage, warehousing, or any other services for his supplier. And, finally, this was not the first case in which a complaint charging a violation of Section 2(c) was dismissed for failure of proof in support of the charge. (See, for example, *Main Fish Company, Inc.*, Docket 6386, 53 FTC 88 (1956).)

The crucial question in every Section 2(c) case, brought against either the buyer or the seller, is whether the alleged competitive advantage accorded or received by a buyer actually involves preferential treatment effected through the payment or receipt of "brokerage, or an allowance or discount in lieu thereof," or preferential treatment in the form of a direct price discrimination cognizable under Section 2(a). And in every case, the answer to this question must be determined by an examination of all the facts, including the normal business operations of the buyer and seller, the relationships of these parties to each other and to their other customers and suppliers, and the circumstances surrounding the particular transactions. If, upon an examination of such facts and circumstances, it appears that the situation involves the use of one or more of the devices at which Section 2(c) was aimed, i.e., "dummy" brokerage setups, in which purchases are made through fictitious brokers to whom brokerage is paid by the sellers; "false" brokerage payments to some but not all of a seller's competing customers; price discounts based on direct sales allegedly resulting in savings to sellers of brokerage fees customarily paid to brokers whose services are dispensed with; or some variation of these devices, the case is one for disposition under Section 2(c), with the well-settled interpretations applicable. If, on the other hand, none of these indicia is present and an analysis of the circumstances precludes as a logical conclusion the concept or hypothesis of brokerage, or allowances in lieu of brokerage, then the case is one for treatment under Section 2(a), involving the additional burdens of proof and questions of justification and defense for which the statute provides.

Applying these principles to the Hruby case, the full scope and limited effect of the decision therein becomes immediately apparent. The un rebutted facts established in the record disclosed that Hruby was a true warehouse distributor who purchased for his own account and resold to food wholesalers with whom he did not compete. There is no indication that he ever acted or purported to act as a broker for any of his suppliers, or, indeed, that any of his suppliers ever sold through brokers in the market area served by Hruby. As sole owner of the goods he purchased, Hruby handled them just as he saw fit. He selected his own customers, set his own resale price, provided his customers with small-lot delivery services, and assumed all risks of collection and losses in transit. In short, he was an independent entrepreneur, operating at a functional level midway between the packers who were his suppliers and the wholesalers who were his customers. Quite obviously he was neither an intermediary "dummy" broker employed by another buyer as a vehicle for the receipt of brokerage nor one of a number of competing customers of his suppliers who was receiving a competitive advantage through the receipt of discriminatory allowances. Also, since he himself had never operated as a broker and his suppliers had never even sold through brokers in his market area, it is equally clear that he was not the recipient of price discounts accorded to him on the basis of savings of brokerage usually paid by the suppliers on their sales.

Thus, the legal holding in the Hruby case was simply that the receipt of a payment by a functional entity in the chain of distribution is *no per se* the receipt of brokerage, or a discount in lieu thereof, even though the amount of such payment bears the same percentage relationship to the gross price as does the brokerage that is customarily paid in the industry. The circumstances that the payment in issue in a given case has been sometimes referred to as "brokerage" and is the equivalent in amount of the brokerage customarily allowed are suggestive that the payment is a discount in lieu of brokerage, but they are not the only or conclusive factors to be weighed. In Hruby, the Commission weighed all of the facts in evidence and concluded that the nomenclature used by the parties notwithstanding, the payment to Hruby had a logical basis wholly unrelated to brokerage and that it did not constitute the receipt of brokerage or a discount in lieu thereof.

I am not able to share the forebodings of those referred to in your letter who have expressed the feeling that the decision in this case will "seriously damage future enforcement of the Robinson-Patman Act and particularly the brokerage section." This decision is, of course, a precedent, as are all judicial and administrative decisions. It is, in effect, a pronouncement that, unless subsequently modified or overruled, the Commission will in the future decide in the same manner cases presenting the same, or essentially the same, facts. It means that in deciding matters that present questions of whether payments are discounts in lieu of brokerage, the Commission will analyze carefully all of the relevant facts in seeking to determine their true character. This, it seems to me, is essential, for only by making such analyses in these cases can the Commission avoid the risk of becoming a victim of the tyranny of "ambiguous labels."

I trust that you will find these brief comments of some assistance to you and to your members. To those of your association who have a sufficient further interest, I strongly suggest that they carefully read the full decision in the Hruby case.

Sincerely,

PAUL RAND DIXON, *Chairman.*

MEMORANDUM

SEPTEMBER 26, 1967.

To: The Commission.

From: Philip Elman.

Subject: ATD Catalogs, Inc., Docket 8100.

I do not agree that the Commission should reopen its investigation of compliance with Section 2(d) of the Clayton Act by publishers of independent toy catalogs. A large amount of money has already been spent on investigating this question, and no evidence of violations has yet appeared. We have held hearings, compiled a lengthy record, and issued a policy statement setting forth our interpretation of the law as it applies to this industry. To my knowledge, the only complaint received since issuance of the policy statement has been Mr. Rosenwasser's. Despite his self-serving statements about how ATD "has managed to survive these recent harrowing years" only through "great cost and expense", the staff has advised my office that ATD has in fact done well and that its profits are about on a par with those of other catalog publishers, both independent and jobber-owned.

I think that we have already spent enough money investigating this industry, and that it would be unwise at this time for the Commission to assume the role of Mr. Rosenwasser's private enforcement agency.

MEMORANDUM

JANUARY 22, 1968.

To: The Commission.

From: Mary Gardiner Jones.

Subject: V. La Rosa & Sons, Inc., File No. 631 0266.

In the attached memorandum the staff recommends closing of its Section 2(a) investigation of V. La Rosa & Sons on the ground that La Rosa's private label sales which formed the basis for the challenged discriminations had declined to 5% of its total sales and that its lower private label prices may well have been cost justified. I agree and move the staff recommendation.

In the course of the 2(a) investigation the staff learned that La Rosa was participating in an in-store broadcasting promotion in possible violation of Section 2(e).¹ The promoter of the in-store system (Storecast) had previously submitted details of his plan to the Commission for an advisory opinion. After modifications had been made by Storecast to meet our initial objections, the plan was approved by the Commission on February 4, 1965. Our investigation has now revealed, however, that many of La Rosa's customers never received notice of the availability of the Storecast program, and many of those who did receive notice were of the opinion that the program was completely impractical for their type of grocery business, thereby raising an issue with respect to its functional availability.

¹ Actually, participating retail customers not only receive in-store promotional services (for which they pay) but also receive *payments* based on a percentage of goods purchased from participating suppliers. Hence, the program is perhaps equally, or even more appropriately, within the reach of Section 2(d).

La Rosa had apparently relied upon the favorable advisory opinion issued to Storecast. After learning that our investigation revealed many customers who had not been notified, La Rosa itself undertook to notify its customers of the availability of the plan. Under these circumstances, staff recommends closing of the 2(e) investigation with respect to La Rosa. I agree and so move.

The flaws that have been uncovered in this 2(e) investigation are certainly not peculiar to Storecast. This promoter's plan for notifying "all" retailers in an area seems to be at least as reasonable as any of the numerous three party promotional plans which the Commission has considered. The names of all grocery and drug stores appearing in the yellow pages of the telephone book are compiled, and every six months Storecast mails notices of the promotion to all such retailers. In the few areas of the U.S. in which it operates Storecast has about 33,000 retailers on its mailing list. Nevertheless, La Rosa's customer list for several Connecticut and New Jersey cities was found to contain a substantial number of accounts not appearing on Storecast's mailing list. Fifty such retailers were interviewed, and it was confirmed that they did not receive notice of the program. A substantial number of these were found to be in close geographical proximity to customers who were receiving the program.

In addition to the apparent failure of Storecast's notification method, serious doubt seems now to exist with respect to the functional availability of the Storecast promotional program.

La Rosa is a participating supplier in the Storecast program in the Northern New Jersey, New York City, Philadelphia and Southern New England areas. Presumably, La Rosa has many hundreds (probably thousands) of retail customers in these major metropolitan areas. Nevertheless, there are only *two* of La Rosa's customers participating in the Storecast promotion, both of which are chains—Acme and First National (and only 4 retailers, all chains, participating in Storecast altogether). In the light of these figures, the conclusion seems inescapable that the promotion is not a practical one for all of La Rosa's competing customers.

I have been advised that within the last three years the Commission has approved approximately 25 third-party arrangements involving in-store promotional services (typically, broadcasting or projection devices), and I believe the experience of this file casts serious doubt upon the validity of all of these programs. It seems appropriate at this time to re-examine all of these outstanding opinions. Apparently some of the early ones did not contain any qualifying language about the *supplier's* continuing obligation to see that the promotion is made available to all of his competing customers, or the potential liability of a participating retailer if he knows (actually or constructively) that the program has not been made available to competing retailers. One attempt to remedy this situation was the Commission's press release of September 21, 1965 explicitly stating these qualifications, and apparently all of the recent advisory opinions have been similarly qualified.

A further precaution had been suggested by the Division of Discriminatory Practices—namely, to require the recipient of a favorable advisory opinion, if he uses the opinion in selling his program to a supplier, to remind the supplier that he is not relieved of his statutory obligation to insure that the program is made available to all of his competing customers. In the light of facts contained in this file, I am of the view now that we should have followed this recommendation.

The staff advises that they are currently investigating the three largest in-store broadcasting promoters, including Storecast. At a minimum, those investigations should be expedited. However, staff advises that even on an expedited basis, it will be approximately 9-12 months before these are returned from the field, analyzed, and recommendations prepared for submission to the Commission. Under the circumstances, it would be useful to have the views of the Division of Advisory Opinions and the Division of Discriminatory Practices as to what immediate action might be appropriate pending the results of the current investigations. Perhaps consideration should be given to a modification of all outstanding advisory opinions on three-party promotional assistance plans, such as by requiring the promoters to notify the participating suppliers and retailers of their continuing statutory responsibilities. Another possibility would be to require "compliance reports", or status reports, of all such promoters who have received favorable advisory opinions.

I move that the staff be instructed to expedite the three current investigations. I further move that the Division of Advisory Opinions and Division of Discriminatory Practices be requested to comment at their early convenience on possible remedial action that the Commission could take now.

OCTOBER 13, 1969.

Memorandum to: Commissioner Dixon, Commissioner Elman, Commissioner MacIntyre, Commissioner Jones.

From: James M. Nicholson.

For information. Letter to Gregg Potvin, General Counsel, Select Committee on Small Business, House of Representatives.

OCTOBER 10, 1969.

GREGG POTVIN, Esq.,
*General Counsel, Select Committee on Small Business,
House of Representatives, Washington, D.C.*

DEAR GREGG: When I received a copy of Chairman Dixon's letter to you of October 2, 1969 with schedules attached, I noted that there were some speeches and circulations of mine relating to the Robinson-Patman Act and its enforcement which had not been included.

Although I am not sure that the deletions represent any substantial contribution to your present hearings, I have attempted to review my own files for additional documents. Enclosed is a schedule of all matters which I have discovered that I made any comment upon. Copies of all those documents not previously provided are also furnished herewith.

I hope these may be helpful to you.

Sincerely,

JAMES M. NICHOLSON, *Commissioner.*

RESPONSE TO QUESTION SEVEN

I. Speeches:

1. Antitrust: Sound and Fury? August 7, 1968.
2. Robinson-Patman: Magna Carta or Typhoid Mary? March 13, 1969.*

II. Special matter:

3. United Fruit Company and United Fruit Sales Corporation, File 671 0187 and Harbor Banana Distributors, Inc., File 681 0092, November 26, 1968.*
4. Thermoid Company, Docket 7032, December 31, 1968.
5. Trade Regulation Rule Proceeding Regarding Functional Discounts in the Electrical Supply Industry, February 24, 1969.
6. Guides for Advertising Allowances and Other Merchandising Payments and Services, February 26, 1969.
7. Guides for Advertising Allowances and Other Merchandising Payments and Services, May 22, 1969.

III. Agenda matter:

1. Furniture Manufacturers Association of California, File 638 7086, June 6, 1968.
2. Piedmont Auto Exchange, Inc., File 661 0052, October 2, 1968.*
3. Advertising Checking Bureau, Inc., File 693 7045, October 11, 1968.
4. Groveton Paper Co., Docket 6592, November 12, 1968.
5. The Gillette Company, File 661 0081; and Philip Morris, Inc., American Safety Razor Division, File 681 0145, March 20, 1969.*
6. Sales Opportunities, Inc., File 693 7116, April 8, 1969.
7. Scott Finks Company, Inc., et al., File 611 0813, April 10, 1969.*
8. Groveton Paper Company, Docket 6592, April 22, 1969.
9. Chesebrough-Pond's Inc., Docket 8491; The Mennen Company, Docket 8496; Eversharp, Inc., Docket 8497; White Laboratories, Inc., Docket 8500; and Philip Morris Incorporated, Docket 8505, April 22, 1969.
10. The Department Store Industry, June 9, 1969.

*Previously transmitted under separate cover.

11. Marketers of Fresh Fruits and Vegetables, File 681 0040, June 18, 1969.
13. The Circle Grocery and Delicatessen, Corres., File No. 049486, July 3, 1969.
15. Schick Safety Razor Company, Division of Eversharp, Inc., File 681 0144, August 26, 1969.
16. Joseph M. Zamoiski Co., et al., File 631 0003, September 8, 1969.

IV. Non-agenda matter:

1. Republic Appliance Corporation, et al., File 601 0030, February 23, 1968.
2. New York American Beverage Co., File 671 0159, August 22, 1968.*
3. Gross Auto Electric, Inc. (Advisory Opinion), File 693 7024, September 12, 1968.
4. An Education of the Effects of the Orders Issued Under the Robinson-Patman Act, September 8, 1969.
4. Interstate Bakeries Corporation and Continental Baking Company, File 661 0116, January 28, 1969.*
5. American Radiator & Standard Sanitary Corporation, File 651 0093; Day & Night Manufacturing Company, Division of Carrier Corp., File 651 0094; and Crane Company, File 651 0095, May 28, 1969.
6. An Evaluation of the Effects of the Orders Issued Under the Robinson-Patman Act, September 8, 1969.

ANTITRUST: SOUND AND FURY?

REMARKS OF JAMES M. NICHOLSON, COMMISSIONER, FEDERAL TRADE COMMISSION, BEFORE THE SECTION OF ANTITRUST LAW, 91ST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, AUGUST 7, 1968, PHILADELPHIA CIVIC CENTER, PHILADELPHIA, PA.

Gentlemen, for four days you have been sharing the thoughts, ideas and projections of the preeminent members of the antitrust bar. In recent weeks you have been reading in *U.S. News & World Report* and the *Wall Street Journal* about the "runaway boom in mergers;" *Time* magazine has told us that while the Justice Department grows "more cautious", the Federal Trade Commission is "more aggressive" . . . "bolder"; and Ralph Nader, testifying before a Senate Sub-Committee, has indicated that General Motors is a "classic candidate" for antitrust action, the only obstacle to which is "political." Professor Galbraith has recently stated that contemporary antitrust policy and its efforts are a "charade", while prominent and able economists vigorously dissent to that view and make cogent arguments in support of the viability of our antitrust laws. The President has appointed a special Commission to study and report on the antitrust laws, and this Section has now completed an up-dating of the 1955 Report of the Attorney General's Committee. And Thomas Austern continues to challenge the Robinson-Patman Act.

Surely these are not sleepy times in antitrust. The enforcement agencies and this bar cannot afford to feel complacent about the status of the law.

It would seem inappropriate for a postulant to digest the opinions, call attention to the errors, resolve the conflicts, and propose conclusions, particularly in front of this distinguished and informed body. But, as one who has been thrust into the middle of the controversy and turmoil, I would like to share with you some perhaps less ambitious, but I hope meaningful, and practical, observations.

I.

The antitrust imbroglio which engulfs us all is not susceptible to easy resolution. It involves not only the narrow questions pertaining to refinements of existing law, but more importantly, the broader issues relating to the overall direction and future of antitrust. Therefore, my remarks are not going to be of a "how to" or "my view" nature. If you came this morning to get some key, some insight, on whether the Federal Trade Commission might approve or settle or challenge (or perhaps even look into) that problem sitting back on your desk, you are going to be disappointed.

Professor Turner and Ed Zimmerman have brought some clarity to the law through their preliminary, albeit comprehensive, merger guides which the Department of Justice will utilize. As a part of the process of review and reevalua-

tion which I believe should characterize the continuing renewal of any institution, these merger guides make a truly meaningful contribution to the institution of antitrust. In like manner, the Commission from time to time proposes Guides that are designed to bring some measure of order out of confusion or chaos. Today, however, I hope to make a case for much broader efforts at self-renewal.

Antitrust enforcement has exhibited both success and failure, and neither can be ignored. In examining the nature and quality of the law and its enforcement, there is a temptation to dwell at length upon positive achievements. This arises, not from a need for self-justification or self-defense, but rather from a conviction that too little attention is called to the good that sound antitrust enforcement produces.

It is disturbing to realize that except for the personnel of the enforcement agencies, some legislators and this very esteemed and specialized bar, the rest of the country is not particularly interested. Antitrust is not a burning public issue. Only a rare industry-wide conspiracy or price-fixing expose is considered sufficiently newsworthy to receive other than business page coverage by the press or a brief mention on the six o'clock news.

In view of the indifference that antitrust seems to engender in the collective public consciousness, its greatest achievement in recent times must be that it has endured and remained entrenched. There is, or should be, little doubt that hard core violations will continue to be prosecuted with vigor, and as a result, there is a considerable degree of compliance on the part of business with the clearly defined areas of the law. Where the anticompetitive nature of the acts or practices has been reasonably clear and where the available remedy has been pro-competitive, knowledgeable persons should find little fault with recent enforcement efforts. It is a mistake to discount the substantial success of antitrust, and I refuse to join those who choose to do so.¹

Effective and prompt action against some of the cruder forms of anticompetitive conduct does not excuse the enforcement agencies from their failure to face up to the more difficult and sensitive problems of antitrust. We have been constantly reminded of the absence of competitive forces in some industries, of concentrated power in the hands of a few giants, and of the growing concentration of power in the hands of others. Our response, with few exceptions, has been to examine the incipient oligopoly and monopoly, and the builders of new centers of power—but the problems of existing power and concentration has received little attention. Surely, we have an obligation to determine whether our competitive economy is adversely affected by such existing concentration and power, and, if so, whether present laws are adequate to meet the problem.

To meet this challenge, I believe that a comprehensive and systematic program of legal and economic inquiry should be established at the Federal Trade Commission to serve as the foundation of enforcement activity and, if warranted, of recommendations for statutory revision. Indeed, the FTC should become the center for continuing research into all aspects of our ever-changing economic scene to assure the proper maintenance of a free market economy. With some shift in priorities, I believe the Commission could initiate such studies within its present frame work. We could also take better advantage of the wealth of talent available in the academic, financial and business communities.

The FTC has always had the authority to conduct studies and publish reports on matters within its jurisdiction, and its power to gather necessary facts is tremendous. A review of the legislative history of the Act which established the Commission discloses that economic study and reporting was viewed as one of the new Commission's primary functions.² The late Senator Kefauver observed that the Commission had performed this function with outstanding success in its

¹ I see no need to go on at length in defense of government actions that subserve the public policies to which we claim to be committed. If it is true that, in the words of Justice Black, "the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic * * * institutions," *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), then obviously anything that the enforcement agencies do to provide conditions more conducive to free interaction of market forces is in the public interest and not subject to just attack.

² See Report of the House Committee on Interstate and Foreign Commerce, Report No. 533, 63rd Cong., 2d Sess., April 14, 1914, pp. 3-4.

early days, but he bemoaned the later shift to case-by-case adjudication that brought a drying-up of the educative function that Congress had envisioned and necessarily narrowed the Commission's perspective.³

As the Mayor of San Francisco recently pointed out, examination of the particular problems in antitrust has been from too narrow a view. It is like standing atop Telegraph Hill in San Francisco "... looking through a telescope at only one of the spectacles, which in their whole make one of the world's breathtaking views."⁴

II.

After Chairman Dixon came to the Commission in 1961, he began to revitalize the role of the Bureau of Economics and to reinstitute the broader industry-wide (as opposed to the case-by-case) approach to enforcement problems. In a step toward broadening its own perspective, the Commission announced last month that it has directed its Bureau of Economics to undertake an in-depth investigation of the causes, effects and implications of the conglomerate merger movement. Incidentally, the announcement was followed the next day, I am told, by a drop in the market of some of the more glamorous conglomerate stocks. This reaction is unwarranted because the study is not intended, and should not be viewed, as the signal for an all-out offensive against the conglomerates. This is one of the unfortunate incidents of any call for a study; there will always be those who suspect that the study is sought only for the purpose of supporting arguments already accepted or conclusions already reached. Such a study would be a prostitution of the spirit of internal renewal which I feel is essential to institution of antitrust.

Our conglomerate study will include examination of the shortrun anticompetitive aspects of such mergers and the relationship between conglomerate mergers and technical or business efficiencies. It will look into the economic performance of conglomerates in the market place, and the effect of conglomerate mergers on the competitive vigor of enterprises by their change in status from independent firms to subsidiaries or divisions of conglomerates. Finally, it will examine the impact of such structural changes on long-run competitive activity. This will surely result in a report of enormous importance. It offers a perfect example of the direction in which the Commission should go.

III.

Among the studies which the Commission should direct is an evaluation of the Robinson-Patman Act and the relationship that the Act, as it has been interpreted and enforced, bears to the goals of overall antitrust policy. Surely the call for a fundamental reassessment from many men of great professional and intellectual stature requires that the Commission respond.⁵

This suggestion is certain to identify me, in the minds of some, as a foe of the Act. Although I have some concern that at times the Act is applied in a manner that may inhibit competition or penalize innovation, I am even more concerned that, as now constituted, the Act requires use of a case-by-case approach where so many of the problems are industry-wide. In such circumstances, Commission action may result in unfair competitive disadvantage to those whom we sue and frustration of Commission policy to dispose of problems on a broader basis.

I think that we have a responsibility to undertake a searching review of this law. If we find that our own interpretations of the Act have operated in a manner not intended by the Congress, we should ourselves demonstrate a willingness to reassess traditional positions. On the other hand, if we find that the Act as presently written compels us to take positions which experience and reason tell us are contrary to a sound competitive economy, we must be prepared to recommend appropriate legislative revisions. Our duty requires that we enforce the law as it is written, but it does not require that we must do so in a purely passive manner, thus denying to the Congress the benefit of our practical experience in administering the law and observing its effects.

³ Kefauver, *In a Few Hands: Monopoly Power in America*, p. 214 (1965).

⁴ Alloto and Blecker, *Antitrust in Galbraith's New Industrial State*, XIII Antitrust Bulletin 215, 217 (Spring 1968).

⁵ See, e.g., Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 Harv. L. Rev. 773 (1968), and *Isn't Thirty Years Enough*, 30 ABA Antitrust Section 18 (1966); Edwards, *The Price Discrimination Law*, pp. 627-57 (1959); Kaysen and Turner, *Antitrust Policy*, p. 239 (1965); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 Wash. L. Rev. 1 (1966).

One must keep in mind that FTC economic reports were instrumental in securing the Celler-Kefauver amendments to the anti-merger law. Moreover, a recent economic report on the Webb-Pomerene Act, which concluded that the act has failed to achieve the goals envisioned for it, demonstrates that the FTC is able to objectively review statutes which it administers.

It is not difficult to think of other areas which warrant study in the suggested program. For example, it has been asserted that very important segments of our economy are dominated by firms which, without culpable collusion, operate free of market control. These firms seem to persistently exercise extensive power over price and output levels without fear of meaningful competitive response from existing or potential rivals. If such firms can operate with substantial freedom from the discipline and direction of the market without question by the enforcement agencies, declarations concerning the claimed dedication of this country to the principles of a competitive system are rightly suspect as empty ritual or simple propaganda.

It is clear to me that the Federal Trade Commission must strive to make antitrust more relevant to our advanced industrial economy. Where violations are found, the Commission has the power under Section 5 to order far-reaching changes in the businesses and industries subject to its jurisdiction. Indeed, the outer limits of the Commission's authority under Section 5, in my opinion, have not yet been approached. So long as a given Commission action furthers the public interest in preserving a competitive market economy, I believe it will be sustained. Therefore, I think that it is within the existing authority of the Commission to create or restore the probability of competitive performance in non-competitive oligopoly industries.

To exercise this authority—and recognizing the role of market structure in determining business conduct and ultimate industrial performance—I think that the Commission should first commence studies of important and highly concentrated industries. Such studies would identify the causes for the absence of competition in the existing structures and the barriers which stand in the path of new entrants. High barriers stand as blockades to new competition and thus assure the ability of existing market members to continue to fail to innovate, to operate inefficiently or to earn abnormally high profits, all without fear of attracting newcomers. After identification of barriers through industry-wide factual inquiry, we can enhance competition by lowering barriers significantly through administrative or adjudicative action. This seems to me to be a feasible approach to cope with the ills attending the possession of undue market power, although I do not mean to suggest that other means of enforcement should not be examined.

Any such studies should examine the present, intermediate and long-term effects which the market itself may have on these industries. Consideration must be given to external forces, such as substitute products, which may be developing. The long-term significance of the industry product or service should certainly be considered. Even if the long-term prospects of a tight oligopoly are not favorable because of other forces, any study should consider the desirability of action to free the market in the near and intermediate term. And quite clearly, of course, the establishment of industry priorities must be made as part of the planning for such an effort.

In conducting industry studies, the Commission should learn and report more about the implications of a high degree of product differentiation. At this time, I would have considerable difficulty with the suggestion that advertising expenditures should be limited as a means of lowering barriers to entry.⁶ However, I do believe that the Commission should develop the facts and, if warranted, come forward with a program to deal with heavy advertising outlays that have the effect of barring potential entrants and/or eliminating, in a predatory fashion, existing competitors.

It may be deceptive, within the meaning of Section 5, to substantially exaggerate the significance of immaterial differences between like goods. When puffing is carried to extremes, it is perhaps time for advertising to return to its traditional roles—information and education. Perhaps such a program would not only enhance meaningful competition, but would also stimulate innovation and product differences of substance which would be a legitimate object of advertising emphasis.

⁶ See, e.g., Turner, *Advertising and Competition*, an address before the Briefing Conference on Federal Controls of Advertising and Promotion, June 2, 1966, reported in ATRR No. 256, p. X-1 (June 7, 1966).

In addition, it would be profitable, I believe, for the Commission to look into and report on the relationship of size to technological progress. It would be of interest to the Commission and the public to know about the comparative performance of various sized firms in discovery and implementation of innovations. I understand that some work has been done privately on the issue. I think the FTC could make a significant contribution to such a project.

Surely, if progress is our ultimate economic aim, we should get the facts about the conditions from which it is most likely to flow.

IV.

I hope these observations will contribute to a discussion and a decision to reassess our approach to certain enduring problems and to the appreciation and careful analysis of problems that are currently in the making. In areas in which economic history and empirical knowledge build a strong case for the absence of meaningful competition or indicate the development of such a condition, we do not fulfill our obligations by standing pat, or by uttering shibboleths, or by taking rash action.

We must diligently gather facts, carefully evaluate them, and swiftly and imaginatively move to remedy whatever violations they reveal. In each step we take, honesty and fairness, rather than subservience to preconceived answers, must characterize our efforts.

A competitive free enterprise system is susceptible, in the absence of a truly effective antitrust program, to collectivism in which government seizes control of important business or important business seizes control of government.

Unless we study, reassess, and reevaluate the effects that the interplay of antitrust, the market and competition have had on our nation, we may awaken some morning to find that our opportunity to maintain a free market economy and, perhaps, a free society is gone.

ROBINSON-PATMAN: MAGNA CARTA OR TYPHOID MARY?

REMARKS OF JAMES M. NICHOLSON, COMMISSIONER, FEDERAL TRADE COMMISSION, WASHINGTON, D.C., BEFORE THE PHARMACEUTICAL WHOLESALERS ASSOCIATION, LAS VEGAS, NEV., MARCH 13, 1969

When I assumed my present seat on the Federal Trade Commission over a year ago, I suppose there was no one of the many laws entrusted to it to administer which I approached with more trepidation and concern than the Robinson-Patman Act. Like many corporate practitioners, I had read much of the literature which forms the Robinson-Patman folklore, and I had no difficulty in deciding that this was one quagmire which my clients should avoid.

It is certainly true, as one writer phrased it, that "The Robinson-Patman Act is sometimes praised, sometimes abused, much interpreted, little understood, and capable of producing instant arguments of infinite variety."¹ It may also be true, as the Supreme Court has observed, that it is a "singularly opaque and illusive statute"² and that "precision of expression is not an outstanding characteristic of this Act."³ It is small wonder that this law has triggered so much debate and attracted supporters to whom its strictures are closely akin to holy writ, as well as opponents to whom its very name is anathema.

Thus, depending upon the source to which you turn, you might hear the Act described as "the Magna Carta of small business,"⁴ an "absolute essential" to the preservation of small business in this country,⁵ or the "Typhoid Mary"⁶ of antitrust. Its outright repeal has been vigorously urged by leading magazines devoted to business⁷ and even by former employees of the Federal Trade Commission.⁸

¹ Kintner, "An Antitrust Primer", 1964 Ed., pg. 60.

² *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 530 (separate opinion).

³ *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1953).

⁴ "Small Business Problems In The Drug Industry", Report of the Select Committee on Small Business, 90th Congress, 2d Session, December 31, 1968, pg. 5.

⁵ *Id.*, at 6.

⁶ Bork, "The Place of Antitrust Among National Goals", address before National Industrial Conference Board, pg. 9 (March 3, 1966).

⁷ Editorial, "Antitrust: The Sacred Cow Needs a Vet", November 1962 issue of *Fortune*.

⁸ Edwards, "The Price Discrimination Law (1959).

Not too long ago, a well-known writer and practitioner in the field almost gleefully observed that he was witnessing a new trend at the Federal Trade Commission "the quiet chloroforming of Robinson-Patman."⁹

In the face of these widely divergent, even irreconcilable, views, I suppose I can be pardoned if, in advance of my appointment, I did not wonder if it was remotely possible for mortal men to administer such a statute.

Upon my appointment, I decided to fall back on the refuge of siding with my friends. Some of my friends are for Robinson-Patman and some of my friends are against Robinson-Patman, and I'm for my friends. Unfortunately, a newcomer to the Federal Trade Commission soon understands that he cannot be quite that neutral.

One who is foolish or venturesome enough to accept a seat on a modern government regulatory agency soon finds himself confronted with the discouraging but inescapable avalanche of files, each calling for individual attention and each taking up a substantial portion of each day, as well as many nights. I make this observation not to elicit sympathy—most of you could probably lodge the same complaint—but to point to the greatest difficulty encountered by present-day administrators . . . the inability to find the time to examine problems from a broader perspective. In Robinson-Patman the trees are especially numerous and the forest especially hard to define. Yet to administer the Act with intelligence, it is essential that a broader perspective be sought. Although a preoccupation with individual cases is a danger to intelligent administration, it is equally dangerous to determine to obtain an absolute and perfect harmony within an Act in its entirety.

There is something about this Act that tends to make one philosophize. Books are written about it and lawyers and students discuss it in law reviews—and, although I've dwelt on it too long, I eliminated five pages of just such ramblings from my first draft of these remarks. The businessman is not particularly interested in the intellectual exercise of lawyers—and administrators—associated with the Act. The businessman is concerned with the application of the Act within his industry. I think perhaps the Commission is coming around to the view that this is more important than either the semantics of Robinson-Patman philosophy, or the technicalities of individual enforcement with which it has been embroiled for years.

I find evidence of this in the Commission's recent handling of the so-called stocking dealer question. When the problem was presented to us last year in the form of a request for an advisory opinion, the Commission divided in its response.¹⁰ A manufacturer had requested an opinion as to the legality of his proposal to grant an extra discount to those wholesalers or distributors who warehoused his products, the discount to do no more than take into account their added expense in so doing. A majority of the Commission was of the opinion that this would be illegal since, under established precedents, the discounts could not be cost justified by the manufacturer and would thus amount to compensating the wholesalers for their own expense of doing business to the injury of those wholesalers who did not or could not stock. Hence, the majority felt that the discounts could only be granted to the extent that they could be reconciled with Section 2(d) of the Act, which would require that they be made available on proportionally equal terms to all competing customers.

Two Commissioners dissented. One felt that the proposed discount would be legal under either 2(a) or 2(d). I could not endorse either view since I did not feel that we had all the necessary facts which would be needed to make the analysis necessary to the proper application of the statute. It seemed to me that the answer to the problem turned upon the question of whether the discount proposed would result in injury to competition. While I was willing to concede that the prior cases dealing with similar problems,¹¹ although not wholly in point, might well have sustained the majority view, I was fearful that an uncritical and mechanical application of the rule derived from those older precedents might be inappropriate to different industries and at different times.

⁹ Rowe, "The Robinson-Patman Act—Thirty Years Thereafter", 30 A.B.A. Antitrust Section 9 (1966).

¹⁰ F.T.C. Advisory Opinion Digest No. 263, Trade Reg. Rep. ¶18,425 (1968).

¹¹ *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co. v. F.T.C.* (7th Cir. 1963) 323 F. 2d 44; *National Parts Warehouse v. F.T.C.* (7th Cir. 1965) 346 F. 2d 311; *Monroe Auto Equipment v. F.T.C.* (7th Cir. 1965) 347 F. 2d 401; *Purolicator Products, Inc. v. F.T.C.* (7th Cir. 1965) 352 F. 2d 874.

In view of these precedents which existed, this opinion was the surprising occasion for a great deal of controversy. My opinion, that there is in the Commission today an atmosphere conducive to a reassessment of traditional positions, was buttressed by its response to this controversy. In a subsequent request for another opinion on this subject, the Commission declined to express its views pending the study of a rule making proceeding involving this question.¹²

At this point, I might also refer to the fact that this action by the Commission further leads to the conclusion that this Act is not as inflexible as some would have you believe. Congress has not provided that all price discriminations are illegal, but only those which cannot be justified by one of the defenses made available *and* which result in injury to competition as that term has been applied to the practice. Thus Congress has not preempted the field, but has, in this respect, left in the hands of the Agency some latitude to consider pricing practices in the market context in which they take place. That is what the Commission has undertaken to do here.

However, I would not wish these remarks or the Commission's commendable willingness to reassess its traditional position to mislead any of you here or any who might read these comments. The thrust of the precedents, and the view which may prevail, is that the discounts for stocking and other functional services are illegal. Anyone who ignores this fact in reliance upon the hope of future change does so at his peril. Businessmen, like lawyers, should never confuse what the law is with what they think it ought to be or with what they hope it will become.

An even more dramatic example of the present Commission's willingness to restudy and reevaluate its prior stands has just been furnished by the recent release of its revised Guides For Advertising Allowances under Sections 2(d) and (e) of the Act. These two Sections provide that it is illegal for a seller to pay allowances or furnish services to any customer without making such allowances or services available to all competing customers on proportionally equal terms. Our prior Guides in this area were issued in 1960, but much has transpired since that time, both within the Commission and the courts, and the need for a reassessment of the 1960 Guides became evident.

Unquestionably the most notable event in this area was the Supreme Court's own decision in the *Fred Meyer* case.¹³ There the Court made it plain that a seller must regard as his customers for purposes of the Act all those retail customers of his wholesalers who competed with direct buying customers to whom he furnished promotional assistance. Thus, in this situation at least, the Court swept away all previous distinctions which might have existed as between direct and indirect buying customers and held that the seller owed a duty to all under existing law. In drafting its opinion, the Court acknowledged the difficulties which a seller might expect to encounter in getting benefits to the many retail customers of his wholesalers and made it clear that nothing barred the seller from utilizing his wholesalers for that purpose under rules and guides promulgated by the Commission.

Since our 1960 Guides were wholly inadequate for this purpose, the Commission immediately set about to issue for public comment a set of proposed revised Guides which represented our own staff's best efforts to bring the Guides into conformity with the *Fred Meyer* decision and the other developments which had taken place in the intervening years. The proposed guides reflected the rigidity of the 1960 Guides. The public comments received were quite voluminous and, I assure you, carefully studied by the staff and the five Commissioners as well. As a result of this, the Commission has just released its substantially revised Guides, which will take effect in thirty days and has further pledged itself to a further reevaluation of their effectiveness eighteen months hence in the light of further comments received and our own experience in their administration. It may well be that even these much more realistic guides will be further amended before their May 1 effective date.

I will not take up your time here with what would be a dull recitation of the many provisions contained in these Guides, but will instead commend them to your careful study. For example, they even contain further elaboration upon what is meant by the elusive term "proportionally equal terms", which always leaves me feeling the way I felt upon encountering an old friend on the street. I

¹² F.T.C. Advisory Opinion Digest No. 333 Trade Reg. Rep. ¶ — (1969).

¹³ *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

asked him how his wife was, and he replied, "Compared to what?" If you are inclined to ask here "Proportional to what?", I trust these Guides will be of some assistance.

Of more immediate concern to this group should be the treatment of a promotional program which a manufacturer delegates for administration through his wholesalers. When you consider a manufacturer-wholesaler administered program, you will find that the Commission has replaced the previous virtually per se Guides with one which will permit a manufacturer to delegate a fair and workable program to his wholesalers for administration. However, the manufacturer must undertake the duty of conducting periodic checks among the various types of retailers involved to see that the wholesalers are actually administering the program in the manner required by law and he must take appropriate corrective action where it is apparent that any wholesaler is not.

The wholesaler, administering promotional assistance programs on behalf of a seller, may find himself in violation of Section 5 of the Federal Trade Commission Act. This could arise if the wholesaler has represented the program to be usable and suitable and it is not, or if the program was not offered to all of the manufacturers' competing customers, or was otherwise administered in a discriminatory manner.

To those of you who have concern with allowances which your sources make for advertising, promotion or display of their products, you should study the proposed final guides with care, and should let us know whether they relate realistically to your industry.

These new approaches to Robinson Patman enforcement by the Commission will, I am certain carry over into its consideration of the recently completed hearings before Congressman Dingell's Subcommittee to study Small Business Problems In The Drug Industry and the Subcommittee's Report published December 31, 1968. As you know, the Subcommittee made several recommendations affecting the Commission. First, it recommended that we hold appropriate proceedings to determine the area of competition between hospital pharmacies and small privately owned community pharmacies and take such further action as may be necessary to define the area of the "own use" exemption of the Non-Profit Institution Act of 1938.

Second, it recommended that we proceed on a case-by-case basis to investigate the apparent violations shown by the testimony received during the course of the hearings and take appropriate and vigorous action where such violations could be proven. Finally, it was recommended that we report, on or before January 15, 1970, actions taken with respect to the other two recommendations. I might add here, certainly without intending any disrespect for the Subcommittee or its Chairman, that the word "recommended" as used by the Subcommittee can be regarded as something in the nature of a Congressional euphemism. We will make the necessary inquiries and we will file the recommended report on or before the deadline set.

However, this will not be allowed to affect the outcome of any individual matters which might be investigated, and subsequently considered by the Commission. Such matters will be considered on their merits and decided on the basis of the facts developed. In that posture, I am sure you will understand my inability to comment in detail at this time on cases now under investigation which the Commission will later be called upon to decide on their merits. Despite the fact that we know problems exist in the industry, we must approach them with an open mind.

The Subcommittee recognized that the practices in this industry, particularly under the Non-Profit Institution Act, raise a number of problems in a grey area which have never been adequately investigated or resolved in litigated cases. That Act exempts from the coverage of the Robinson Patman Act sales to non-profit hospitals for their own use. Our previous experience and the testimony at the hearings demonstrate that a variety of factual situations can arise: the hospital may sell to in-patients; the hospital may sell to out-patients of staff physicians or clinics located on the hospital premises; the hospital pharmacy may sell to the general public, or to other retailers, without regard to whether the demand results from hospitalization or treatment on the hospital premises.

The sale of drugs to out-patients of staff physicians or clinics located on hospital premises constitutes one of the grey areas involved, where it is not clear how the law would or should apply. It is possible that, after examination, it will be found that such sales are not within the exemption. On the other hand, we

cannot be sure that the Commission would find, or that a court would uphold, a finding to this effect due to the vagueness of the phrase "for their own use" and the absence of a clear indication as to what Congress meant when it used it in the law.

From what I have been told by our staff and from what I have learned reading the transcript of the hearings, the legal result is not at all certain even where sales at lower prices are made to profit-making hospitals, where such sales are for their own use. Here again we encounter the requirement that a sale at a lower price does not violate the Robinson-Patman Act unless such sale results in injury to competition even though it is clear that it enjoys no exemption. If it is true that retail pharmacies are in no position to compete for the business of patients confined in hospitals, difficulty might be encountered in establishing the requisite injury.

A problem analogous to the traditional dual distribution situations we have encountered in other industries is raised by the recurring reports that some hospitals are diverting a portion of their purchases to outside retailers. Where sales are made by manufacturers to hospitals with full knowledge that this is taking place, if that is the fact, and where such resales are being made by hospital employees with the full knowledge of the hospitals, if that also is the fact, culpability under the Act would seem to be involved and no grey area question would seem to be presented. But where this is being done without the knowledge of the manufacturer in the one case, or the hospital in the other, I have some difficulty with a mechanical application of the sanctions of the law even though the law does not require knowledge as an essential element of a violation thereof. To establish a technical violation under these circumstances would appear to be possible but of very doubtful utility.

These are just some of the complex problems of which I have become aware and I trust that my focus of attention upon the difficulties will not lead you to believe that the Commission is taking a negative approach to your difficulties. Far from it. We have been concerned with the problems of this industry for some time and, as our own Chairman advised the Subcommittee back in June, we plan to attack the hitherto unchallenged unfair drug distribution practices and discriminations with novel applications of laws administered by the Commission. The challenge has been placed in our hands and the industry must judge for itself how well we are able to meet it in the future.

On the other hand, I would caution you again not to expect more than the law can deliver. The Robinson-Patman Act, nor any other statute now on the books, can, or should, protect you from the effects of hard competition, so long as that competition is fair. The law cannot guarantee that you will not be adversely affected by changing market conditions and new methods of distribution, for that law is not designed to preserve the status quo or impede progress. Change is the essence of a dynamic and progressive economy and the businessman, at whatever level of distribution he might do business, who cannot keep abreast of these changes must suffer the fate which then befalls him.

The wholesaler has been charged by some to be an anachronism. In many industries he has been eliminated or has become a vestigial appendage to the primary flow of goods and products from the manufacturer. Many manufacturers count their wholly-owned distribution systems as one of their most valuable assets . . . a means for introduction of new products, a source of customer information, the device for assuring service, and the most direct and sure means of utilizing their advertising and promotional funds. You are all aware of the methodology of wholesaler elimination . . . merger, vertical forward integration and the withering technique of picking off the larger customers for direct sales, leaving fewer and fewer of the smaller and smaller customers to be handled by the wholesaler.

What then is the future of this functional level and what are, or may be, the influences of the law on that future?

First of all, there is an underlying policy, in my opinion, which favors and will continue to favor any means of distribution which will get products from the manufacturer to the ultimate consumers in the most reliable manner and with the least increment to price. Next, there is no policy today which protects against or forbids growth by internal expansion. While the law may put brakes upon similar growth by means of mergers, manufacturers may grow by setting up their own distribution systems and going direct to their ultimate customers. Third, while existing law prohibits a manufacturer employing a dual distribution system from granting lower prices to his direct buying customers than he

charges his wholesalers, it does not prohibit him from charging the same price to all as matters presently stand. Many students of our economy are greatly concerned with this latter point, but it cannot be forgotten in projecting future plans.

It seems to me that the task of the wholesaler today is to make his services so valuable to manufacturers and retailers that he will continue to be an indispensable cog in our distribution machinery. To the extent that he succeeds in doing this, manufacturers will not be tempted to take over the function themselves and he can then legitimately call upon the law to protect him from unfair and illegal practices on the part of his suppliers, his competitors and his customers. To the extent that he fails, he cannot expect the law to step in and, in effect, reward him for his inefficiency with an artificial support for his continued existence after he has ceased to serve a useful economic function. I, for one, have confidence in the ability of the wholesaler in most industries to perform in a manner which will assure his continued relevance.

WALK AROUND SPECIAL MATTER

NOVEMBER 26, 1968.

Re In the Matter of United Fruit Co. and United Fruit Sales Corp., File No. 671 0187.

In the Matter of Harbor Banana Distributors, Inc., File No. 681 0092.

SEE ATTACHED MEMORANDUM

(Previously circulated as a Walk Around by Commissioner MacIntyre on November 22, 1968.)

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Assistant Executive Director.

MEMORANDUM

NOVEMBER 26, 1968.

To: Commission.

From: James M. Nicholson.

Subject: In the Matter of United Fruit Co. and United Fruit Sales Corp., File No. 671 0187.

In the Matter of Harbor Banana Distributors, Inc., File No. 681 0092.

At my request, the staff has prepared the following amendments to the United Fruit order to reflect my concern that the order, as originally submitted, contained no basic attempt to monopolize prohibition directed towards Harbor and to broad prohibition directed at United's participation in this attempt. While the complaint clearly charged Harbor with the attempt and United with aiding in the attempt, the order originally proposed was directed only at the specific practices by which the attempt was given effect and the assistance was rendered.

It should be noted that the staff's original recommendation was generally in accord with the approach previously taken in similar cases. Neither the staff nor I have been able to locate a complaint or order which contains such a broad, catch-all attempt to monopolize prohibition, so to this extent we may be blazing a new trail. In this matter, it is a trail I think we should follow.

It should be noted that the staff has submitted a proposed new paragraph III and a new paragraph VII to the order previously circulated, with the other paragraphs to be renumbered accordingly if the Commission agrees with the new additions, the adoption of which I now move.

I continue to be impressed with the professional skill and willingness to cooperate which the staff has demonstrated in its handling of this case.

III.

It is further ordered that respondents United Fruit Co. and United Fruit Sales Corp., corporations, and their officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale or distribution of bananas in commerce, as "commerce"

is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Granting any advantage to any purchaser of bananas for resale where the purpose or effect may be to create a monopoly in the line of commerce in which said purchaser competes, or where the purpose or effect may be to hinder, lessen, restrict or eliminate competition with said purchaser.

VII.

It is further ordered that respondent Harbor Banana Distributors, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale, offering for sale, purchase, or offering to purchase bananas in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Engaging in any act or practice where the purpose or effect may be to create a monopoly in respondent Harbor in the purchase, sale or distribution of bananas, or to hinder, lessen, restrict or eliminate competition with respondent Harbor in the purchase, sale and distribution of bananas.

Other orders renumbered accordingly.

SPECIAL MATTER

DECEMBER 31, 1968.

Re Thermoid Co., Docket No. 7032.

(I request that this matter be considered in connection with Standard Motor Products, Inc., Docket No. 5721, previously circulated by Chairman Dixon on December 26, 1965.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kunew); General Counsel Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Assistant Executive Director.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See attached memorandum.

MEMORANDUM

DECEMBER 31, 1968

To: Commission.

From: James M. Nicholson.

Subject: Thermoid Co., Docket No. 7032, and Standard Motor Products, Inc., Docket No. 5721.

The above respondents became subjects of Commission cease and desist orders in the late fifties. Some 8,000 man-hours of compliance work have been devoted toward securing their adherence to our proscriptions against further unlawful price discriminations. These efforts, however, have been unsuccessful. As far as we can determine at the moment, respondents are now, and probably have been since inception of the orders, violating Section 2(a) of the Robinson-Patman Act.

The staff proposes further investigations. If the past history of these matters is a guide, the Commission of 1971 or later will be reviewing these matters and either ordering further investigation or throwing in the towel as I am inclined toward doing now.

I do not mean these comments to be viewed as criticism of the staff. In my experience, I have found that the Bureau of Restraint of Trade's Compliance Division is staffed by some of our best attorneys. However, I believe that they are laboring under serious handicaps, some of which are: (1) a small staff for a very large job; (2) cumbersome procedures; (3) an unsatisfactory liaison arrangement with the Department of Justice; and (4) complex statutes, such as the Robinson-Patman Act, which apparently make compliance work considerably more difficult than even the initial prosecutions.

We, the Commission, are to be criticized. In my opinion, we pay too much attention to the game at the expense of the result we seek for the public. Our mission in policing orders is twofold. We seek adherence to our orders, and we

should also evaluate the impact of these orders periodically. In the latter regard, we should be quick to reopen orders and make them less or more stringent as competitive conditions and results warrant. However, we rarely reach this area of compliance work for we are too busy "begging" compliance with the original cease and desist orders.

I move that we take a beginning step here toward upgrading our compliance program by hearing further from the staff about our efforts to secure order adherence by the auto parts supplier respondents of the fifties. Frankly, is the task a futile one? In listing priorities, where would proposals for continued effort on the captioned dockets rank? How can we insure that we will not repeat our past dismal record in these proceedings? Are the problems in these two cases found in other Robinson-Patman compliance proceedings? Are these matters similar to our troubles in enforcing 2(a) orders against the biscuit manufacturers?

Our compliance program is as important as our prosecutions and our efforts at industry guidance—perhaps even more so. Surely, it is meant to both restore damage to competition and enhance competition by deterring violations. It appears that these purposes cannot be accomplished as things stand now.

MEMORANDUM

DECEMBER 19, 1968.

To: Commission.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

Subject: Docket No. 7032, Thermoid Co.—Rejection of Compliance Report Recommended: Sec. 2(a), Clayton Act, Price Discrimination, Automotive Products.

Pursuant to Section 3.61 of Commission's Rules of Practice for Adjudicative Proceedings and Sections 6-051.26 and 6-052.33 of the Administrative Manual, Thermoid Company's compliance reports of October 30, 1967, March 13, 1968 and May 7, 1968, are transmitted herewith for Commission review.

PROCEDURAL HISTORY

By Order issued October 3, 1958, the Commission adopted the initial decision of the hearing examiner ordering respondent to cease and desist from discriminating in the prices of its automotive replacement parts. It also ordered respondent to file a report setting forth the manner and form of compliance. Respondent filed timely reports in response thereto.

COMPLAINT

Respondent was charged with price discrimination between independent jobbers and group jobbers, and between private brand purchasers (rubber companies, mail-order houses, oil companies) and jobbers.

COMPLIANCE HISTORY

Respondent's original compliance reports indicated price differentials which respondent claimed were partly cost justified. Cost savings were listed by name, but the allegations were not supported by any data. The cost justification was combined with a meeting-competition defense, consisting in the assertions for each individual private-brand customer that higher quotations were found to be "uncompetitive" and "we requested at the known and established competitive level." When some questions were raised by the staff, regarding the cost justification, the respondent concentrated on its meeting competition defense. In a supplement to its report, the defense was greatly expanded quantitatively but not qualitatively.

Subsequently, the compliance function of the Commission was reorganized, and the case was consecutively assigned to a number of attorneys, three of whom are no longer with the Division and one had to be reassigned to some other, more urgent work before he had a chance to complete his review. The complexity of the case made it impossible for any single attorney to bring his study to fruition in the relatively short span of his assignment within the framework of extreme shortage of Robinson-Patman manpower, and the high turnover in the Division necessitated repeated starts from scratch. Finally, in August 1967, as a part of the slow process of elimination of the backlog of old, inactive compliance cases, this case was assigned to the attorney who is currently handling the matter. Due to staleness of compliance material (the last supplement was dated August 8,

1960), up-to-date information as to the manner and form of compliance was requested.

A Supplemental Report of Compliance dated October 30, 1967, was submitted which indicated an abandonment of the defense of meeting competition and a new reliance on cost differences to justify very substantially lower prices to private-brand customers as compared with prices paid by warehouse distributors. Respondent pointed out: "In the event the Commission is unsatisfied with any portion of this cost study, we ask that specific objections be given to us and that we be given an opportunity to revise the study to meet the same. . . ."

Assuming that this was a bona fide offer, the staff made a thorough analysis of the cost study with a view of suggesting to the respondent the essential changes.

An informal meeting was held on January 11, 1968, at which time respondent was informed of the many points that in the view of the Compliance Division were unsatisfactory.

The most serious defect in the study was the proration in proportion to dollar sales of commodity costs, Factory Administration, Sales Administration, General Management and Staff, Engineering, Data Processing, and Accounting, inasmuch as it is self-evident that if one purchaser pays \$1 for an item and another \$2 for the same item, the manufacturing supervision, design engineering, data processing and accounting are not going to change, much less double for the second purchaser. The cost justification falls on this alone.

On March 13, 1968, respondent wrote:

With respect to the cost justification study, based on the comments made during our meeting of January 11, 1968, it has been decided for the present to forego any further reliance on this study as a basis for justifying the private brand prices. Instead, we would appreciate being afforded an opportunity to present competitive pricing information which we trust will justify the price levels being accorded customers.

By letter of March 28, 1968, respondent was given thirty (30) days to submit the "meeting competition" data.

Respondent requested and was granted an extension until May 8, 1968. The information was submitted by a supplement to its compliance report dated May 7, 1968.

ANALYSIS OF CURRENT COMPLIANCE

Respondent manufactures and sells automotive parts, divided into two general categories, rubber products, consisting primarily of flexible radiator hose and fan belts, and friction products, which are mainly brake lining and clutch facing materials. In its cost study (Exhibit R-PB-5 in the compliance report of October 31, 1967), respondent submitted a comparison of weighted average prices to its warehouse distributors and private brand customers:

	Fan belts	Hose
WD.....	\$1	\$0.7941
Atlas.....	.6865	.6512
Goodrich.....	.5865	.6286
Sun.....	.6528	.7153

There are thus very great price differentials between the warehouse distributors and private brands, and rather substantial differences within the private brands group. By accepting the consent order, respondent admitted that private brand parts are of like grade and quality and it never claimed that there might be any differences in grade and quality.

The meeting-competition defense in the May 7, 1968, compliance report is based on the assumption that the meeting competition data submitted in the 1959 compliance report were "proper." In fact these consisted basically in an allegation repeated on every sheet: "Usual prices were found to be uncompetitive." The current price structure is substantially the same as it was at the time of the complaint and the first attempt to justify it by a meeting-competition defense in 1959. As respondent pointed out in its 1968 report: ". . . it is our position that the pricing history with respect to both Goodrich and Sun reflects a continuation of the competitive pricing situation which existed January 1, 1959 . . ."

There is an allegation in the report, "the pricing history reflects consistent efforts on the part of Thermoid (and this is particularly true in the case of Sun) to increase prices over 1959 levels, some of which efforts were successful, others of which were not." It is safe to assume that this is true, but such attempts do not constitute compliance because an increase which does not reach the level of prices charged regular warehouse distributors would not change the substance of the violation, particularly where the efforts are so feeble that increases are retracted at the slightest—real or imaginary—hint of resistance, as can be seen throughout the reports. In any event, regardless of what the history might have been, the current situation is summed up in the respondent's report, with regard to Goodrich, as follows: "apparently during 1966 Goodrich had indicated dissatisfaction with existing price levels, and as a result on December 1, prices were reduced. . . ."

The sum total of evidentiary support for this is a statement in an internal memorandum (Exhibit G-11): "As past correspondence indicates, we are not competitively priced with the co-supplier, Dayco. From what I can learn we are 5% to 6% too high across the board on flexible hose. We are 10% to 12% too high on the short line of fan belts." (See *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 758-9 (1945)). The respondent's paraphrase in the report is probably closer to facts. At any rate, it represents the respondent's interpretation of the situation and reflects its state of mind which are hardly "showing that his lower price . . . was made in good faith to meet an equally low price of a competitor." As Edwards, *The Price Discrimination Law* 569 (1959), pointed out, continuity of price differentials places them "beyond the legal boundaries of good faith." Already in *The Goodyear Tire & Rubber Company*, 22 F.T.C. 232, 331 the Commission said with regard to the meeting-competition defense: "it is available only if the discrimination started with the competitor." Here we have substantially the same pricing system that existed before the consent order.

The Supreme Court held in *F.T.C. v. Cement Institute*, 333 U.S. 683, 725: "But this does not mean that § 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others."

In *Standard Oil Company*, 49 F.T.C. 923, 954, the Commission reiterated the *Goodyear* doctrine, *supra*, in the following words: "They were not the result of departures from a nondiscriminatory price scale which were made to meet lower prices of competitors, but represented only the continued application of the pricing standards previously adopted by respondent and followed by it since long before 1936." (See also *Champion Spark Plug Co.*, 50 F.T.C. 30, 42 (1953)).

Concerning Sun Oil Company, respondent's report says: "The files do not indicate why these reductions were granted, but due to the history of the relationship we assume that competition was a, if not the controlling factor." As to Atlas, it appears that respondent may have met a lower Goodyear's offer to Humble. However, suffice it to say that no matter how justifiable the price reduction to Humble might have been, its extension to all other Atlas accounts, completely independent business entities, could at best be characterized as a measure of prevention, but certainly not "made in good faith to meet an equally low price of a competitor." Whether this was a sound business decision or not is not within our purview. What matters here is the fact that this is one type of a pricing development which the statute was designed to prevent in order to protect the independent business in distribution.

SUMMARY AND RECOMMENDATION

To sum it up, the respondent, in the initial report started with a cost savings conjecture which, even if it had been supported by evidence, fell very substantially short of the price differentials which it was supposed to justify. This was followed by a Section 2(b) defense consisting in a series of statements that pre-order prices were extended because "usual prices were found to be uncompetitive." In the second phase (the most recent submission), respondent resorted to a cost justification, this time based mainly on proration of costs in proportion to sales prices. When the staff suggested that this amounted to justifying price differentials by price differentials, respondent returned to the former meeting-competition defense, bringing it up to date by claiming general "competitive situation" in one case (Sun Oil), extension of a price to all customers in one category because of an alleged competitive offer to one of them (Atlas), and presenting some very feeble evidence of meeting competition in the case of one private brand of lesser magnitude (Goodrich). Throughout its his-

tory of "meeting competition," no efforts were made to verify competitive quotations.

The history of mala-fide justifications of substantially the same pricing systems it had before the consent order, indicates that it would be pointless to request another supplement. It would give rise to another delay, but could not change the situation. All reasonable avenues of negotiation have been explored and terminated in a cul-de-sac. It is accordingly, recommended that the compliance report be rejected in its entirety, but that no further report be requested at this time. If we felt that Thermoid would respond to negotiation we would recommend an additional report following the rejection. Basically put we do not feel that Thermoid would willingly accede to giving up its discriminatory discounts to its big customers.

We propose that following the rejection a full field investigation be instituted to establish compliance or noncompliance with the order and with the statute in general, for the purpose of determining the appropriate action to be taken. This proposal is patterned after our recommendation in *Republic Molding Corporation*, Docket No. C-212, which was adopted by the Commission Minute of February 23, 1966. Attached hereto is a letter advising respondent of the rejection and that the Bureau of Restraint of Trade has been directed to conduct an investigation in this matter in order to determine the manner and form of respondent's compliance with the order and the statute in general and to submit a report to the Commission with recommendation.

The issue of confidentiality has not been touched upon, inasmuch as a rejected compliance report with all exhibits becomes automatically confidential.

Respectfully submitted,

JOSEPH J. GERCKE,
*Chief, Compliance Division,
Bureau of Restraint of Trade.*

Approved:

WILMER L. TINLEY,
*Assistant Director,
Bureau of Restraint of Trade.*
CECIL G. MILES,
*Director, Bureau of
Restraint of Trade.*

FEBRUARY 24, 1969.

Re Trade Regulation Rule Proceeding Regarding Functional Discounts in the Electrical Supply Industry.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (Mr. Kuzew) General Counsel Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Assistant Executive Director.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

See attached memorandum.

MEMORANDUM

FEBRUARY 24, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Trade Regulation Rule Proceeding Regarding Functional Discounts in the Electrical Supply Industry.

As directed, the staff has submitted the results of its preliminary inquiry into the initiation of a Trade Regulation Rule proceeding regarding functional discounts in the Electrical Supply Industry. Briefly summarized, the staff has concluded that discounts in varying amounts are being granted to stocking distributors, but it cannot conclude that the practice is industry-wide. The outburst of letters from members of the industry, following release of Advisory Opinion Digest No. 263, was prompted by the fear on the part of many stocking dealers that the allowances would be discontinued. Indeed, four distributors alleged they had received such discounts before the Opinion but none since.

All stocking distributors interviewed were of the opinion that the discounts were necessary to enable them to compete with non-stocking distributors who

have lower operating costs. Oddly, none of the stocking distributors could identify specific non-stocking dealers with whom they competed. Some were certain they existed and others expressed concern that the Commission's Opinion, if unchanged, would lead to the growth of non-stockers in the industry. As a result of this, the staff has not had contact with any non-stocking distributor nor have any written in to take a position on the Opinion one way or the other.

From the information so far collected, the staff has drawn two general conclusions. First, the matter does not appear to require, as the volume and tone of the letters initially suggested, immediate action by the Commission. Second, few conclusions can be drawn with respect to current pricing practices in the industry and the effect thereof on competition. Hence the staff feels that before it can make a recommendation, further information will be necessary from the manufacturers, primarily as to their price and customer lists, the latter of which would furnish the names of any non-stockers who could furnish facts as to the competitive impact of stocking discounts.

With regard to the staff's first conclusion, I fear we have not made our purpose clear in referring this matter for handling under the Trade Regulation Rule Procedure. As I viewed the problem and attempted to set forth in my January 10, 1969 circulation in *The Wella Corporation*, File No. 693 7059, our purpose was not primarily to launch an enforcement program in the electrical supply industry as it was to resolve the legal question as to whether injury to competition resulted from the granting of discounts to dealers which do no more than take into account the added costs which the recipient of the discounts assumed in the resale of the seller's products.

The urgency of the matter does not arise from the need to take corrective action in this or any other particular industry. The urgency arises from the need to resolve the legal question which apparently arises in a number of industries. Here the volume of letters received from the electrical supply industry indicated that industry would be a convenient vehicle for the conduct of a Rule proceeding looking towards the resolution of the problem. As matters now stand, it might have been wiser to have selected another industry for the test, although it did not seem as appropriate to select the furniture industry where the proceedings would have been complicated by the existence of so many outstanding orders dealing with the practice.

However, I do not feel this precludes us from making the effort in that industry if future developments so dictate and do not feel the staff should feel precluded from recommending that we hold the proceeding in that or another industry if they conclude such would enable us better to reach our goal. Certainly, the furniture industry would present no problem as to the identity of stocking dealers since such information is already contained in the investigative files.

Still I do not think it is yet necessary to abandon the effort in the electrical industry, the staff already having gone as far as it has in developing a good deal of useful information, although I do not favor reference for a field investigation to obtain more. Unless we assign this matter a priority status it may not deserve in comparison to other matters now pending in the field, such a step could only result in considerable delay and I do feel this is a matter of some importance. I believe the Division underestimates its own fact-gathering powers since it seems to feel that a field investigation will be necessary to obtain the needed information from the manufacturers. We need not assume that they will decline to furnish this information on a voluntary basis for the purpose for which it will be requested. Hence I would have the Division itself give further attention to this problem with the view of developing the information it states it will need to arrive at an informed conclusion.

In the course of this further consideration, I would not have the Division labor under any misunderstanding. The Commission is approaching this proceeding with an open mind. We are not out to hang a charge on this or any other industry. We are trying to resolve a serious problem. If the evidence developed establishes that in fact the granting of these discounts do result in injury to competition within the meaning of the statute, then the Division should recommend appropriate action. If it can be established that they do not result in such injury, then we will want to know so that we can be guided thereby.

Accordingly, I move this matter be returned to the Division of Trade Regulation Rules for further development along the lines set forth above.

MAY 22, 1969.

Re Guides for Advertising Allowances, and Other Merchandising Payments and Services.

FOR INFORMATION

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs, Executive Director; Assistant Executive Director.

Re Guides for Advertising Allowances and Other Merchandising Payments and Services.

CONCURRING STATEMENT OF COMMISSIONER NICHOLSON

I previously filed a dissenting statement in connection with the issuance of the proposed Guides in which I noted my disagreement with the definition of a "customer" as set forth in Guide 3, but in which I also noted my general feeling that the Guides represented a constructive step forward in the reasonable interpretation of a difficult and complex statute. I remain much of the same mind as I here elect to file a concurring statement to the issuance of the final Guides.

I note that concurrence here because I believe the procedure we have followed is adapted to and has resulted in very nearly as informative set of Guides as could be evolved under the circumstances. On my motion, the proposed Guides were not made final at the time but were issued in proposed form in order to give all interested parties another opportunity to comment and make suggestions. The number and content of the comments received have resulted in several significant changes in the final Guides here issued, resulting, in the main, in a compilation of guidelines which are reasonable, pragmatic and, we hope, workable.

This is not to say that I cast my vote wholly free of reservations. All along I have entertained some doubts as to the detailed coverage which some of these provisions have given to practices perhaps best left to the individual judgment of the sellers concerned acting pursuant to more general guidance as to the results which they were expected to achieve. It is not entirely clear to me, for example, why we need spell out with such specificity how a seller is to get notice to his customers once we clearly inform him that such notice must be given. For my part, I care little whether he writes each of them a personal letter or shouts the glad tidings from his office window so long as they get the message. Thus I have some sympathy for some of the views expressed by the dissenter, though I cannot subscribe to his conclusions which fail to acknowledge the progress here made.

If we have erred too much on the side of detail, however, I would note that the procedure being followed contains another safeguard in the undertaking by the Commission to review the effectiveness and the adequacy of these Guides eighteen months after they become effective. It is my hope that when that reexamination takes place the Commission will have the benefit of the comments of those who have been governed by these Guides as well as the benefit of our own experience in enforcing them over that span of time. Commission Guides should at all costs avoid the deadening effect of rigidity and keep pace with changing market conditions and new distributional practices.

FEBRUARY 26, 1969.

Re Guides for Advertising Allowances and Other Merchandising Payments and Services.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (Mr. Kuzew) General Counsel Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Assistant Executive Director.

Attached is a copy of my dissenting statement to accompany the Guides and press release.

Re Guides for Advertising Allowances and Other Merchandising Payments and Services.

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

In the main, I think these Guides represent a constructive step forward in the reasonable interpretation of a difficult and complex statute. As such, they should be welcomed by those businessmen who are seriously concerned with problems of compliance with the law, but who have found that goal difficult to achieve under previous Guides and interpretations issued by the Commission. Without retreating in any respect from the basic requirements of the law, the Commission has here achieved a more balanced and sensible interpretation thereof and this will, I believe, bring about a far greater degree of compliance than has been obtained in the past.

I have qualified the above endorsement of the revised Guides because I believe that in one important respect they do go beyond existing law and encompass situations where I do not think this law should apply. The revised Guides now include within the definition of a "customer", set forth in Guide 3, not only those who purchase directly from the seller but also "any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller."

This I feel is too broad. Clearly, a seller must regard as his customers all those indirect buyers who compete with direct buyers to whom he grants promotional assistance. *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). By a logical extension of this doctrine, I think it is equally clear that a seller must also so regard buyers who compete with other indirect buyers who receive direct promotional assistance from the seller. But I see no need to go further than this and draft a definition so extensive as to include within its terms those purchasers from wholesalers who have no favored direct buying competitors and no indirect buying competitors who receive direct promotional assistance. As matters now stand, a seller who sells *only* to wholesalers will find that he still owes a duty under the law to the retail customers of his wholesalers even though he does not deal directly with any retailer.

I can find no sanction in the statute or in the *Fred Meyer* decision for this definition nor can I see any pressing need for its adoption. Where such a seller launches a retailer-oriented promotional program and his wholesalers fail to implement it in the manner intended, I think the Guides as presently drafted clearly apply to the wholesalers in their capacity as sellers, without extending the original seller's liability so far down the distributional chain. Further, other Guides make clear the responsibility of the original seller to check the use made by his customers, the wholesalers, of payments for promotional services made to them, so not even the practicalities of the situation necessitate the creation of a direct responsibility running from the seller to retailers with whom he does not deal.

With this exception, I have added my support to the revised Guides and further endorse the Commission's undertaking to review their effectiveness in actual practice after eighteen months of experience with their administration.

 AGENDA MATTER

JUNE 6, 1968.

Re Furniture Manufacturers Association of California, File 033 7086.

From: Commissioner Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director.

I request that this matter be placed on the Commission's meeting agenda. Attached is my dissenting statement.

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

I would not issue an advisory opinion in this matter since the Commission does not have sufficient facts to determine whether the applicant's proposed compensation of dealers, who provide stocking services, is inimical to the purposes of the Robinson-Patman Act.

The majority follows on a long line of Commission interpretations under which eligibility for functional discounts was solely related to the functional level of

the buyer.¹ In all of these cases it could be said that a seller's reimbursement of a buyer for services also benefited him in the resale of the seller's product. However, whatever competitive disadvantage may be experienced by another buyer's failure to receive such compensation may be due not to a subterfuge by the seller to avoid the purposes of the Robinson-Patman Act but merely to the unpaid buyer's reluctance to innovate, to attempt marketing efficiencies, to engage in business risks, or to move with the times.

In none of these cases did the Commission carefully consider that its failure to permit compensation of the buyer for particular functions as a purchaser might hamper competition and efficiency in marketing, nor did it consider the *possibility* that its sole concern with the resale functional level of the buyer "compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration."² In none of these matters did the Commission fully recognize that while, at one time, distinctions between the various distribution levels in American marketing had been clearcut and the duties assigned to each level were rigidly defined, modern-day consumer needs and business response to such needs have resulted in a "proliferation of modern marketing [which] defies neat nomenclature and descriptive labels."³

The majority assumes that the proposed discount will amount to a violation of law. Commissioner Elman is certain that it will not. I will not make either assumption. We lack the facts necessary to make the analysis suggested above—an analysis so necessary to the proper application of a statute not meant "to penalize, shackle, or discourage efficiency, or to reward inefficiency."⁴

OCTOBER 2, 1968.

Re Piedmont Auto Exchange, Inc., file No. 661 0052.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kugew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry; Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda. See attached Memorandum.

MEMORANDUM

OCTOBER 2, 1968.

To: Commission.

From: James M. Nicholson.

Subject: Piedmont Auto Exchange, Inc., file No. 661 0052.

This matter was originally docketed for investigation as a "buying group" case under Section 2(f) and it appears that as originally conceived Wholesalers Auto Parts Warehouse (WAPW) was set up solely to buy for the 14 wholly-owned jobber outlets. However, by the time of the investigation most of the jobber outlets were independently owned and WAPW had added 156 nonaffiliated jobber customers. WAPW solely determines which lines of products it will carry and several competing lines are carried. No drop-shipping is allowed except in an emergency.

While the staff memorandum states that the jobbers who are or were under the control of WAPW receive no competitive advantage over any competitors, it also notes that the "affiliated" jobbers receive a 7% volume discount and the non-affiliated jobbers receive a 6% discount. The memorandum further notes that WAPW salesmen receive only a 2½% commission on sales to affiliated jobbers, as opposed to 5% on sales to non-affiliated jobbers, because they do very little missionary work where the former are concerned.

¹ See e.g., *Agricultural Laboratories, Inc.* 26 F.T.C. 296 (1938); *Albert L. Whiting*, 26 F.T.C. 312 (1938); *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co. v. F.T.C.*, 323 F.2d 44 (7th Cir. 1963); *National Parts Warehouse v. F.T.C.*, 346 F.2d 311 (7th Cir. 1965); *Monroe Auto Equipment v. F.T.C.*, 347 F.2d 401 (7th Cir. 1965); *Purolator Products, Inc. v. F.T.C.*, 352 F.2d 874 (7th Cir. 1965).

² *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 207 (1965).

³ *Id.*, at 204.

⁴ *H.R. Rep. No. 2287*, 74th Cong., 2d Sess. 3 (1936).

Thus while I am not certain there is 100% compliance with the law here, I am in argument with the staff that WAPW is now anything but a buying group and that a full field investigation would be costly, time-consuming and would accomplish nothing beneficial in the public interest. I move the matter be closed.

MEMORANDUM

SEPTEMBER 13, 1968.

To: Commission.

From: John Perry, Attorney, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: Piedmont Auto Exchange, Inc., file No. 661 0052.

Recommendation: Close: No evidence of violation.

Statute and Charge: Section 2(f), amended Clayton Act: inducing and receiving discriminatory prices (buying group).

Commodity: Automotive parts and supplies.

APPLICANT

The applicant in this matter is the Federal Trade Commission.

PROPOSED RESPONDENT

The proposed respondent is Piedmont Auto Exchange, Inc., 521-31 E. Third Street, Charlotte, North Carolina.

THE PIEDMONT ORGANIZATION

Mr. George V. Gilbert (now deceased) started the Piedmont organization with one Jobber outlet in Charlotte, North Carolina. As he expanded his business, he opened thirteen (13) branch Jobber outlets in a "wagon wheel" around Charlotte. He then decided to operate a warehouse to supply his Jobber operations. The entire operation was run as a sole proprietorship until 1952, when Mr. Gilbert incorporated each Jobber outlet as well as the warehouse. The name given the warehouse was Wholesalers Auto Parts Warehouse, Inc. ("WAPW"). After incorporating the various operations, Mr. Gilbert began selling stock to his employees, except in the original Piedmont Jobber outlet in Charlotte and in WAPW. These latter two (2) operations remained under his sole ownership. (TBF #1, p. 2).

Prior to his death, Mr. Gilbert established a testamentary trust in his will (dated November 10, 1962). The corpus of the trust was all of Mr. Gilbert's stock in the various Piedmont operations, including WAPW. The beneficiaries of the trust are Mr. Gilbert's wife, son and daughter, who share equally in the trust income.

WHOLESALE AUTO PARTS WAREHOUSE, INC.

WAPW was originally formed by Mr. Gilbert to "sell" only to the Jobber outlets he owned, namely, the fourteen (14) Piedmont stores. In other words, he acted as his own Warehouse Distributor. When Mr. Gilbert died (date uncertain, but his will was dated November 10, 1962), his son took over the management of WAPW and the Charlotte Piedmont store. The son determined WAPW had to sell to other than affiliated Piedmont Jobbers, since by that time many of the Piedmont stores were completely or partially independently owner, were no longer "captive" and were buying parts from other sources. As a matter of fact, the Piedmont stores in which the Gilbert estate (trustees) have an interest buy only from 27% to 31% of their parts from WAPW. (TBF #1, p. 23) WAPW now sells to 156 Jobbers. (TBF #1, p. 3)

The WAPW warehouse is approximately 45,000 square feet. The inventory is valued at approximately \$300,000. WAPW's annual sales are approximately \$1.5 million. (TBF #1, pp. 1-2).

Although formerly wholly owned by Mr. Gilbert, WAPW stock is now held by several other parties. Of the 371 WAPW shares, the Gilbert estate (trustees) holds 105 shares, Piedmont Auto Exchange, Inc. of Charlotte holds 115 shares, the son owns one (1) share, and the other shares are held by six (6) others, including five (5) of the other Piedmont stores. (TBF #1, p. 25) The Gilbert estate also owns stock in a few of the Piedmont stores which in turn own stock in WAPW. (TBF #1, pp. 25-26) According to the list on pages 25 and 26, TBF

#1, the Gilberts own stock in only six (6) of the fourteen (14) Piedmont stores.

WAPW gives a volume discount on a monthly basis to Jobber customers on all but a few lines. The "affiliated" Jobbers receive a 7% discount and the non-affiliated Jobbers receive a 6% discount. The volume discount was granted in response to discounts granted WAPW's customers by Auto Parts Central Warehouse in Charlotte, North Carolina, a now defunct "buying group." (TBF #1, p. 3)

WAPW, operating as a Warehouse Distributor, has four (4) full-time salesmen. They call on all Jobber customers. The salesmen receive a 5% commission on sales to non-affiliated Jobber customers and 2½% on sales to "affiliated" Piedmont Jobbers. The reasons for the difference in commissions is that the Piedmont stores generally phone in their orders, and they receive very little missionary work. WAPW solely determines which lines of products it will carry. Several competing lines are carried. No "drop shipping" is allowed unless in an emergency. (TBF #1, pp. 3-4)

NATURE OF INVESTIGATION

The investigation in this matter was initiated on September 22, 1965. The "field investigation" was conducted on November 3-4, 1965. The entire investigation consisted of two interviews, one with Mr. Jackson G. Gilbert, son of the Piedmont founder (TBF #1, pp. 1-4) and one with Richard Thigpen, Jr., Mr. Gilbert's attorney (TBF #1, pp. 22-24). The entire Buff File contains fifty-one (51) pages, including the above-mentioned interviews.

CONCLUSIONS AND RECOMMENDATION

This matter was docketed for investigation as a "buying group" matter under Section 2(f) of the amended Clayton Act. From the sparse material in the file, it appears the original concept of the Piedmont organization would result in a violation of Section 2(f). In other words, Mr. Gilbert would buy at Warehouse Distributor prices for all of his fourteen (14) Jobber outlets. The files indicated, however, that most of the Piedmont Jobber outlets were independently owned during the investigation (November 1965) and the trend was toward independent ownership of all the Piedmont Jobber outlets. It appears the Jobbers who are or were under control of the Gilbert family receive no competitive advantage over any competitors. Incidentally, we have received no complaints from competitors. With the expansion of WAPW's sales to 156 so-called non-affiliated Jobbers, it appears the Piedmont organization, as presently constructed, can be labelled anything but a "buying group."

Although the file is three (3) years old, and we have no present knowledge of the operations of WAPW or any of the Piedmont Jobber operations, it is my opinion that a full field investigation at this time would be costly, time-consuming, and would accomplish nothing beneficial to the Commission or the public interest.

I recommend this matter be closed and that the attached closing letter be mailed to the proposed respondent.

Respectfully submitted.

JOHN PERRY,
Attorney, Division of Discriminatory Practices.

Approved.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.
WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint of Trade.

FEDERAL TRADE COMMISSION,
Washington, D.C.

Re Piedmont Auto Exchange, Inc., file No. 661 0052.

PIEDMONT AUTO EXCHANGE, INC.,
Charlotte, N.C.

GENTLEMEN: The Commission has conducted an investigation involving your alleged violation of Section 2(f) of the amended Clayton Act, through the alleged

receipt of discriminatory prices in connection with the purchase, sale and distribution of automotive parts and supplies.

On the basis of the information developed in the investigation, it does not appear that further action by the Commission is warranted. Accordingly, the matter has been closed. The Commission may at any time take such further action as the public interest may require.

Sincerely,

JOSEPH W. SHEA, *Secretary.*

OCTOBER 11, 1968.

Re Advertising Checking Bureau, Inc., File 693 7045.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; and Secretary (J. Kuzow). Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; and Assistant Executive Director.

From: James M. Nicholson.

I request that this matter be placed on the Commission's meeting agenda. See attached Memorandum.

MEMORANDUM

OCTOBER 11, 1968.

To: Commission.

From: James M. Nicholson.

Subject: Advertising Checking Bureau, Inc., file 693 7045.

This request for an advisory opinion is limited to one question, i.e., the legality of refusing to pay advertising allowances for any advertising featuring a price below the dealer's wholesale price. In a comprehensive memorandum, the staff has reviewed the precedents and concluded that inclusion of such a provision in cooperative advertising plans would result in a violation of Section 2(d) and Section 5.

As the staff has discussed, in *General Electric Company*, Docket 8487, the Examiner had issued an order prohibiting GE from effectuating a program under which it would not contribute to any dealer advertising which mentioned prices below those listed in a "minimum prices for advertising" schedule. The Examiner had reasoned that this would be a denial of the proportionally equal treatment of all competing dealers required by 2(d) and would also constitute a restraint of trade in violation of Section 5. The Commission dismissed the complaint because the record was not adequate to enable an informed determination on the merits. Rather than remanding the case, the Commission considered the public interest would be better served by instructing the staff to maintain a close scrutiny of GE's cooperative advertising plans. General Electric subsequently discontinued the practice.

On the basis of this clear indication of the Commission's position, subsequent compliance activities in the wearing apparel and electric shaver industries have been directed at the elimination of similar provisions in cooperative advertising plans. The most common phraseology used in these matters was to condition payments upon the advertised prices being at the "retailer's regular price." At this point, I have no trouble fitting this advisory opinion request into context and agreeing with the staff that the proposal would be illegal under the same theory. Whether the line of demarcation is drawn at the list price, the regular retail price or the dealer's wholesale cost, the principle would appear to be the same, the only difference being that in each instance a different floor is drawn under the advertised prices which will qualify for allowances. The same objections could be raised in either case.

What appears, on the surface at least, to be out of context is the compliance action taken in *Bali Brassiere*, discussed on page 8 of the staff's memorandum, where the Commission approved the substitution of a provision which reads as follows:

This plan is not applicable to advertisements offering merchandise as "closeouts", "discontinued lines", "special bargains", "sale", "special promotion", "clearance" or "irregulars" or to advertisements similarly characterized or to advertisements offering June or January special promotional merchandise.

Further, it appears that by Minute date June 17, 1966, the Commission gave its approval to the following substantive language for use in letters to respondents

who were interested in substitutes for the forbidden provisions in their programs:

The Commission appreciates that sellers may wish to avoid contributing to promotional activities which they reasonably believe may damage their prestige. Accordingly, restrictions which prohibit only the *characterization* of customer offers as "Sale", "Bargain", "Close-out", "Clearance", and other similar characterizations are acceptable so long as they neither state nor imply any interference with customers' pricing practices.

While I must admit to some difficulty in articulating a rationale which would distinguish a refusal to pay advertising allowances for "sale" advertising from a refusal to pay allowances for advertising featuring prices below "regular" prices or below wholesale costs, the question appears to have been settled by prior Commission action and I have no wish to reopen it at this time. I merely raise the question in order to make it clear that the opinion here proposed by the staff does not conflict with the compliance actions, but fits more precisely under the GE principle as I have been given to understand the difference.

This, of course, leaves a question as to whether the opinion, as presently drafted, is as helpful as it might be in informing the Bureau as to acceptable alternatives. It is my feeling that in this matter, at least, we should not content ourselves with a simple negative ruling when we have already advised numerous businessmen of the alternative which might be equally acceptable to the Bureau, which, incidentally, seems to be well aware of our action with respect to price floors in cooperative advertising plans, but not with respect to "Sale" advertising. Consequently, I move that we direct the staff to revise the opinion to include advice as to what would be acceptable along the lines of the language approved by the Commission in its action of June 17, 1966.

MEMORANDUM

SEPTEMBER 24, 1968.

To: Commission.

From: Richard B. McMahon, Attorney-Adviser, Division of Advisory Opinions, Bureau of Industry Guidance.

Subject: Advertising Checking Bureau, Inc., file No. 693 7045.

Advisory Opinion: Inclusion of clause limiting price advertising (loss leader type) by retailers in cooperative advertising programs.

Statute: Section 2(d), amended Clayton Act, section 5, F.T.C. Act.

Recommendation: Disapproval.

By letter of August 27, 1968, Mr. Arthur S. Fay, Manager, Co-op Audit & Payment Division, The Advertising Checking Bureau, Inc., 353 Park Avenue South, New York, New York, 10010, (Hereinafter termed "ACB"), requests an advisory opinion concerning the legality of including the following clause limiting price advertising by retailers in cooperative advertising plans instituted by his firm's manufacturer-clients:

Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind.

ACB understands a supplier may not insist that his customers feature merchandise in cooperative advertising at a "suggested price" because such restriction might lead to discriminatory allowances as between competing retailers, but asserts that a manufacturer should be permitted to protect his brand image. As justification, ACB points out that such limitation on price in cooperative advertising would not affect the level of retailer markup and "since it is reasonable to expect that all dealers are in business to make a profit, advertising of products *below the dealer's wholesale cost* would create an unfair quality picture of the manufacturer's brand in the consumer's eyes."

ACB offers a rather complete cooperative advertising audit service for management in various lines of manufacturing. It checks advertising in over 1600 daily newspapers for numerous client-manufacturers such as Scott Paper Company and Jantzen, Inc., providing them with research reports on their own dealer and on competitor advertising. ACB audits and approves dealer advertising for payment under a client's cooperative advertising program and, if desired, will supervise and manage a client's account from drafting the cooperative advertising agreement to the payment of reimbursement claims.

Against this background we questioned whether the instant request was proper under Section 1.1 of the Commission's Rules for issuance of an advisory opinion.

The proposal as presented does not appear compatible with ACB's stated business activities as a proposed course of action. Through a conversation with the requesting party we developed that the proposal, as a practical matter, was hypothetical in so far as it related to ACB's business. However, since the presented problem is important to ACB's clients, particularly those representative of the clothing industry, he is of the opinion that the limiting clause has a proper place in the several client's cooperative advertising agreements. Because of this and because of the unique problem involved, we have found no adjudicated cases in point, we feel that a distinct service would be performed for the business world through consideration of the matter presented as an advisory opinion.

We do not know the identity of the client-manufacturers whose cooperative advertising agreements are to be modified to the extent proposed; we can only presume that some are now under Commission order prohibiting Section 2(d), Robinson-Patman Act, discriminations. Nor are we aware of the alternatives provided by any involved program; allowances for no-price advertising, sales incentives, point-of-sale aids and others usually appear as alternative means but, even though proportionalized, do not in our opinion constitute adequate substitutes for effective competitive price advertising to the consumer.

Section 240.9 of the Commission's Proposed Amended Guides for Advertising Allowances and Other Merchandising Payments and Services provides that cooperative advertising programs must be in their terms suitable and usable by all competing customers. By way of an example it is pointed out that a seller should not require as a prerequisite to the granting of advertising allowances to customers that such customer's advertising feature prices which, by prearrangement, are acceptable to both seller and customer, regardless of whether the seller or the customer established the prices. While this broad-brush approach to problems arising from price-limiting provisions in cooperative advertising agreements will be adequate in most instances the Rule does not appear to include the specifics present in this matter, i.e., the effort to control "loss leader" type sales by retailers for the benign purpose of protecting a manufacturer's quality image.

The simple act of "loss leader" advertising a sale of merchandise at or below cost prices is not, standing alone, unlawful, that is, this type business activity does not constitute an unfair method of competition or an unfair act or practice violative of Section 5, Federal Trade Commission Act. The practice must be married to some predacious business tactics, such as with the intent or effect of stifling competition or tending to create a monopoly, to bring it with the Act's proscriptions (*E. B. Muller & Co., v. F.T.C.*, CA 6, 1944, 142 F2d 511). The practice has also been held unlawful when accompanied by representations and acts which have a tendency or a capacity to injure or to discredit competition and to deceive purchasers as to the real character of the transaction (*Sears, Roebuck & Co. v. F.T.C.*, CA 7-1919, 258 Fed. 307).

Nor does it appear that a sale at cost or at a below cost price, in and of itself, would be condemned under the Sherman Act. Of course, an agreement between competitors (*U.S. v. Ekco Products Co.*, DC Cal., 1957, CCH 68768) or between a buyer and seller (*U.S. v. Parke, Davis and Co.*, 362 U.S. 29) is more clearly within the Act's condemnation than an individual's sale of his products below cost, sans agreement (*U.S. v. Aluminum Co. of America*, CA-2, 1945, 148 F2d 416). The practice may, however, constitute evidence of a contract, combination or conspiracy in restraint of trade violative of Sections 1 or 3 (*U.S. v. Chemical Specialties Co., Inc.*, DC NY, 1958, CCH 69186) or evidence of monopolizing, attempting to monopolize, or combining or conspiring to monopolize in violation of Section 2 (*U.S. v. Safeway Stores, Inc.*, DC ND Tex., 1957, CCH 68871).

In this latter cited case, the defendant, Safeway Stores, Inc., having been charged with having attempted to monopolize an area food market, consented to entry of a Final Judgment without adjudication and was thereafter enjoined from, among other practices, selling food items at unreasonably low or below cost prices for the purpose of monopolization and with the probable effect of destroying competition or eliminating a competitor. The injunction provided that should it be established that defendant Safeway

"(A) Has offered to sell or sold continuously or for a substantially continuous period of 60 days or more a daily total of 50 or more items below cost or at unreasonably low prices in any retail store; or

(B) Has sold in any store any number of items below cost whose total dollar sales volume in any four-week period constitutes more than 10% of total dollar volume of sale in that store during the same period; . . ."

the same would constitute a violation of the Judgment unless defendant Safeway would establish that the acts were not done for the prohibited purposes charged.

Section 3 of the Robinson-Patman Act, 49 Stat. 1526, makes specified pricing practices criminal offenses. It prohibits three kinds of trade practices (a) general price discriminations, (b) geographical price discriminations, and (c) selling at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. It is important to note that this section, in contrast to Section 1 of the same Act, does not amend the Clayton Act. In other words, although general and geographical price discriminations are both criminally punishable under this section and subject to redress under Section 2 of the Clayton Act, as amended, selling "at unreasonably low prices" is subject only to the criminal penalties provided by Section 3 (*Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 1958; *Safeway Stores, Inc., v. Vance*, 355 U.S. 389, 1958), and enforceable by the Department of Justice. When read in context, legislative excerpts indicate no more than this (80 Cong. Rec. 9419-9421, 9903). It is noteworthy that in 1950 Representative Patman indicated (Hearings on H.R. 7905, 81st Cong. 2d Sess., Serial No. 14, Part 5, p. 48) that Section 3 is not included in the list of laws designated as the "antitrust" laws.

Thus, it would appear that the simple act of selling merchandise at unreasonably low or below cost prices does not, in the absence of any predatory purpose or injurious effect upon competition or the probability of such an effect, violate any of the "antitrust" laws this Commission is empowered to enforce. While this is true, the discussion thus far does not provide us with a solution to the question involved in ACB's request, that is, whether a manufacturer-sponsor of a cooperative advertising program may prevent a participating retailer from advertising low or below cost prices by means of a prohibition in his cooperative advertising agreement limiting the payment of allowances to those advertisements which mention price at or above an arbitrary level. We think not. It is our view that as between two classes of customers, one selling below "minimum prices for advertising" and the other above such limitation, there is inherent discrimination in a program granting the one reimbursement for advertising at the approved price for which it sells, while the other, also advertising at the price for which it sells, would not be reimbursed under the same program.

The proposed restriction on price advertising seems to offer a reluctant retailer-customer three otiose alternatives; (1) he may advertise prices at or above the limitation level, (2) he may refrain from using any price in his advertising, or (3) he may advertise a price below the limitation level and pay for the advertising himself without promotional assistance. On this basis it would appear that inclusion of the price-limiting clause in a cooperative advertising agreement restricts its availability, it would be tailored to suit the needs of a favored customer class, those who agreed to advertise at or above the fixed level, and would not be suitable and usable on reasonable terms to all competing customers.

The requesting party justifies use of this proposed restrictive clause as a means of protecting the quality picture of the manufacturer's brand in the consumer's eyes. That the institution of a similar price-limiting plan was merely to discourage the advertising of its products at uneconomically low or below cost prices was the position taken by *General Electric Company* in Docket 8487 (Initial Decision, pp. 11-14). In this matter respondent, General Electric (GE), during 1959, amended its cooperative advertising plan by stating it would not contribute to any dealer advertising which mentioned prices below those listed for specific models in a "minimum prices for advertising" schedule (Initial Decision, pp. 6-11). After a hearing on the Commission complaint, issued May 28, 1962, it was found that this requirement (1) resulted in discrimination among competing retailers in the payment of promotional allowances in violation of Section 2(d), amended Clayton Act, and (2) tended to unduly hinder competition and restrain trade in violation of Section 5, FTC Act (Press Release, 14 March 1963).

In his Initial Decision of 1 March, 1963, the Hearing Examiner said that while the cooperative advertising plan was offered to all retailers "the most important and productive advertising media utilized by these retailers, namely, the advertising in newspapers of respondent's products to the consuming public at a low competitive price has been denied them". He went on to say:

What GE has accomplished by means of its plan is to deny a substantial number of retailers the benefits of cooperative advertising payments unless they adhere in their advertising to a pricing schedule which is not of their choosing or desire. And is, in fact, one which they cannot possibly use because of the highly competitive nature of their market. This is not a proper basis for proportional availability under 2(d) of the Robinson-Patman Act. The restrictions in the plan make it effectively unavailable to those retailers who wish to or must remain competitive pricewise on GE's products. * * * (Initial Decision, p. 18).

And further, on page 25, he continued his analysis by stating:

The introduction of these minimum prices for reimbursement for cooperative advertising was, however, clearly designed and intended to attempt to eliminate lower priced advertising and consequently constitutes an attempt by respondent to tamper with the prices of its retailer dealers which it had no right to do. *U.S. v. Socony-Vacuum Co., Inc.*, 310 U.S. 150 (1940); See also *Plymouth Dealers Ass'n. of Northern California v. U.S.*, 279 F2d 128 (9th Cir., 1960). The success of the plan in stabilizing the prices at which the dealers sold is not the determining factor as to whether the plan violates Section 5 but whether the plan as a whole interferes with 'the freedom to sell in accordance with their own judgment.' *Kiefer Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951).

After oral argument on cross appeals from the initial decision, by minute of 26 February, 1964, the GE complaint was dismissed without adjudication of the issues involved. In the dismissal order the Commission indicated that the record was not adequate to enable an informed determination on the merits. Rather than remanding for the taking of further evidence the Commission considered "that the public interest would be better served by instructing" the staff to maintain a close scrutiny of GE's Cooperative Merchandising Plans. Subsequent investigation determined that GE had abandoned the challenged provisions in its merchandising plans relating to the obtaining of cooperative advertising payments.

As noted previously, we know of no adjudicated cases in which the operation and probable effect of ACB's proposal has been considered by the Commission or the courts under applicable antitrust laws. We take the position, however, that an offered advertising allowance would not be available to all customers of a manufacturer-sponsor because of the condition imposed by the proposed clause on the basis of the Commission decision in refusing to accept compliance reports in the so-called "electric shaver" (*Sperry Rand Corp.*, D-6701; *Schick, Inc.*, D-6892; *Ronson Corp.*, D-7066; and, *North American Phillips Co.*, D-6900) and the rejection of reports of compliance in the so-called "apparel industry" cases (for example, *Bali Brassiere Company, Inc.*, Docket C-705, File No. 611 0507-1, p. 74).

In the "electric shaver" cases, the Compliance Division recommended rejection of submitted compliance reports, each respondent having a similar plan in operation, because cooperative advertising reimbursements were not available to all competing customers since none would be given those who advertise and sell at prices lower than the suggested retail price. The view was taken that the condition imposed did not insure the proper display or sale of a product but was designed solely to discourage price competition, probably the most important aspect in competitive selling. The defect was not cured by the fact that a customer was able to get the promotional allowance by not mentioning price. Even though the program would be thus available, it was not available on proportionally equal terms since one retailer could, while another could not, advertise the price at which he sold. This position was adopted by the Commission.

In the "apparel industry" cases, many respondents submitted compliance reports which included similar conditions. The most common phraseology conditioning reimbursement for dealer advertising was upon the advertised prices being at the "retailer's regular price", but there were variations. The Bureau of Restraint of Trade, in a memorandum to the Commission under date of 18 February, 1966, reported that many manufacturers contend that the reason for inserting these provisions was to protect their reputation in the marketplace; the similarity to ACB's reasoning in this respect is unmistakable. The Division recommended that respondents be advised that the Commission had

determined that provisions which limit the prices at which goods may be advertised have the potential for resale price maintenance and preventing the availability of allowances, and therefore unacceptable in reports of compliance (Docket C-705, File No. 611 0507-1, pp. 60-64). This position was adopted by the Commission and respondents so notified.

Subsequently respondent, Bali Brassiere, reported that it had eliminated from its promotional plan the objectionable words "at regular prevailing prices" and had added a provision substantially to the following effect:

This plan is not applicable to advertisements offering merchandise as "closeouts", "discontinued lines", "special bargains", "sale", "special promotion", "clearance" or "irregulars" or to advertisements similarly characterized or to advertisements offering June or January special promotional merchandise.

This was received and filed as respondent's report of compliance on 6 October, 1966, (File No. 611 0507-2-2).

In our view a requirement that all advertising to be eligible for reimbursement under a cooperative advertising program must not advertise products "at a price below the retailer's wholesale price" makes reimbursement, in fact, unavailable to competing customers who occasionally do sell at prices not consonant with the limitation imposed. Price advertising is an essential part of the selling process and the retailer who is able to advertise the price at which he sells, and be reimbursed therefore, has a distinct competitive advantage over his competitor who is not reimbursed for advertisements listing the price at which he sells. The proposed limitation would tend to discourage price competition even though the supplier cannot legally control resale prices. To add to the manufacturers right to engage in cooperative advertising with customers the authority to control resale prices, by a clause requiring that sale price advertising must be at or about a fixed sum, would give him a right not included in the statute and, we feel, extend its operation, by construction, beyond its meaning when interpreted with the view to ascertaining the legislative intent in its enactment.

In interpreting the many interdictions of the amended Clayton Act we are guided by Justice Frankfurter's admonition "to reconcile such interpretation . . . with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 74. Such policies include, of course, an absolute prohibition against unlawful tampering with the pricing structure of customers or competitors. While price fixing or resale price maintenance in the classic sense may not be involved in this request, there does appear to be a form of price restriction or tampering present. The advertising of a price is an offer to sell at that price, and, we submit, an attempt to control the price at which a retailer advertises an article is an attempt by indirection to control the resale price of that article. In *U.S. v. Parke, Davis and Co.*, 362 U.S. 29, the court, while recognizing the traditional right of customer selection, disapproved measures taken in agreement with independent wholesalers to control retailer price advertising. Here, the incipency test laid out in *F.T.C. v. Motion Pictures Advertising Service Co.*, 344 U.S. 392, was applicable since the practices "when full blown" would violate the Sherman Act.

On the basis of the foregoing comments and conclusions we believe that the Commission's interpretation of Section 2(d) in the "electric shaver" and "apparel industry" cases, as well as the interpretation of Section 5 in the latter group, is compatible with broad antitrust objectives and that institution by ACB of the proposed clause in client's cooperative advertising agreements would do violence to those principles. We are mindful of the Commission's position in the "apparel industry" cases (restrictions which prohibit the characterization of customer offers), in *Honeywell, Inc.*, File No. 683 7063 (Advertising which will not damage a seller's prestige) and in Independent Garage Owners of America, Inc., File No. 683 7097 (below cost advertising for limited periods of time). It would seem likely a suggestion that similar language substitution, as was done in the latter advisory opinion, for ACB's loss leader provision might be pertinent here. However, because ACB initially confined its request to inclusion of the specific clause in merchandising agreements, we do not recommend such action at this time. There will be another time and another request where the substitution will be more appropriate.

A draft letter for the Secretary's signature by direction of the Commission informing the requesting party of the Commission's decision in this matter is attached. Also attached is a draft press release for publication if directed.

Respectfully submitted.

RICHARD B. McMAHILL,
Attorney-Adviser,

Division of Advisory Opinions, Bureau of Industry Guidance.

Approved:

ARTHUR R. WOODS,
Acting Chief, Division of Advisory Opinions,
Bureau of Industry Guidance.

CHALMERS B. YARLEY,
Director, Bureau of Industry Guidance.

Concurrence:

Digest approved for publication:

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices,
Bureau of Restraint of Trade.
WILLIAM F. JIBB,
Director, Office of Information.
RUFUS E. WILSON,
Chief, Division of General Trade Restraints,
Bureau of Restraint of Trade.

INCLUSION OF PROVISION IN COOPERATIVE ADVERTISING AGREEMENTS LIMITING PRICE ADVERTISING BY RETAILERS

The Commission recently rendered an advisory opinion regarding a proposal to include the following statement in cooperative advertising agreements to be drafted by the requesting party for use by manufacturer-clients for the purpose of placing a restriction on price advertising practices by their retailer-customers:

Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind.

The requesting party explained that this provision is intended to assist manufacturer-clients to protect the quality of their brand image through providing them with the means for limiting the payment of promotional allowances to those retailer-customer advertisements which mention price at or above the retailer's wholesale price level. He took the position that such limitation would not affect any retailer's markup picture.

The Commission advised that although it appreciates the desire of manufacturers to avoid cooperating in promotional activities which they feel may do violence to their corporate prestige, it could not give its approval to the proposed inclusion of a price-limiting provision in cooperative advertising agreements. The reason for this action is that inherent in such provision is a strong possibility that payments of discriminatory promotional allowances and the unlawful fixing or maintaining of resale prices might result if the proposal is put into operation.

The Commission further pointed out that implementation of such a provision in cooperative advertising agreements has the potential of restricting the availability of promotional allowances and other payments generally. Such potential restriction results from the requirement that reimbursable customer promotions must adhere to a price not below an arbitrary figure. This restriction disfavors the customer who occasionally may advertise a seller's products at a price not consonant with the limitation imposed and favors the competing customer who will adhere to a price pattern agreeable to the seller.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

FEDERAL TRADE COMMISSION,
Washington, D.C.

Re File No. 693 7045.

Mr. ARTHUR S. FAY,
The Advertising Checking Bureau, Inc.,
New York, N.Y.

DEAR MR. FAY: This is in further reference to your request of August 27, 1968, for an advisory opinion regarding your proposal to include the following statement in cooperative advertising agreements drafted for use by manufacturer-clients for the purpose of placing a restriction on price advertising practices by their retailer-customers:

Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind.

It is understood that your proposal is intended to assist your manufacturer-clients to protect the quality of their brand name image through providing a means of limiting the payment of promotional allowances to those retailer advertisements which mention price at or above the retailer's wholesale price level. Your position is that such limitation would not affect any retailer's markup picture.

Although the Commission appreciates that manufacturers desire to avoid cooperating in promotional activities which they feel may do violence to their corporate prestige, the Commission cannot approve the proposed inclusion of a price-limiting provision in cooperative advertising agreements. This position is taken for the reason that inherent in such provision is a strong possibility that payments of discriminatory promotional allowances and the unlawful fixing or maintaining of resale prices might result if the plan is put into operation.

Implementation of a provision such as you have suggested in cooperative advertising agreements has the potential for restricting the availability of cooperative advertising allowances and other promotional payments generally. Such potential restriction results from the requirement that reimbursable customer promotions must adhere to a price not below the retailer's wholesale price. This restriction disfavors the customer who occasionally may advertise a seller's products at a price not consonant with the limitation imposed and favors the competing customer who will adhere to a pricing pattern agreeable to the seller.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary.*

THE ADVERTISING CHECKING BUREAU, INC.,
CO-OP ADVERTISING AUDIT & PAYMENT DIVISION,
New York, N.Y., August 27, 1968.

Mr. FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices,
Federal Trade Commission, Washington, D.C.

DEAR MR. MAYER: Although we understand a manufacturer may not normally insist that his retailers feature merchandise at a "suggested price" under a cooperative advertising plan because it might possibly lead to discrimination against certain classes of retailers, the manufacturer certainly wants to protect the quality of his brand image through such plans. Therefore, we would like to request an advisory opinion from the Commission on the inclusion of the following statement in such plans to give the manufacturer the type of protection he seeks:

Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind.

It would seem to us that such a limitation on price features would, in no way, affect the level of markup a retailer decided to place on his merchandise and since it is reasonable to expect that all dealers are in business to make a profit, advertising of products *below the dealer's wholesale cost* would create an unfair quality picture of the manufacturer's brand in the consumer's eyes.

We would appreciate the Commission's opinion.

Very truly yours,

ARTHUR S. FAY,
Manager, Co-op Audit and Payment Division.

NOVEMBER 12, 1968.

Re Groveton Paper Co., Docket No. 6592.

From : James M. Nicholson.

To : Commissioner Dixon, Bureau of Restraint of Trade.

I request that this matter be placed on the Commission's meeting agenda.
See attached Memorandum.

MEMORANDUM

To : Commission.

From : James M. Nicholson.

Subject : Groveton Paper Co., Docket No. 6592.

Pursuant to direction, the staff has submitted its report and recommendations as to how we should proceed with respect to outstanding 2(d) orders in light of the *Fred Meyer* decision. After discussing the background and applicable precedents, the staff concludes that the probability is that the Commission could not successfully apply the *Meyer* doctrine to previous orders without some form of notice and opportunity to be heard whether through reopening of said orders or through other procedures.

I am inclined to agree, though I must confess to some doubt on this score as most of the precedents cited by the staff deal with situations in which a new interpretation was later placed upon an order which differed from that in effect at the time the order was issued and not with a situation where an appellate court had given a new construction of the statute on which the orders were based. Here the staff notes that there are no precedents directly in point.

However, the staff would avoid an immediate resolution of this legal question by proposing two alternative methods of procedure short of meeting the question head-on. First, it would wait until issuance of the revised advertising allowance guides and then use on Order to File a Special Report with each of the respondents under order to determine the manner of compliance with the order, whether further corrective action is necessary and whether reopening or modification of orders is appropriate. This would permit respondents to conform with the Guides if they so desire. Its second alternative would be to send a letter to each respondent advising that their "statutory" compliance standards would in the future be expected minimally to conform to *Meyer* and the Guides.

The staff favors the first approach and so do I. In view of the magnitude of the task and the manpower requirements, this seems to me to be an intelligent solution to the problem which will discharge our responsibilities to secure compliance with the court opinion, while at the same time avoiding what we can hope will turn out to be an unnecessary confrontation over a difficult procedural question.

I move we adopt the staff's first recommendation.

MEMORANDUM

SEPTEMBER 25, 1969.

To : Commission.

From : Chief, Compliance Division, Bureau of Restraint of Trade.

Subject : Groveton Paper Co., Docket No. 6592. Recommendation re, the application of the theory in *Fred Meyer* to previously issued orders.

This is in response to the Commission's Minute dated April 17, 1968, requesting recommendations as to how the Commission should proceed with respect to outstanding orders affecting Section 2(d) of the Clayton Act, as amended, in light of the decision of the United States Supreme Court in *F.T.C. v. Fred Meyer, Inc., et al.*, (Slip opinion March 18, 1968).

Because of the particular responsibilities of this Division in relation to the processing of compliance with Commission orders, this memorandum examines the compliance effect on Commission orders issued prior to the judicial interpretation in *Fred Meyer*, of Section 2(d) of the Clayton Act, as amended. In said opinion the Supreme Court ruled that the word "customers" in Section 2(d) includes retailers who buy through wholesalers and who compete with a direct buyer in the resale of the suppliers' products.

A listing of those outstanding Commission orders issued under Section 2(d) which are believed to be substantially affected by *Fred Meyer* has been compiled. In making this compilation, a total of two hundred and forty-six (246) matters involving statutorily phrased 2(d) orders have been reviewed. The 2(d)

matters not so reviewed include instances wherein the Commission's complaint was dismissed or the Commission's order was subsequently set aside; matters wherein the order to cease and desist is not final because of pending appeal; and the group of 2(d) orders issued against members of the garment industry. Additionally, the Section 5-2(d) inducement cases were not considered in this review because the orders involved are not statutorily phrased 2(d) orders.

Of the two hundred and forty-six (246) 2(d) matters that have been reviewed, a total of one hundred and ninety-eight (198) cases have been included in the final compilation. These include thirty-eight (38) pre-Finality Act orders, and one hundred and sixty (160) post-Finality Act orders. Five of the pre-Finality Act orders have been enforced. The forty-eight (48) cases excluded from this listing, because in this Division's opinion they would not be clearly affected by the *Fred Meyer* decision, comprise the following: (a) Matters wherein the record (i.e., complaint, findings, decision, and order) does not identify the class or classes of customers to whom or through whom the respondent sells its products, e.g., sales are said only to have been made to customers in general and the discrimination was alleged to have occurred among such customers in general (typically older cases); (b) matters wherein the record indicates that historically all respondent's sales are made directly to a single specified class of customers (typically retailers in the jewelry and wearing apparel industries), notwithstanding the absence of corresponding limitation in the order; and (c) cases which are known to have been closed for the reason that the respondent has discontinued its business operations, either *in toto* or in pertinent part.

The final listing of one hundred and ninety-eight (198) cases believed to possibly be affected by *Fred Meyer* is attached as Appendix A,¹ and attached as Appendix B is a statistical summary wherein the cases included in Appendix A are classified into groupings considered helpful for present purposes.

We believe that several considerations and postulates need be prospected in order that the complexity of the problem in *Meyer*, as affecting previously entered orders, is appreciated, and more importantly, that a decision as to the method to be employed in the future in handling compliance with these orders is soundly premised.

The keystone legal issue which must be considered is whether a judicial interpretation by the Supreme Court as to the coverage and meaning of a statute (Section 2(d) of the Clayton Act, as amended) broadens or otherwise affects a respondent's future obligations under a statutorily phrased order entered prior to such interpretation, and at a time when a more constricted interpretation of the statute was understood by both parties.

We also propose to discuss whether a substantial difference exists because of the entry of an order by consent rather than after adjudication, as well as the significance of the Commission's past approval of compliance reports inconsistent with, or containing less stringent requirements than the now enunciated *Meyer* doctrine.

At the outset we wish to point out that we have discovered no case law which directly or clearly supports the proposition that a respondent's obligations under a Commission order to cease and desist, which tracks the statutory language of Section 2(d) of the amended Clayton Act, automatically expand with an exposition of the statutory standards through judicial interpretation.

The key cases which deal directly with the propriety of interpretation of decrees do not as a rule involve litigated decrees, but rather consent decrees. As to whether a substantive difference exists between consent decrees or those entered after adjudication, the Supreme Court has suggested that such difference is one of form and not substance. In *United States v. Swift & Co., et al.*, 286 U.S. 106

¹ Cases appearing in the listing are numbered in fairly chronological sequence, and are identified by name and docket number (the latter column also includes the statute(s) involved). With the exception of the self-evident product identification, the additional information included for each listed case is explained as follows:

Finality: Specifies the date of the Commission's order and, when appropriate, the date of subsequent affirmation or modification;

Nature of Order: Indicates whether the order to cease and desist is a consent order, or an order entered after litigation, hearings, or the taking of evidence or testimony (including stipulations of fact). Additionally, all orders may be considered to be in the standard, statutory form unless a departure therefrom is specifically noted in this column;

Current Status: States the current posture of the case regarding Commission action upon the report of compliance or any supplemental report of compliance, and the existence of pending investigations and relevant advisory opinions; and

Status Under Fred Meyer: Briefly, a statement of the reason why the case is believed to be affected by the *Fred Meyer* decision.

(1932), the Court, in discussing the nature of a consent decree issued in an antitrust case, specifically rejected the argument that a consent decree is to be treated as a contract, and held that it was a judicial act. It would appear therefore that a decree or order does not, because of consent vehicle alone, differ from a litigated decree or order. If any difference is perceptible, it seems to be based on the concept that a respondent subject to a consent order has equitable considerations which may militate in its favor.

For example in *United States v. Atlantic Rfg. Co.*, 360 U.S. 19 (1959), the United States brought suit against appellees for violation of the Elkins and Interstate Commerce Acts. The suit was settled by a consent decree. For a period of sixteen (16) years, the decree was construed by both parties to have the same meaning. The Government finally challenged this interpretation, arguing that the terms of the decree supported a new interpretation just as well as the old, and that the new interpretation would more nearly effectuate the purpose of the statutes under which the original suit was brought. In making it clear that the issue here was the propriety of *administrative interpretation, not modification*, the Court said it would not substantially change the meaning of the words of a decree to which the parties had consented without an adjudication of the issues. The Court specifically said:

"Where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with Government's reasons for entering into the agreement in the first place." (at 23)

In *United States v. Int. Harvester*, 274 U.S. 693 (1927), the Government petitioned the Court to obtain further relief under an outstanding consent decree. The Court refused to approve a construction of the decree which "would plainly be repugnant to the agreement approved by the court, and embodied in the decree, which has become binding upon all parties, and upon which the International Harvester Company has, in the exercise of good faith, been entitled to rely." (at 703)

The rationalization of these cases would seem to militate against more stringent interpretations of an order sans reopening, where both the Government and a respondent have adhered to a previous interpretation over a protracted period of time. For present purposes we must also recognize the fact that the Commission has approved many compliance reports based on the pre-Fred Meyer interpretation of Section 2(d), and the fact that the Commission's theory of violation in many instances was plead on a fact premise more narrow than the Meyer doctrine; e.g., discrimination between direct buyers. In addition, the Commission has in at least one instance issued an advisory opinion in relation to an order admitting of a more liberal standard of compliance than now statutorily imposed by Meyer. The Commission, on the other hand, might argue that the new interpretation of the word "customers" in its Section 2(d) orders would more nearly effectuate the meaning of the statute as construed by the Supreme Court. We note, however, that the Court refused a similar argument in the *Atlantic Rfg., Co.*, case, although there made in a different fact context than arising out of the current Meyer opinion.

In *F.T.C. v. Standard Brands, Inc.*, 189 F. 2d 510, (2nd Cir. 1951), the Commission issued its order after a proceeding in which the Commission's complaint charged that the respondent's sales unlawfully affected competition among its customers. The complaint did not charge, nor did the Commission ultimately specifically find, that the respondent's activities had had any unlawful effects upon the respondent's competitors on the primary level.

The Commission later conducted hearings which indicated that the respondent's activities were substantially lessening competition between Standard Brands and some of its competitors, and thereafter made application for a decree affirming and enforcing the order. The Court held that the Commission's finding of substantial lessening of competition at the primary line level did not dovetail with the coverage of the Commission's order. The Court stated:

"Perhaps this conclusion may seem somewhat formalistic. For the Commission may at once begin a new proceeding pursuant to a complaint charging violations of the Act as to Standard Brands' competitors and, in such a proceeding, the Commission may properly consider the evidence heretofore taken in the violation hearing. Nevertheless, this seeming formalism is desirable in

fairness to respondent since, in such a new proceeding, it may be able to offer evidence proving that its actions were not unlawful vis-a-vis its own competitors." [at 513]

The language in *Standard Brands* takes on more meaning in light of the Supreme Court's decision in *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360 (1962). The *Broch* case involved a pre-Finality Act, Section 2(c) Clayton Act order. The Court of Appeals, on petition to review, limited a portion of the order. The Supreme Court held that the Court of Appeals acted inappropriately and prematurely in limiting that portion of the order which prohibited acts other than those which the respondent was shown to have literally perpetrated. The court held that such overbroadness, if such it was, could be considered in enforcement proceedings, and upheld the right of the Commission to, in its discretion, formulate a remedy. However, the Court went on to state:

"Upon any future enforcement proceedings the Commission and the Court of Appeals will have ready at hand interpretative tools—the employment of which we have previously sanctioned for use in tailoring the order, in the setting of a specific asserted violation, so as to meet the legitimate needs of the case. They will be free to construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which *Broch* was found to have committed, or as forbidding no activities except those which it continued would directly aid in perpetuating the same old unlawful practices *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 727 [4 S. & D. 676]. They need not—as we have already made clear—read the order as denying [367] to *Broch* the benefit of statutory defenses or exceptions. *Federal Trade Comm'n v. Ruberoid*, supra, at 475-476; *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419, 426 [6 S. & D. 193]. Nor need the order be construed as prohibiting anything as clearly lawful as a uniform reduction in commissions. And, we repeat, these various interpretive aids will have to be brought to bear by a Court of Appeals upon a particular practice of *Broch*, and will have to yield the announced result that such practice violates the order, before *Broch* can be subjected to penalties because of still a second repetition of the violation." [at 366] (Emphasis supplied.)

In relation to post-Finality Act orders the Supreme Court, in addition, stated: "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. See *Labor Board v. Express Pub. Co.*, 312 U.S. 426, 435-437; *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 726 [4 S. & D. 676]; *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 54 [4 S. & D. 716]. Compare *New Haven R. Co. v. Interstate Commerce Comm'n*, 200 U.S. 361, 404; *Swift & Co. v. United States*, 196 U.S. 375, 400-401." [at 367]

We feel that *Standard Brands* and *Broch* supplement the availability of an equitable defense to a pre-*Meyer* respondent. It can be well argued from such standpoint that many pre-*Meyer* complaints, and correspondingly the resulting orders, were substantially premised on theories of violations less stringent than the *Meyer* doctrine and that a statutorily phrased order is correspondingly no broader than the fact structure which premised its issuance.

Such a defense would not be available, of course, to respondents bound by orders entered under different circumstances. In any case where an order has been written in statutory language, and the complaint and/or findings show a record basis for a *Fred Meyer* type of situation, the *Standard Brands* and *Broch* principles might not prove stumbling blocks to enforcing such an order, because the order, in the light of the complaint and findings, could be interpreted to cover the *Fred Meyer* type of situation.

While we recognize the possibility of the above occurrences, it nevertheless appears to be true that most orders written in statutory language prior to *Fred Meyer* were not preceded by a record basis coextensive with the *Fred Meyer* theory. In addition the standards of compliance reasonably anticipated under such orders did not require the kind of statutory business behavior the Supreme Court has now said is necessary.

Other cases exist which bear on the question of the availability of equitable and substantive arguments being available to respondents should the Commission attempt to apply *Meyer* to past orders, even if the application would be made as to future conduct and with reasonable notice.

In *F.T.C. v. Nash Finch Company*, 288 F. 2d 407 (D.C. Cir. 1961) and *Sperry Rand v. F.T.C.*, 288 F. 2d 403 (D.C. Cir. 1961), an attempt by the Commission to apply post-Finality Act standards to orders issued prior to the finality amendment of the Clayton Act were successfully challenged. In these cases, however, the Courts, premised their conclusions on the fact that the suggested construction of the statutory amendment did not countenance coverage of pre-existing orders.

In a very recent case, *National Dairy Products Corporation v. Federal Trade Commission*, Civil Action No. 1071-68 (D.D.C. 1968), a preliminary injunction was issued against the Commission by the District Court after the Commission attempted to substantively interpret the order prohibitions against asset acquisitions so as to include a there defined market share concept. National Dairy stated in its complaint that it was asking the court to act because plaintiff was subject to a suit for civil penalties for failure to obey the order as expanded through administrative interpretation, and that plaintiff was consequently entitled to immediate relief. The court agreed, saying in the injunction that:

"There exists between the parties a justiciable controversy in respect of which the plaintiff is entitled under the Declaratory Judgment Act, 28 USC 2201-02 to a declaration of its rights by this Court."

However valid its observations, the court nevertheless suggested that a reopening proceeding would provide more equitable safeguards to the affected respondent.

Supporting this theory is *Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136 (1967). There the Commissioner of Food and Drugs issued regulations as to labeling and advertising of drugs. Violations of the regulations were subject to penalty. Upon challenge the Court held that the administrative action was properly reviewable because it would affect the "... day to day business of ... companies; its promulgation put petitioner in a dilemma that was the very purposes of the Declaratory Judgment Act to ameliorate." [at 152]

If however the Commission changed the compliance necessary under existing 2(d) orders without reopening and modifying, such a Commission action, though questioned, may not technically be considered ripe for judicial action in a court of appeals. *Rettinger v. Federal Trade Commission*. — F.2d — (2nd Cir. 1968), *Vulcanized Rubber and Plastics Company v. Federal Trade Commission*, 258 F.2d 684 (D.C. Cir. 1958). This is not to suggest however, that such a re-determination of compliance standards would not be considered justifiable by a District Court in a declaratory judgment proceeding.

There are other analogies in case precedent lending credence to the postulate that courts react very conservatively with respect to administrative attempts to expand coverage of orders beyond what may be considered a reasonable and clearly understood relationship between the questioned acts and practices and the language of the order as originally postured in relation to such acts and practices. *U.S. v. International Nickel Co.*, 203 F. Supp. 739 (S.D.N.Y. 1962) *Ashville Tobacco Board of Trade, Inc. v. F.T.C.* 294 F.2d 619 (4th Cir. 1961), *Carter Paint Co. v. F.T.C.* 333 F.2d 654 (5th Cir. 1964).²

In exploring the possibility of applying *Meyer* to previously issued statutory orders, the *Meyer* decision may be characterized as not being a change of law but rather an interpretation of what the statute always meant, irrespective of the fact that less stringent concepts may have motivated past enforcement.³ It may be argued that the construction by the Supreme court did not make new law, but merely clarified the meaning of the statute, and the Commission, acting in the public interest must expand its interpretation of such orders to give literal

² See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d (3rd Cir. 1967), reversed on other grounds, — U.S. — (1968), where the court expressed its opinion that retroactivity should be determined from the facts of a particular case, having in mind the purpose which the new rule seeks to accomplish and the comparative benefits and evils of retroactivity. It emphasized that in civil unlike criminal cases, it is appropriate to recognize that businessmen must rely on counsel, who are in turn guided by the existing precedents in making decisions in relation to the antitrust laws on specific business conduct. The theory of the Court of Appeals seems to have been that when a party has relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness would require that the new rule be applied prospectively only.

³ It should be noted that recent Supreme Court decisions involving criminal cases have made it clear that the theory that the law has always been what the latest case for the first time declares it to be, i.e., the Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on earlier rules of law, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965) to *Mapp v. Ohio*, 397 U.S. 643 (1961).

effect to the intended statutory proscriptions. Further, the equitable concept of estoppel will not bar the Commission from so applying the new interpretation to such orders, *P. Lorillard v. F.T.C.* 186 F.2d 52 (4th Cir. 1950).

Pursuing this rationalization, a respondent subject to a statutorily phrased order is arguably bound by all subsequent and expanding statutory interpretations by the highest *Court* and a respondent who consents to such an order consents to such a judicial probability. Such an argument, however, suffers from a mathematical deficiency in the sense that, assuming the accuracy of our research, no such literal instance has been found in existing precedent.

Our conclusion with respect to the application of legal principles to the present problem is that the rationalization of the previously cited cases militate against the probability of the Commission successfully applying *Meyer* to previous orders without some form of notice and opportunity to be heard whether through reopening of said orders or through other procedures.

As a practical consideration, however, the Commission has approved compliance reports in over one hundred and fifty (150) cases where the standards of compliance do not measure up to the *Meyer* requirements. Minimally, any attempt, to apply *Meyer* to said orders must countenance the requirements of the Section 3.61 of the Commission's Rules. In Section (a) thereof it is provided, *inter alia*, that "The Commission will review such reports of compliance and will advise each respondent whether the actions set forth therein evidence compliance with the Commission's order."

In Section (d) of said Rule it is further provided:

"The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

The previous approval of lesser compliance standards than statutorily imposed by *Meyer* would make it incumbent to remove such prior approval as a precedent to taking any action designed to apply *Meyer* to such orders. Correspondingly, and aside from the application of *Meyer* to said orders, it would seem desirable, if not essential, for the Commission, as a minimum, to make it clear in some form of notification to affected respondents that such previous approval of compliance reports will not in any way militate against the Commission's future application of statutory standards to respondents under outstanding orders.

In summary, therefore, and supplementing our previous conclusion as to the infirmities of the legal position supporting any attempt to summarily apply *Meyer* to past orders by way of future compliance requirements, we feel that it is unnecessary to explore the various procedural mechanisms which might be available to respondents who took exception to any such attempt. The vehicles of declaratory judgment, and perhaps appeal, suggest themselves as being within the framework of available procedures. Arguments available would include such as the following:

(a) Orders entered by consent admitted of no violation of law and were necessarily premised on the acceptability of compliance standards then recognized.

(b) The framework of the complaints charged law violations on fact situations not countenanced by *Meyer*, e.g., discriminations between wholesalers or between direct buying retailers and the orders, despite employment of broad statutory language, cannot properly apply to unanticipated eventualities.

(c) The changed interpretation places respondents in penalty or enforcement jeopardy in areas never reasonably countenanced.

(d) The Commission had previously recognized, with respect to other cases and in its rules, that where confusion as to coverage of an order exists the fairest procedure is to reopen said order, e.g., *Mohr v. F.T.C.* 272 F.2d 401 (9th Cir. 1959); Section 3.72(b) of the Commission's Rules dealing specifically with "changed conditions of . . . law . . .;" and Section 11(b) of the Clayton Act, as amended, also specifically providing for reopening of final orders.

RECOMMENDED PROCEDURES

We have considered various approaches which the Commission might take to deal with the problem of orders in relation to the decision in *Fred Meyer*.

The availability of the reopening procedure is, of course, apparent but would involve in all probability not only selected instances of litigation on the basis of previously referenced theories but more practically entail a staff-manpower burden for which the Compliance Division and we believe the Bureau of Restraining of Trade is not presently equipped. Any reopening process would moreover suggest the advisability of Commission investigation to determine what respondents are in fact doing as a necessary prelude to informed decision. We also feel that action looking toward rescission of previous compliance reports should also properly entail at least Commission compliance with the notice and opportunity requirement of Rule 3.61(d).

We have concluded that two procedures, in the alternative, suggest themselves as being of practical availability under all of the circumstances.

Alternative 1.—This is the procedure which we recommend. Under this proposal the Commission would, following issuance of revised 2(d)-2(e) guides, send an Order to File a Special Report, supported by Resolution and accompanied by a copy of the guides to each respondent under order. In appropriate language the Commission's resolution would recite the existence of the previous order and compliance report approval. In addition, appropriate reference to the Supreme Court's opinion in *Meyer* would be made. The resolution would make it clear that the Commission is investigating:

- (a) to determine the manner and extent of compliance with the order.
- (b) whether corrective action with respect to Sections 2(d) or 2(e) of the Clayton Act, as amended, should be undertaken,
- (c) whether reopening or modification of orders is appropriate, or
- (d) whether rescission of compliance standards previously approved should be undertaken.

We believe that this approach, if coupled with a requirement to file the special report in one hundred and twenty (120) days, disclosing in detail all aspects of promotional programs in effect from date of receipt of the order to date of filing of the report, will have the following facets:

- (a) It looks to the disclosure of a program which can be implemented or altered after receipt of the order to file the report or in any event the program which is then in effect.
- (b) It permits a respondent to conform a program to *Meyer* if it so elects.

(c) It will provide the Commission with a fact premise upon which to evaluate the need for and manner of corrective action on a per case basis.

We recognize that this procedure would really be forestalling, at least for a time, the need for definitive appraisal of the basic question as to *Meyer's* applicability to each of these orders. However, we do feel that the procedure has prophylactic overtones which may key respondents into taking the needed steps to conform their programs to statutory standards. It also will inform the Commission as to what each respondent is in fact doing.

Alternative 2.—This procedure is basically premised on the consideration that *Meyer* cannot properly be applied to the preponderance of previously entered orders, and that it is desirable to avoid the prodigious burden of reopening all of the affected orders or going through the also considerable and time consuming processes of Alternative 1.

It would entail the Commission's sending a letter notification to affected respondents citing the background of the order and *Meyer* opinion and advising respondent that its "statutory" compliance standards would in the future be expected to minimally conform to the Court's opinion in *Meyer* and the instructions of the accompanying guides. No further report would be required although this fact would not be specifically mentioned.

This approach, we recognize, is substituting notice and suggestion for more positive action. However, it also recognizes the practical, legal and manpower problems of endeavoring to do more.

In recommending Alternative 1 we apprise the Commission of the fact that the Compliance Division has but one man assigned to the whole area of 2(d) orders and the present overall case load does not practically admit of our ability to assign more men to this area, despite an existing backlog. If Alternative 1 is adopted, and the garment orders are excluded, I recommend that

at least eight experienced attorneys be identifiably assigned to handle this project from the standpoint of analyzing the required reports. We know from experience that precise analysis of 2(d) programs is most frequently a complex problem and with the suggested number of attorneys the per attorney case load would still exceed twenty (20).

In conclusion, I again point out that we have not frontally included in our consideration of this problem the in excess of three hundred (300) 2(d) orders outstanding in the garment industry. Compliance with these matters is being handled by the Division of Discriminatory Practices. We are advised that these orders eventuated from an industry structure in which the suppliers generally do business directly with the "customers" and that intermediaries are not the rule. This structural setting aside, however, we view the garment matters as presenting identical legal problems insofar as the application of the *Meyer* doctrine is concerned. Because of the structural differences existing in the garment industry, we believe, that for present purposes and in the absence of some future compelling reason, such cases should be excluded from Alternative 1, if such is adopted.

In recommending Alternative 1, and assuming the garment orders are excluded, the number of special reports would approximate one hundred and ninety-eight (198).

As we understand the present practice with respect to clearance of Section 6 orders to file reports by the Bureau of the Budget, it does not countenance clearance of these questionnaires since the nature and scope of the investigation would include the consideration as to whether each recipient is violating the Clayton Act, as amended, or an order. [Memorandum of the Chairman, September 27, 1963, p. 2, par. 1, "Re Investigations Under Section 6(b) of the Federal Trade Commission Act; Orders to File Special Reports."]

In conclusion, we stress our observation that the effectiveness of Alternative 1 is directly related to the Commission's ability to assign adequate manpower to this project.

Respectfully submitted.

Approved:

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*As is apparent from the foregoing careful analysis there are serious questions as to whether the *Meyer* interpretation can properly be applied to previously entered orders, even after notice and, where appropriate, the rescission of previously approved compliance reports. That interpretation of the law clearly applies to the current activities of respondents, however, and we believe that the Commission's position at this time should be that it also applies to previously entered orders which involve sales to wholesalers and retailers.

APPENDIX A

Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
1. United States Rubber Co., et al.	3685, 2(a), (d)	Apr. 25, 1939	Nonconsent ¹	R/C received and filed, June 3, 1939; S/R/C received and filed, Sept. 28, 1954; MIT 2(a), Feb. 5, 1968.	Automobile tires	Sales to wholesalers, direct retailers (and service stations, automobile manufacturers).
2. Curtice Bros. Co.	3381, 2(a), (d)	Apr. 15, 1940	Nonconsent	R/C received and filed; S/R/C received and filed, June 1, 1955.	Fruit and vegetables	Sales to wholesalers and retailers.
3. Lambert Pharmacal Co.	3749, 2(d)	Aug. 12, 1940	do	R/C received and filed; S/R/C received and filed, July 8, 1957.	Mouthwash	Do.
4. Binney & Smith Co.	4143, 2(a), (d)	Dec. 31, 1940; affirmed and enforced (2d Cir.) Aug. 18, 1954.	Nonconsent (affirmed and enforced per consent).	S/R/C received and filed, Nov. 30, 1954.	Crayons	Sales to distributors and retailers.
5. The American Crayon Co.	4142, 2(a), (d)	Dec. 31, 1940; affirmed and enforced (6th Cir.) Feb. 16, 1957.	Nonconsent	R/C received and filed, Feb. 4, 1958.	do	Sales to wholesalers and retailers.
6. C. F. Sauer Co.	3646, 2(a), (d)	July 31, 1941	do	R/C received and filed; compliance investigation closed Mar. 9, 1954.	Mayonnaise, salad dressing, etc.	Sales to wholesalers and retailers.
7. Life Savers Corp.	4571, 2(a), (d)	Dec. 23, 1941	do	S/R/C received and filed Aug. 9, 1955.	Candy confections	Do.
8. American Art Clay Co.	5049, 2(a), (d)	May 12, 1944	do	S/R/C received and filed Dec. 1, 1955; MIT, Apr. 11, 1967.	Art materials, educational supplies, etc.	Field investigation pending.
9. Curtiss Candy Co.	4556, 4673, 2(a), (d), (e), (f), 3.	Nov. 12, 1947 modified, Aug. 15, 1951.	do ²	R/C received Apr. 7, 1952; inv. hearing closed Aug. 21, 1959; closed following special report Mar. 16, 1962.	Candy, candy ingredients	Sales to wholesalers and retailers (and vending machine operators).
10. Consolidated Cigar Corp., et al.	5865, 2(d)	July 7, 1951	do	R/C received Oct. 8, 1951; S/R/C received Jan. 16, 1957.	Cigars	Sales to wholesalers and retailers.
11. International Salt Co., et al.	4307, 2(a), (d)	Aug. 22, 1952	Nonconsent	R/C's received; inv. results filed Jan. 13, 1955.	Salt	Sales to wholesalers and retailers.

APPENDIX A—Continued

Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
12. Wooster Rubber Co.	6216, 2(d), (e)	Oct. 31, 1954	Nonconsent	R/C received Mar. 9, 1955; S/R/C received and filed June 30, 1961. Each approval rescinded by Comm. Mar. 12, 1964; III, Feb. 18, 1966.	Kitchen and automobile rubber accessories and equipment.	Sales to retailers, distributors, jobbers; field investigation pending.
13. Tetley Tea Co., Inc.	6462, 2(d)	April 26, 1956	Consent ³	R/C received and filed June 28, 1956.	Tea, tea bags.	Sales to retailers, jobbers.
14. Jos. Martinson & Co., Inc.	6469, 2(d)	June 30, 1956	do	R/C received and filed Oct. 8, 1956.	Coffee, tea.	Sales to retailers, brokers, wholesale distributors.
15. Minute Maid Corp.	6466, 2(d)	July 27, 1956	do	R/C received and filed Oct. 19, 1956.	Frozen food products	Sales to retailers, brokers, distributors.
16. Revlon Products Corp.	6519, 2(d), (e)	Aug. 17, 1956	Consent	R/C received and filed Apr. 2, 1957; S/R/C received and filed July 1, 1959.	Cosmetics	Sales to retailers, wholesalers.
17. Dolcin Corp.	6569, 2(d), 5	Aug. 31, 1956	do	R/C received and filed Nov. 27, 1956; no violation on spot check, Aug. 13, 1959.	Drug preparations	Sales to wholesalers and retailers.
18. O'Cedar Corp.	6552, 2(d), (e)	Oct. 31, 1956	do	R/C received and filed, Feb. 13, 1957.	Mops, waxes, polishes	Payments (for demonstrators) available to direct retailers.
19. Bourjois, Inc., et al.	6635 2(d)	Mar. 5, 1957	do	R/C received and filed, May 23, 1957.	Cosmetics	Customers not identified.
20. Leaf Brands, Inc.	6749, 2(a), (c), (d)	Sept. 13, 1957	do ³	R/C received and filed, Dec. 19, 1957.	Candy, chewing gum	Sales to retailers, jobbers (brokers).
21. McCormick & Co., Inc.	6470, 2(d)	Sept. 17, 1957	do ³	R/C received and filed, Feb. 27, 1958; S/R/C received and filed Dec. 10, 1959.	Spices, extracts, teas, coffees, condiments, etc.	Sales to retailers, wholesalers, brokers.
22. Pompeian Olive Oil Corp.	6468, 2(d)	Sept. 20, 1957	do ³	R/C received and filed, Dec. 1, 1959.	Olive oil	Sales to retailers, food brokers, allowances available to direct retailers.
23. J. H. Filbert, Inc.	6467, 2(d)	Sept. 19, 1957	Nonconsent	R/C received and filed, Jan. 24, 1958.	Margarine, salad dressing, other food products.	Sales to retailers, grocery distributors.
24. Topps Chewing Gum Co.	6747 2(a), (d)	Oct. 26, 1957	do ³	R/C received and filed Jan. 27, 1958.	Chewing gum	Sales to retailers, jobbers.
25. The Sweets Co. of America, Inc.	6460 2(d)	Nov. 7, 1957	do ³	R/C received and filed, Apr. 18, 1958.	Candy	Sales to retailers, distributors, brokers; promotional payments to direct retailers.
26. Reed Candy Co.	6461 2(d)	Jan. 28, 1958	do ³	R/C received and filed, May 27, 1958.	do	Sales to retailers, brokers, jobbers; indirect customers do not receive promotional allowances.

27. Groveton Paper Co.	6592 2(d)	May 7, 1958	Nonconsent	S/R/C recommended for approval by memo dated Mar. 25, 1968.	Household paper products	Allowances available to direct retailers and wholesalers (who may pass same on to their retailer customers). Sales to retailers, wholesalers.
28. General Foods Corp.	6596 2(d)	May 7, 1958; affirmed (3d Cir.) June 4, 1959.	do	R/C received and filed, July 27, 1960.	Grocery products	
29. Piel Brothers, Inc.	6598 2(d)	May 7, 1958	do	R/C has not been submitted to Commission; S/R/C requested, Aug. 18, 1967.	Beer	Complaint alleged sales to retailers.
30. Hudson Pulp & Paper Corp.	6599, 2(d)	do	do	R/C received and filed, July 25, 1960.	Household paper products	Complaint alleged sales to retailers.
31. P. Lorillard Co.	6600, 2(d)	May 7, 1958; affirmed (3d Cir.) June 4, 1959.	do	R/C has not been received and filed.	Cigarettes	Sales to retailers, wholesalers; vending machine operators; promotional allowances available only to direct-purchasing retailers.
32. Crosse & Blackwell Co.	6463 2(d)	May 8, 1958; affirmed (4th Cir.) Jan. 5, 1959.	do ³	R/C received and filed, July 7, 1959.	Food products	Sales to retailers, food brokers, distributors; some allowances not available to indirect retailers.
33. Dandeen Pretzel & Potato Chip Co.	6919, 2(a), (d), (e)	June 25, 1958	Consent	R/C received and filed, May 3, 1960.	Pretzels, potato chips, etc.	Sales to retailers, jobbers; allowances available only to retailers.
34. North American Phillips Co., Inc.	6900, 2(a), (d), (e)	Nov. 3, 1958	do ⁴	R/C rejected June 2, 1959; MII, June 8, 1966.	Electric shavers	Sales to wholesalers; retailers; field investigation.
35. Sperry Rand Corp.	6701, 2(a), (d), 5	Nov. 3, 1958	do ⁴	R/C rejected June 2, 1959; MII, Feb. 19, 1965; Inv. report, Feb. 17, 1967.	do	Sales to retailers, wholesale distributors; compliance investigation shows failure to notify most indirect retailers.
36. Schick Inc.	6892, 2(a), (d), (e), 5	do	do ⁴	R/C never submitted to Comm.; MII, Feb. 28, 1966.	Electric shavers	Sales to wholesalers, retailers; field investigation pending.
37. Hafner Coffee Co.	6961, 2(d)	Dec. 3, 1958	do	R/C received and filed, Oct. 5, 1959.	Coffee, instant coffee	Sales to retailers, grocery wholesalers and jobbers; wholesalers not required to pass allowances on to their retailer customers.
38. Ronson Corp., et al.	7066 2(a), (d), 5	Jan 8, 1959	do ⁴	R/C rejected, June 2, 1959; R/C received and filed, Aug. 11, 1960.	Electric shavers, cigar and cigarette lighters.	Sales to retailers and distributors.
39. Liggett & Myers Co., Inc.	6642 2(d)	Sept. 9, 1959	Nonconsent	R/C never submitted to Commission.	Cigarettes	Sales to retailers, tobacco wholesalers; vending machine operators to indirect retailers.
40. Philip Morris, Inc.	6750 2 r(d)	Sept. 9, 1959	Consent	R/C received and filed, July 27, 1960.	do	Sales to retailers, tobacco wholesalers; vending machine operators; allowances not available to many indirect retailers.

APPENDIX A—Continued

Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
41. The American Tobacco Co.	6830, 2(d)	Sept. 9, 1959	Consent	R/C never submitted to Commission.	Cigarettes	Sales to retailers, tobacco wholesalers; vending machine operators; promotional payments not available to indirect customers.
42. R. J. Reynolds Tobacco Co.	6848, 2(d)	do	do	R/C received and filed, Oct. 6, 1960.	do	Sales to retailers, tobacco wholesalers; vending machine operators.
43. Brown & Williamson Tobacco Corp.	6908, 2(d)	do	do	R/C never submitted to Commission.	do	Sales to retailers, tobacco wholesalers; vending machine operators; promotional payments may not be available to all indirect retailers.
44. General Mills, Inc.	6926, 2(d)	Sept. 10, 1959	do	R/C received and filed, Dec. 29, 1959.	Household sponges	Sales to direct retailers, distributors; allowances available to direct retailers and distributors.
45. Bayuk Cigars, Inc.	7395, 2(d)	Feb. 12, 1960	do	R/C received and filed, Oct. 12, 1959; reopening Oct. 23, 1959; R/C received and filed, Apr. 14, 1960.	Cigars	Complaint alleged sales to retailers.
46. Swanee Paper Corp.	6927 2(d)	Mar. 22, 1960	Nonconsent	R/C received and filed, June 6, 1962; S/R/C approved, Aug. 15, 1963.	Household paper products	Complaint alleged sales to retailers.
47. Marlun Manufacturing Co., Inc., et al.	7516 2(d), 5	Apr. 14, 1960	Consent	R/C never submitted to Commission, MI, Sept. 26, 1966.	Electric rotisseries	Sales to retailers, wholesalers; field investigation pending.
48. Fieldcrest Mills, Inc.	7528 2(d), (e)	Apr. 27, 1960	do	R/C received and filed, May 2, 1961; compliance investigation closed, June 21, 1966.	Rugs, blankets, towels, domestics	Sales to retailers, distributors; promotional benefits available to indirect-retailers when no direct retailer in competition.
49. Bercut-Richards Packing Co., Inc.	7651 2(d)	do	do ³	R/C received and filed, June 21, 1960.	Canned food products	Sales to wholesalers, brokers, and retailers.
50. Albert Ehlers, Inc.	7663 2(a), (d)	do	do	R/C received and filed, June 22, 1961.	Food products	Sales to retailers, wholesale jobbers; allowances not available to all indirect customers.
51. Anchor Chemical Co., Inc.	7701 2(d)	April 28, 1960	do	R/C received and filed, June 22, 1960.	Chemical specialties	Complaint alleged sales to consumers and dealers.
52. Wetter Numbering Machine Co., Inc.	7700 2(d)	May 10, 1960	do	R/C received and filed, July 13, 1960.	Typographical numbering machines	Complaint alleged sales to dealers and consumers.
53. Lanston Industries, Inc.	7699 2(d)	June 1, 1960	do	R/C received and filed, July 25, 1961.	Typecasting, other printing equipment	Complaint alleged sales to distributors.

54. Select Magazines, Inc., et al.	7384, 2(d)	July 6, 1960	do	Certain R/C's received and filed, June 29, 1962; penalty settlement re select and time: MII, Jan. 9, 1967. S/R/C received and filed, Nov. 18, 1965. R/C received and filed, Mar. 2, 1964.	Books, magazine	Complaint alleged all sales through distributors; not all retailers getting allowances; investigation pending.
55. Curtis Publishing Co., Inc., et al.	7385, 2(d)	do	do	do	do	Complaint alleged all sales through distributors.
56. Cowles Magazines, Inc.	7386, 2(d)	July 6, 1960	do	do	Books, magazines	Complaint alleged all sales through distributors.
57. Esquire, Inc., et al.	7387, 2(d)	do	do	do	do	Do.
58. New Yorker Magazine, Inc., et al.	7388	do	do	do	do	Do.
59. Newsweek, Inc., et al.	7389, 2(d)	do	do	R/C received and filed, Feb. 4, 1963; comp. inv. closed, Sept. 25, 1967. R/C received and filed, Oct. 26, 1961. Comp. investigation, Nov. 9, 1961.	do	Do.
60. United States News Publishing Corp., et al.	7390, 2(d)	do	do	Penalty Settlement, Apr. 12, 1965. S/R/C received and filed, June 23, 1964. R/C is recommended, received and filed Oct. 26, 1961.	do	Do.
61. The Hearst Corp.	7391, 2(d)	do	do	do	do	Do.
62. MacFadden Publications, Inc.	7392, 2(d)	do	do	do	do	Do.
63. Fawcett Publications, Inc.	7393, 2(d)	do	do	do	do	Do.
64. Triangle Publications, Inc.	7394, 2(d)	do	do	do	do	Do.
65. The New American Library of World Literature, Inc., et al.	7611, 2(d)	do	do	S/R/C approved Jan. 3, 1964.	do	Do.
66. Dell Publishing Co., Inc.	7612, 2(d)	do	do	R/C received and filed, Sept. 26, 1961: S/R/C received, June 22, 1967. R/C received and filed, Oct. 26, 1961. S/R/C approved Jan. 3, 1964.	do	Do.
67. Bantam Books, Inc.	7613, 2(d)	do	do	do	do	Do.
68. National Comics Publications, Inc., et al.	7614, 2(d)	do	do	do	do	Do.
69. Pocket Books, Inc., et al.	7615, 2(d)	do	do	do	do	Do.
70. Horst-Allen Co.	7867, 2(d)	Aug. 31, 1960	do	R/C approved with caveat, Mar. 14, 1966. R/C approved, Nov. 7, 1960.	do	Do.
71. Midwest Biscuit Co.	7868, 2(d)	Sept. 3, 1960	do	R/C received and filed, Dec. 2, 1960.	Nonfood household supplies	Complaint alleged sales to retailers.
72. Craftsman Line-up Table Corp.	7847, 2(d)	Sept. 7, 1960	do	do	Cookies, crackers	Sales to retailers, wholesalers; discriminatory practices investigation pending, Sept. 25, 1967.
73. Ipswich Hosiery Co., Inc.	7715, 2(d)	Oct. 12, 1960	do	R/C received and filed, Feb. 10, 1961.	Printing, photoengraving equipment. Hosiery products	Complaint alleged sales to dealers and distributors. Sales to retailers, wholesalers. Jobbers; allowances may not be available to indirect retailers.

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Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
74. Anniston Foundry Co.	8031, 2(d)	Oct. 19, 1960	Consent	R/C received and filed, Dec. 13, 1960.	Pipe, pipe fittings	Complaint alleged sales to retailers.
75. Kerr Glass Mfg. Corp.	8096, 2(d)	Dec. 7, 1960	do	R/C received and filed, Oct. 25, 1963.	Glass containers and lids	Sales to wholesalers and retailers.
76. Dennis Chicken Products Co., Inc.	8091, 2(d)	Dec. 21, 1960	do	R/C received and filed, Sept. 28, 1961.	Chicken, turkey food products.	Sales to wholesalers, retailers.
77. Ball Brothers Co., Inc.	8092, 2(d)	do	do	R/C received and filed, Dec. 18, 1961.	Glass containers, lids, zinc products.	Do.
78. Chun King Corp.	8093, 2(d)	Jan. 12, 1961	do	Penalty settlement, Oct. 5, 1965; R/C approved, Oct. 11, 1966.	Oriental food products	Do.
79. Nibco, Inc.	8074, 2(d)	Mar. 2, 1961	do	R/C received and filed, June 1, 1961.	Valves, fittings, other plumbing products.	Complaint alleged sales to wholesalers, manufacturer's representatives.
80. S. C. Johnson & Son, Inc.	8177, 2(d)	Mar. 16, 1961	do	Inv. closed, R/C filed, Nov. 9, 1966.	Automotive and floor waxes, furniture, and shoe polish, other products.	Sales to wholesalers, retailers.
81. Penick & Ford, Ltd., Inc.	8118, 2(d)	Apr. 12, 1961	do	R/C received and filed, Aug. 24, 1961.	Food products, corn syrup, molasses.	Do.
82. Idaho Canning Co. (Ltd.)	7495, 2(d)	May 2, 1961	do	R/C and S/R/C received and filed, July 2, 1963.	Fruits and vegetables	Sales to retailers, wholesalers, brokers.
83. Marcal Paper Mills, Inc.	8293, 2(d)	Jun. 10, 1961	do	R/C not submitted to Comm.; compliance investigation suspended pending Fred Meyer.	Household paper products	Sales to retailers, jobbers, wholesalers available to direct-purchasing retailers.
84. Golden Press, Inc.	8342, 2(d)	July 8, 1961	do	R/C approved, Dec. 2, 1965.	Children's books	Complaint alleged all sales through distributors.
85. Grosset & Dunlap, Inc., et al.	8343, 2(d)	do	do	R/C reviewed, Sept. 15, 1961.	do	Do.
86. Tyler Pipe Foundry Co.	8123, 2(d)	Aug. 11, 1961	do	R/C received and filed, Jan. 9, 1962; R/C received and filed, Feb. 5, 1963.	Plumbing products	Complaint alleged sales to American Radiator & Standard Sanitary Corp.
87. Holt, Rinehart and Winston, Inc.	8344, 2(d)	Aug. 22, 1961	do	R/C received and filed, Dec. 28, 1965.	Magazines	Complaint alleged sales to distributors.
88. Usen Canning Co.	8313, 2(d)	Sept. 22, 1961	do	R/C received and filed, Aug. 20, 1962.	Cat food	Sales to retailers, wholesalers.
89. Yakima Fruit & Cold Storage Co.	7718, 2(d)	Sept. 28, 1961	Nonconsent	R/C received and filed, Dec. 19, 1961.	Fresh fruit	Sales to retailers, brokers, wholesalers.
90. T. W. Holt & Co., Inc.	8371, 2(d)	Oct. 24, 1961	Consent	R/C received and filed, (1962).	Grocery products	Sales to retailers, wholesalers.
91. Comptone Co., Ltd., et al.	8377, 2(d), 5	do	do	R/C received and filed, June 28, 1962.	Sunglasses	Sales to retailers, jobbers.

92. Aluminum Co. of America	8175, 2(d)	Nov. 1, 1961	do	R/C received and filed, Feb. 12, 1962; advance operation re allowances to wholesalers whose customers compete with direct buying retailers, July 16, 1966.	Aluminum foil products	Sales to retailers, wholesalers.
93. Robilio & Cuneo, et al.	8294, 2(d)	Nov. 6, 1961	do	R/C approved, Mar. 22, 1962.	Macaroni	Sales to wholesalers, retailers.
94. Grabler Manufacturing Co., Inc.	7838, 2(d)	Nov. 29, 1961	do	R/C received and filed, Feb. 9, 1962; R/C approved, Feb. 25, 1963.	Plumbing products	Complaint alleged sales to American Radiator and Standard Sanitary Corp.
95. Shreveport Macaroni Manufacturing Co., Inc.	7719, 2(d)	Jan. 24, 1962; enforced (5th Cir.), July 18, 1963.	Nonconsent ^s	R/C approved, Sept. 20, 1965.	Macaroni	Sales to retailers, wholesalers.
96. The Regina Corp	8421, 2(d)	Feb. 2, 1962	Consent	R/C not submitted to Comm.; co compliance negotiations suspended pending Fred Meyer.	Floor polishers, vacuum cleaners.	Sales to retailers, distributors; promotional allowances to retailers 8 percent; and distributors 3 percent; who may pass on to their customers.
97. Bridgeport Brass Co.	7842, 2(d)	Mar. 7, 1962	do	R/C received and filed, June 22, 1962.	Plumbing products	Complaint alleged sales to American Radiator and Standard Sanitary Corp.
98. Vanity Fair Paper Mills, Inc.	7720, 2(d)	Mar. 21, 1962; enforced as modified (2d Cir.), Dec. 18, 1962.	Nonconsent ^s	R/C received and filed, July 11, 1963.	Household paper products	Sales to retailers, wholesale grocers.
99. Sofskin, Inc.	C-109, 2(d)	Apr. 2, 1962	do	R/C received and filed, Oct. 31, 1962.	Handcreams	Sales to retailers, wholesalers; jobbers, brokers; promotional payments to retailers (10 percent), wholesalers (2 percent), jobbers (3 percent)—no requirement to pass on.
100. The Quaker Oats Co.	8119, 2(d)	Apr. 25, 1962	Nonconsent	R/C approved, Oct. 15, 1963.	Cat food	Sales to retailers, wholesalers.
101. H.S.D. Publications, Inc.	C-150, 2(d)	June 22, 1962	Consent ^s	R/C is recommended approved, Jan. 22, 1964; letter sent Mar. 2, 1964.	Magazines	Complaint alleged sales to distributors.
102. National Police Gazette Corp.	C-151, 2(d)	do	do ^s	R/C approved, July 15, 1965.	do	Do.
103. Williams Press, Inc.	C-155, 2(d)	June 28, 1962	do ^s	R/C received and filed June 30, 1963.	do	Do.
104. Feature Publications, Inc., et al.	C-160, 2(d)	July 10, 1962	do ^s	R/C approved, Sept. 1, 1965.	do	Do.
105. Gensback Publications, Inc.	C-158, 2(d)	do	do ^s	do	do	do
106. Johnson Publishing Co., Inc.	C-157, 2(d)	July 10, 1962	do ^s	Nonpublic investment, Sept. 1, 1964; R/C approved, Sept. 25, 1967.	do	Complaint alleged sales to local wholesalers.
107. Mercury Press, Inc.	C-159, 2(d)	do	do ^s	R/C received and filed, Mar. 2, 1964.	do	Complaint alleged sales to distributors.
108. Ballantine Books, Inc.	C-161, 2(d)	July 11, 1962	do ^s	R/C approved, Feb. 11, 1966.	do	Do.
109. Flying Eagle Publications, Inc., et al.	C 163, 2(d)	do	do ^s	R/C approved, Sept. 30, 1965.	do	Do.

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Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
110. Ideal Publishing Corp.	C-162, 2(d)	do	Consent ^a	R/C approved, Jan. 22, 1964	do	Do.
111. Berkley Publishing Corp.	C-166, 2(d)	July 13, 1962	do ^a	R/C approved, Nov. 23, 1965	Paperback books	Do.
112. Paperback Library, Inc.	C-164, 2(d)	do	do ^a	R/C approved, Sept. 1, 1965	do	Do.
113. The Ring, Inc.	C-165, 2(d)	July 13, 1962	do ^a	R/C approved, Mar. 22, 1964	Magazines	Do.
114. Belmont Productions, Inc.	C-173, 2(d)	July 17, 1962	do ^a	R/C approved, Jan. 24, 1966	Paperback books	Do.
115. Archie Comic Publications, Inc., et. al.	C-176, (d)	July 18, 1962	do ^a	R/C received and filed, Mar. 2, 1964	Comic books	Do.
116. By-Line Publications, Inc., et al.	C-177, 2(d)	do	do ^a	do	Magazines	Do.
117. E. C. Publications, Inc.	C-180, 2(d)	do	do ^a	R/C approved, Sep. 1, 1965	do	Do.
118. Harvey Publications, Inc., et al.	C-182, 2(d)	do	do ^a	R/C received and filed Mar. 2, 1964	Comic books	Do.
119. Kable News Co.	C-175, 2(d)	do	do ^a	R/C approved, Sep. 30, 1965	Magazines, paperback books	Complaint alleged sales to retailers for publishers.
120. Petersen Publishing Co., et al.	C-179, 2(d)	do	do ^a	R/C approved, Dec. 2, 1965	do	Complaint alleged sales to distributor.
121. Popular Publications, Inc.	C-183, 2(d)	do	do ^a	R/C approved, Sept. 1, 1965	Magazines	Complaint alleged sales to local wholesalers, retailers.
122. Publication Management Corp., et al.	C-181, 2(d)	do	do ^a	R/C approved, Apr. 25, 1966	do	Complaint alleged sales to distributor.
123. Publishers Distributing Corp.	C-184, 2(d)	do	do ^a	R/C received and filed Mar. 2, 1964; advanced opinion (re meeting competition), Mar. 23, 1965	Magazines, comic books, paperback books	Complaint alleged sales to retailers for publishers.
124. Pyramid Publications, Inc.	C-187, 2(d)	do	do ^a	R/C approved, Aug. 20, 1965	Magazines, paperback books	Complaint alleged sales to distributor.
125. Stanley Publications, Inc., et al.	C-178, 2(d)	do	do ^a	R/C received and filed, Mar. 2, 1964	Magazines	Do.
126. Sterling Group Inc., et al.	C-174, 2(d)	do	do ^a	R/C received and filed, Mar. 2, 1964	do	Do.
127. Male Publishing, Corp., et al.	C-200, 2(d)	July 26, 1962	do ^a	R/C approved, Dec. 6, 1965	Magazines, comic books	Do.
128. Golf Digest, Inc.	C-203, 2(d)	Aug. 7, 1962	do ^a	R/C and S/R/C received and filed, Aug. 7, 1964	Magazines	Do.
129. Royal Publications, Inc., et al.	C-201, 2(d)	Aug. 3, 1962	do ^a	R/C approved with exception, Mar. 11, 1966; S/R/C submitted, May 11, 1966	Magazines, paperback books	Do.
130. Variety, Inc.	C-202, 2(d)	do	do ^a	R/C approved, Sept. 1, 1965	Trade papers	Do.
131. Mystery Publishing Co., et al.	C-208, 2(d)	Aug. 24, 1962	do	R/C approved, Sept. 30, 1965	Magazines	Do.
132. Actual Publishing Co., Inc., et al.	C-213, 2(d)	Sept. 10, 1962	do ^a	R/C approved, Sept. 30, 1965	do	Do.
133. Diaperwite, Inc., et al.	C-226, 2(d), (e)	Sept. 11, 1962	do	R/C and S/R/C received and filed, May 15, 1963	Cleaning compounds	Sales to retailers, wholesale grocers.

134. Republic Molding Corp.	C-212, 2(d), (e)	Sept. 5, 1962	do	R/C rejected, Feb. 23, 1966; Mtl, Apr. 13, 1966.	Plastic kitchen products.	Sales to retailers, distributors, jobbers; investigation pending.
135. American Machine & Foundry Co.	7977, 2(d)	Sept. 19, 1962	Nonconsent	R/C received and filed, Feb. 25, 1963.	Toys	Complaint alleged sales to jobber customers.
136. Emenee Industries, Inc.	7974, 2(d)	do	do	R/C received and filed, Mar. 27, 1968.	do	Complaint alleged sales to jobbers.
137. Fisher-Price Toys, Inc.	8243, 2(d)	do	do	R/C received and filed, July 8, 1964.	do	do
138. Hassenfeld Bros., Inc.	8258, 2(d)	do	do	R/C received and filed, Jan. 23, 1968.	do	Sales to retailers, wholesalers; wholesalers may pass payments on to their customers.
139. The Hubley Manufacturing Co.	8254, 2(d)	do	do	R/C not submitted to Comm.	do	Complaint alleged sales to jobber customers.
140. Ideal Toy Corp.	7979, 2(d)	do	do	R/C received and filed, Oct. 31, 1967.	do	Sales to retailers, wholesalers, jobbers.
141. Knickerbocker Toy Co., Inc.	8101, 2(d)	do	do	R/C not submitted to Comm.	do	Complaint alleged sales to jobbers.
142. Kohner Bros., Inc.	8226, 2(d)	do	do	do	do	do
143. Matell, Inc.	8227, 2(d)	do	do	R/C received and filed, May 6, 1963.	do	do
144. Milton Bradley Co.	8256, 2(d)	do	do	R/C received and filed, Apr. 25, 1966.	do	Sales to wholesalers, retailers.
145. The Porter Chemical Co.	8228, 2(d)	do	do	R/C never submitted to Comm.; compliance negotiations center on Fred Meyer.	do	Sales to retailers, jobbers, wholesalers; promotional payments not available to all retailers.
146. Remco Industries, Inc.	8103, 2(d)	do	do	R/C received and filed, Apr. 21, 1966.	do	Sales to wholesalers, retailers.
147. Revell, Inc.	8224, 2(d)	do	do	R/C never submitted to committee compliance negotiations center on Fred Meyer.	do	Sales to wholesalers, jobbers, retailers; payments not available to all retailers.
148. Transogram Co., Inc.	7978, 2(d)	do	do	R/C received and filed, Apr. 14, 1966.	do	Sales to wholesalers, retailers.
149. Wen-Mac Corp.	8245, 2(d)	do	do	R/C received and filed, Oct. 3, 1963.	do	Complaint alleged sales to jobbers.
150. Wolverine Supply & Mfg. Co.	7972, 2(d)	do	do	R/C received and filed, Mar. 1, 1968.	do	do
151. J. A. Folger & Co.	8094 [C-1169], 2(d)	Nov. 14, 1962 [Feb. 9, 1967]	do	Approval of R/C recommended, Mar. 25, 1968.	Coffee	Sales to wholesalers, retailers.
152. Capital Distributing Co., et al.	C-267, 2(d)	Nov. 15, 1962	Consent ⁶	R/C received and filed, June 5, 1967.	Magazines, comic books, paperbacks.	Complaint alleged sales to retailers for publishers.
153. Parker Bros. Inc.	7976, 2(d)	Nov. 19, 1962	do	R/C not submitted.	Toys	Complaint alleged sales to wholesalers, retailers.
154. Bilnor Corp.	7975, 2(d)	Nov. 27, 1962	Nonconsent	R/C approved, Apr. 26, 1966.	do	do
155. Alexander Miner Sales Corp. (Miner Industries, Inc., successor).	8102, 2(d)	Dec. 5, 1962	Consent	R/C approved, Oct. 10, 1967.	do	do

APPENDIX A—Continued

Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
156. Aurora Plastics Co.	8225, 2(d)	do.	Consent	R/C approved, Apr. 26, 1966.	do.	Do.
157. Halsam Products Co.	8230, 2(d)	Dec. 13, 1962.	Nonconsent	R/C approved with caveat (Catalog allowances available to jobbers but not direct-retailers) Jan. 19, 1968.	do.	Do.
158. Hamilton Steel Products, Inc.	8257, 2(d)	Dec. 5, 1962.	Consent	R/C received and filed, Apr. 18, 1968.	do.	Do.
159. Horsman Dolls, Inc.	8241, 2(d)	do.	do.	R/C received and filed, Aug. 29, 1966.	do.	Do.
160. Multiple Products Corp.	8229, 2(d)	do.	do.	R/C approved, Apr. 21, 1966.	do.	Do.
161. Radio Steel & Manufacturing Co.	8244, 2(d)	do.	do.	R/C approved, Apr. 26, 1966.	do.	Do.
162. Tonka Toys, Inc.	8242, 2(d)	do.	do.	R/C approved, Nov. 14, 1967.	do.	Do.
163. Ziff-Davis Publishing Co.	C 312, 2(d)	Feb. 7, 1963.	do.	R/C rejected, Sept. 3, 1963; S/R/C submitted, Dec. 4, 1963.	Magazines.	Complaint alleged sales to distributor.
164. HMH Publishing Co., Inc.	8516, 2(d)	Mar. 28, 1963.	Nonconsent ^e	R/C approved, Dec. 22, 1965.	do.	Do.
165. The Kiwi Polish Co., Proprietary Ltd.	C-616, 2(d)	Nov. 5, 1963.	Consent	R/C received and filed, Mar. 10, 1964.	Shoe polish.	Complaint alleged sales to retailers.
166. Joseph A. Kaplan & Sons, Inc.	7813, 2 (a), (d), (e)	Nov. 15, 1963, enforced (D.C. Cir.), May 13, 1965; modified, Dec. 2, 1965.	Nonconsent	R/C rejected, Sept. 7, 1966; S/R/C received and filed, Aug. 9, 1967, MII, Mar. 6, 1968.	Shower curtains, accessories.	Complaint alleged sales to retailers and 1 wholesaler; investigation pending.
167. Royal Crown Cola Co.	8295, 2(d)	Dec. 23, 1963.	do.	R/C received and filed, Mar. 20, 1964.	Carbonated beverages.	Sales to franchised bottlers, wholesalers, retailers.
168. Schulze & Burch Biscuit Co.	7452 2 (a), (d)	Feb. 7, 1964.	Consent	R/C never submitted to Comm.	Biscuit products.	Complaint alleged sales to retailers, wholesalers; allowances not available to indirect retailers.
169. Flotill Products, Inc., et al.	7226, 2 (c), (d)	June 26, 1964, enforced (9th Cir.), Mar. 16, 1966.	Nonconsent	R/C not yet submitted by respondent.	Canned fruits and vegetables.	Complaint alleged sales to brokers, wholesale grocers, retailers.
170. Alfonso Gioia & Sons, Inc.	7790, 2 (a), (d), (e)	Feb. 8, 1962; set aside, Feb. 1, 1962; reentered, June 30, 1964.	Consent	R/C not received and filed; MII, July 15, 1965.	Macaroni products.	Sales to retailers, wholesalers; some allowances not available to indirect retailers; investigation pending.

171. Procino-Rossi Corp.	C-765, 2 (a), (d), (e)	June 30, 1964	do	do	MI1, July 21, 1965	Macaroni, related products	Complaint alleged sales to wholesalers, retailers, field investigation pending.
172. Gioia Macaroni Co., Inc.	C-767, 2 (a), (d), (e)	do	do	do	MI1, July 15, 1965	Macaroni	Do.
173. Ideal Macaroni Co.	C-766, 2 (d)	do	do	do	do	do	Do.
174. Prince Macaroni Manufacturing Co.	C-768, 2 (a), (d), (e)	do	do	do	MI1, July 15, 1965	do	do.
175. B. T. Babbitt, Inc.	8507, 2(d)	July 27, 1964	Nonconsent?	do.7	R/C approved, May 10, 1967	Household cleaning products	Sales to retailers, wholesalers.
176. Becton, Dickinson & Co.	8493, 2(d)	do	do	do.7	do	Medical thermometers	Allowances available to wholesalers only.
177. Chemway Corp.	8502, 2(d)	do	do	do.7	MI1, June 30, 1967	Cosmetics, over-the-counter drugs, toiletries	Field investigation pending.
178. Chesebrough-Pond's, Inc.	8491, 2(d)	do	do	do.7	Suspend pending Fred Meyer (Minute, May 10, 1967)	Toilet articles	Allowances available to direct purchasing retailers only.
179. Corn Products Co.	8499, 2(d)	do	do	do.7	MI1, May 30, 1967	Shoe dressings, household dyes	Field investigation pending.
180. The d-Con Co.	8503, 2(d)	do	do	do.7	R/C approved May 10, 1967	Rodenticides, insecticides	Sales to retailers, wholesalers.
181. Eversharp, Inc.	8497, 2(d)	do	do	do	Suspend pending Fred Meyer (Minute, May 10, 1967)	Razors, razor blades	Allowances available to wholesalers, 3 percent; and direct retailers, 14 percent.
182. Hazel Bishop, Inc.	8504, 2(d)	do	do	do	R/C approved, May 10, 1967	Cosmetics	Sales to retailers, wholesalers
183. Julius Schmid, Inc.	8495, 2(d)	do	do	do	do	Propylactic rubber products	Allowances available to retailers and wholesalers.
184. Lehn & Fink Products Corp.	8506, 2(d)	do	do	do	MI1, June 30, 1967	Cosmetics, toiletries, non-prescription drugs	Field investigation pending.
185. The Mennen Co.	8496, 2(d)	do	do	do	Suspend pending Fred Meyer (Minute, May 10, 1967)	Toilet articles	Allowances available to direct retailers only.
186. Philip Morris, Inc.	8505, 2(d)	do	do	do	do	Razors, razor blades	Allowances available to wholesalers, 3 percent; and direct retailers, 13 percent.
187. Sterling Drug, Inc.	8498, 2(d)	do	do	do	R/C approved May 10, 1967	Cosmetics, toiletries	Sales to wholesalers and retailers.
188. Union Carbide Corp.	8492, 2(d)	do	do	do	do	Dry cell batteries, insecticides, etc.	Allowances available to wholesalers; not required to be passed on.
189. Warner-Lambert Pharmaceutical Co.	8494, 2(d)	do	do	do	MI1 June 30, 1967	Nonprescription drugs	Field investigation pending.

APPENDIX A—Continued

Name	Docket Number	Finality	Nature of order	Current status	Products	Status under Fred Meyer
190. White Laboratories, Inc.	8500, 2(d)	do	Nonconsent ¹	Suspend pending Fred Meyer (Minute, May 10, 1967).	Prescription, over-the-counter drugs.	Direct retailers favored.
191. Youngs Rubber Corp.	8508, 2(d)	do	do	R/C approved May 10, 1967	Prophylactic rubber products	Allowances available to direct retailers and wholesalers.
192. Galaxy Publishing Corp., et al.	C-798, 2(d)	July 31, 1964	Consent ²	R/C approved Sept. 30, 1965	Magazines	Complaint alleged sales to distributor.
193. Atlantic Products Corp., et al.	8513, 2(d)	Jan. 26, 1965	Nonconsent ³	R/C approved July 16, 1965	Luggage	Sales to wholesalers, jobbers, and retailers.
194. Act Books, Inc., et al.	8557, 2(d)	June 18, 1965	do ⁴	R/C received and filed, May 3, 1966 (adv. op., approving allowances to all indirect retailers, Sept. 9, 1966).	Paperback books	Sales to wholesalers, retailers.
195. Cott Corp., et al.	C-1052, 2(d)	Mar. 23, 1966	Consent	R/C rejected, Dec. 28, 1966; S/R/C received and filed, Mar. 7, 1967.	Carbonated soft drink beverages.	Allowances not available to supermarkets purchasing through wholesalers.
196. Universal Publishing & Distributing Corp.	C-1066, 2(d)	May 13, 1966	do ⁵	Compliance proceedings pending.	Books, magazines	Complaint alleged sales to distributor.
197. Beatrice Foods Co.	C-1090, 2(d)	Aug. 2, 1966	do	R/C approved, Feb. 13, 1968	Oriental foods	Allowances available to wholesalers not required to be passed on.
198. Viviano Macaroni Co.	8666, 2 (a), (d), (e)	Feb. 19, 1968	Nonconsent	R/C not yet submitted by respondent.	Macaroni products	Sales to wholesale grocers, retailers.

¹ Order proscribes discriminatory payments to any person, firm, or corporation "purchasing (respondents' products) from either of said respondents for resale."

² Order proscribes discriminatory payments to "purchasers."

³ Order proscribes discriminatory payments to any customer re "products sold to him by respondent."

⁴ Order prohibits discriminatory payments to any customer acquiring respondent's products "from respondent, from wholesalers, or from any other source."

⁵ Order proscribes discriminatory payments to identified direct-purchasing retailer or retailers, or any other customers.

⁶ Order may not be affected by Fred Meyer because of limitation per "indirect customer" doctrine.

⁷ Declaratory order.

APPENDIX B

STATISTICAL SUMMARY OF LISTED CASES

- A. Nature of Order:
1. Consent: 130.
 2. Non-consent (includes stipulated facts and litigated cases): 68.
- B. Finality:
1. Final: 165 (includes 5 judicially enforced pre-Finality Act cases), includes:
 - (a) Consent: 111.
 - (b) Non-consent: 54.
 2. Non-final (pre-Finality Act): 33, includes:
 - (a) Consent: 19.
 - (b) Non-Consent: 14.
- C. Consistency of order with statute:
1. Standard statutory order: 122, includes:
 - (a) Consent (final): 74.
 - (b) Consent (non-final): 6.
 - (c) Non-consent (final): 30.
 - (d) Non-consent (non-final): 12.
 2. Non-standard orders (departures from the standard are noted in the listing): 76, includes:
 - (a) Consent (final): 37.
 - (b) Consent (non-final): 13.
 - (c) Non-consent (final): 24.
 - (d) Non-consent (non-final): 2.
- D. Report of compliance, initial or supplemental, approved, or received by Commission:
1. Yes: 156, includes:
 - (a) Consent (final): 93 (includes *Select Magazines, Inc., et al.*, #54, because reports of most respondents were approved and a penalty settlement was reached regarding the remaining respondents).
 - (b) Consent (non-final): 16.
 - (c) Non-consent (final): 36 (includes *J. A. Folger & Co.*, #151, because Commission minute dated April 11, 1968, indicated receipt).
 - (d) Non-consent (non-final): 11.
 2. No: 42, includes:
 - (a) Consent (final): 18 (includes *MacFadden Publications, Inc.*, #62, where penalty settlement was reached).
 - (b) Consent (non-final): 3.
 - (c) Non-consent (final): 18.
 - (d) Non-consent (non-final): 3 (includes *Groveton Paper Co.*, #27, wherein approval was recommended by our memorandum dated March 25, 1968, and the files returned to this Division per Commission minute dated April 17, 1968).
- E. Investigations pending: 18, includes:
- (a) Consent (final): 8.
 - (b) Consent (non-final): 3.
 - (c) Non-consent (final): 5.
 - (d) Non-consent non-final): 2.
- F. Advisory opinions which are affected substantially by *Fred Meyer*: 1 (consent, final).

Re The Gillette Company, File No. 661 0081; and Philip Morris, Inc., American Safety Razor Division, File No. 681 0145.

(The Gillette Company Assurance was previously circulated as an Agenda Matter on December 31, 1969 by this office.)

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.
 See attached memorandum.

MEMORANDUM

MARCH 20, 1969.

To: Commission.

From: James M. Nicholson.

Subject: The Gillette Company, File No. 661 0081; and Philip Morris, Inc., American Safety Razor Division, File No. 681 0145.

Included within this circulation are the two Assurances of Voluntary Compliance submitted by The Gillette Company, File No. 661 0081, and the American Safety Razor Division, Philip Morris, Inc., File No. 681 0145. The Division of Discriminatory Practices recommends acceptance of both Assurances as a satisfactory disposition of all the charges against both for alleged violations of Sections 2 (a) and (d) of the Clayton Act, as amended, in connection with the sale and distribution of razors, razor blades and toiletries. I concur and move acceptance of the Assurances as submitted.

It will be remembered from prior circulations that these two cases are part of an industry-wide investigation comprising the four leading manufacturers in the industry. Wilkinson Sword, Inc. is now being processed for submission to the Commission and Schick Safety Razor Company is undergoing further investigation, to be explained in detail when forwarded to the Commission. I am advised that these matters should be submitted within the next two weeks.

A second issue presented by these cases is the request by Gillette for confidential treatment of its Assurance. The staff has developed the facts underlying this requests in its memorandum dated February 13, 1969. As matters stood at the time that the memorandum was prepared, Gillette requested that the Assurance itself be made public, but that the recitals of fact contained therein be kept confidential. The staff would reject this proposal, primarily because the other three have submitted similar assurances without any request for confidentiality and Gillette has presented no persuasive arguments as to why it should be treated differently. All four have already terminated the practices in question, which is well known in the trade, so release of the Assurances should cause little additional reaction. At the same time, the staff recognizes some inequities might result from a seriatim publication of the Affidavits and recommends withholding of any until all have been considered and acted upon by the Commission.

In the meantime, Gillette retained different counsel who, by letter dated March 12, 1969, requested that we take exactly the action which the staff had recommended, namely, to withhold action on Gillette's Assurance until similar action has been taken with respect to its competitors and then publish all the Assurances simultaneously.

I agree with this proposal and so move. It should be noted that this motion is made on the basis of a copy of counsel's letter which was sent to my office, the original being with the staff. Since the staff cannot prepare a responsive reply until it has been apprised of the Commission's position with respect to (1) acceptance of the Assurances and (2) withholding of publication, I further move these matters be returned to the staff to prepare letters advising the respondents that the Assurances have been accepted and that publication of the same will be withheld until Commission consideration of certain companion matters has been completed.

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To: Commission.

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MEMORANDUM

FEBRUARY 24, 1969.

To: Commission.

From: Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: Philip Morris, Inc., American Safety Razor Division, File No. 681 0145.

Recommendation or Acceptance of Assurances of Voluntary Discontinuance with Supporting Affidavit. Sections 2 (a) and (d) of the Clayton Act, as amended. Razors, razor blades, shaving accessories.

This investigation resulted from the investigation and resulting Affidavit of Voluntary Assurances in File No. 661 0081, The Gillette Company (see this Division's memorandum to the Commission of December 4, 1968, in that file). During the course of informal negotiations in that matter, Gillette representatives alleged that its competitors in the razor blade and toiletries industry utilized promotional agreements the same as or similar to the Gillette agreements which were being discontinued as a result of the Commission's investigation.

Limited investigation of competitors was initiated on essentially an industry-wide basis. These investigations have revealed that there are only a few manufacturers of safety razors and razor blades, i.e., The Gillette Company, Eversharp, Inc. (Schick Safety Razor Company), Wilkinson Sword, Inc., and proposed respondent herein. Gillette competitors in the sale of toiletries are more numerous, however. This same limited inquiry has been made of all major factors in this industry.

Philip Morris, Inc., was initially contacted by letter of June 28, 1968, which requested basic information relating to sales, prices, and promotional advertising allowances of its American Safety Razor Division. American Safety Razor Company (hereafter more often designated ASR), although a division of Philip Morris, Inc., is directly accountable to Philip Morris Domestic, that infra-structure of the corporation charged with responsibility for the operations of all domestic divisions or subsidiaries.

Philip Morris, Inc. is a Virginia corporation whose principal office and place of business is located at 100 Park Avenue, New York, New York. Proposed respondent manufactures and sells razor blades, shaving accessories, toiletry preparations and men's grooming products through a corporate division, the American Safety Razor Company, Staunton, Virginia. It is the third largest seller of shaving equipment, Gillette being the first with Eversharp, Inc. second in the industry. ASR had 1967 sales of shaving equipment totalling \$19,500,000—

approximately 12%-13% of the industry market; its sales of all Burma Shave products, including shaving cream and deodorant, amounted to \$842,000 in 1967—estimated to be about 1% of the market for those products; and it had sales of a new product, a spray mouth refresher, of \$1,110,000 in 1967.

ASR operates on a one-price system, selling its products at the same price to all customers regardless of business function. However, ASR's promotional allowances were granted in varying amounts depending on the business classification of the customer. The basis for the varying promotional allowances is found in written promotional agreements. These agreements not only violate Section 2(d) as interpreted by the Supreme Court in *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1969), but apparently result in discriminatory payments in violation of Section 2(a) of the amended Clayton Act.

Under the terms of the "Retail Promotion Agreement" between American Safety Razor Company and all its direct buying retail accounts, each account can receive payments equal to 13% of net purchases each calendar quarter. Of this amount, 3% was automatically paid to the retailer for such things as maintaining an adequate stock of the company's products, the promise not to switch consumers to other products, the promise to consider stocking and displaying of any new brands or packages added to the company's line, installing in suitable places in all stores during ASR major promotions the promotional material furnished by the company (if this is not done, self-service display of merchandise will qualify), and making available upon request a current inventory of the company's products, if such procedure is the policy of the retailer. ASR paid 5% of net purchases for out-of-pocket expenses incurred for promotional efforts of its products by the retailer, the cost to the retailer of incentive bonuses, awards, or prizes paid to sales personnel during periods of promotion of ASR products, and arrangement and conduct of ASR promotional sales efforts. An additional 5% was paid for holding a major promotion each calendar quarter in which the retailer installs special mass displays, floorstands, etc., instructing sales clerks on promotional efforts, and other comparable efforts. ASR made 13% of net purchases available to toiletry merchandiser (rack jobber) customers on essentially the same terms.

Wholesalers, on the other hand, under the terms of a "Wholesale Promotion Agreement" with ASR, received 3% of net purchases for maintaining adequate stocks of ASR products, issuing instructions to salesmen for promotion of ASR products by various means such as carrying adequate samples, assisting dealers in display, using current ASR catalog pages, holding at least one major promotion on ASR products each calendar quarter, and agreeing to pay salesmen commissions equivalent to any paid on competitors' products. No provision contemplated that the wholesalers, or ASR directly, would make allowances comparable to those made to direct-buying retailers and toiletry merchandisers available to competing retailers buying through the wholesalers.

The violation of Section 2(d) of the amended Clayton Act, as interpreted in *Fred Meyer*, is evident. Proposed respondent did not make proportional payments available to retailers buying through wholesalers which corresponded to the regular, contractual allowances made to competing direct retailers and/or toiletry merchandisers. This Division, however, further believes that the promotional policies and agreements of ASR involve price discriminations in violation of Section 2(a). There has been no investigation in this matter other than the basic material submitted by proposed respondent pursuant to our June 28 request. However, limited field investigation in Richmond, Virginia in File No. 661 0081, The Gillette Company, disclosed that large retailers used the promotional monies paid under contracts similar to the ASR agreements to cut retail prices and otherwise improve their competitive position.¹

It is our position that only a portion of the allowances made under the agreements of proposed respondent can be considered true promotional payments cognizable under Section 2(d). The remainder of the monies paid to direct-buying retailers and toiletry merchandisers so exceeded the cost to such customers of whatever advertising or promotional services were actually rendered as to be treated more properly as outright price concessions cognizable under Section

¹ Whereas the Gillette agreements provided for payment of 10% of net purchases to direct retailers and 3% to wholesalers, the ASR agreements provide for allowances of 13% of net purchase to direct retailers and 3% to wholesalers.

2(a).² The amounts paid ostensibly for promotional services were, of course, directly tied to, and in fact, a set percentage of the amount of goods purchased and resold. *National Tea Co.*, 46 F.T.C. 829; *Fred Meyer, Inc.*, Docket No. 7492, *supra*, Slip op. pp. 10-14, *aff'd in pertinent part*, *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 362 (9th Cir. 1966).

In addition to its formal promotional agreements with customers ASR practiced another discrimination in flagrant violation of the Robinson-Patman Act. Through a so-called regional managers' promotional fund ASR has paid additional monies to selected direct-buying accounts for their "promotional" purposes. ASR began this program in 1966. A review of the list of accounts receiving payments from this regional managers' fund reveals that they are wholesalers and the larger retail chains in various areas of the country. Payments under this program to selected customers totalled nearly \$182,000 for the first seven months of 1968. Examples of larger individual payments during this period are: Food Fair Stores, Inc., Philadelphia, Pa., \$2,742; Peoples Drug Stores, Inc., Washington, D.C., \$1,968; Grand Union Co., East Paterson, New Jersey, \$6,129; Schwegmann Bros., New Orleans, Louisiana, \$2,207; Eckerd Drug Stores, Charlotte, N.C., \$3,297; Cunningham Drug Stores, Detroit, Michigan, \$3,960; Walgreen Drug Stores, Chicago, Illinois, \$3,326; Gray Drug Stores, Cleveland, Ohio, \$8,245. Proposed respondent alleges that payments under this program were unusually large for the last quarter of 1967 and the first quarter of 1968 and that such payments ordinarily involved from \$25,000 to \$50,000 per quarter. Proposed respondent ordered termination of this regional manager's fund during the week of September 23, 1968 and as soon as outstanding contracts under the program are honored, we were advised that the program will be abolished.

The gravity of the discrimination practiced under the regional managers' fund is such that this Bureau would not, under most circumstances, recommend disposition by Rule 2.21. However, this practice has been brought to light during the course of an industry-wide investigation of razor blade and toiletry manufacturers. While proposed respondent is one of the larger corporations in the United States, its American Safety Razor Division, with approximately 12%-13% of the shaving equipment market, *supra*, is not nearly as successful as either the Gillette Company, File No. 661 0081, or the Shick Safety Razor Division of Eversharp, Inc., File No. 681 0144. Proposed respondent discontinued this practice even before the date for discontinuance of its questionable promotion agreements which was arrived at through negotiation. We have no reason to doubt the assertion of proposed respondent's counsel that the program will be abolished. Therefore, in view of the foregoing and the success in effecting prompt cessation of the questioned practices by all four safety razor razor and razor blade manufacturers without extensive and costly investigation and subsequent probable litigation, we recommend acceptance of proposed respondent's affidavit of assurances, notwithstanding the serious nature of this regional managers' fund.

ASR cancelled its existing promotional agreements as of December 31, 1968 and has given assurances that thereafter no concessions will be made for merchandising services cognizable under Section 2(d) unless such payments are made available to retailers buying through wholesalers. If proposed respondent grants concessions more properly regarded as reductions in price, its secondary line, Section 2(a) assurances should have the effect that wholesalers will pay no higher prices than direct-buying retailers.

Philip Morris has agreed, as part of its assurances, to submit two reports of compliance—in such detail as the Commission may require—at six-month intervals for one year from the date of acceptance of its assurances and informal disposition by the Commission. The affidavit contains the further commitment to distribute fully the assurances to all officers and key employees of all divisions of Philip Morris Domestic, that part of the Philip Morris organization responsible for operations within the United States. Likewise, the affidavit has been executed by Ross R. Millhiser, President of Philip Morris Domestic, and Executive Vice-President of Philip Morris, Incorporated.

² To the extent the excesses in payments to direct retailers, over the 3% paid wholesalers, may, and should, be treated as Section 2(a) price concessions, direct retailers received a lower price than wholesalers. *Fred Meyer, Inc.*, Docket No. 7492, (March 29, 1963); *Krug v. Int'l. Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948).

It is recommended that proposed respondent's assurances be accepted and that this matter be closed on the basis thereof, without prejudice to the right of the Commission to reopen the same if and when warranted by the facts. Forwarded herewith is a letter for the signature of the Secretary informing proposed respondent of Commission disposition in accordance with Rule 2.21 and advising that the first of two compliance reports is due within six months. As this investigation occurred at the instance of the Federal Trade Commission, no applicant's closing letter is necessary.

The Commission is respectfully requested to note that there is no request for confidential treatment of its affidavit and assurances on the part of proposed respondent. Of the four major safety-razor companies investigated, only Gillette has requested such confidential treatment. Consequently, it is recommended that disposition of this matter on an informal basis be held pending a determination by the Commission on the Gillette request so that equal treatment may be given, so far as possible, to each of the manufacturers involved. As the memorandum of this Division of February 13, 1960 dealing with Gillette's request states, it is recommended that publication of the affidavit of these companies—should the Commission so decide—be simultaneous.

Respectfully submitted.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

Approved:

WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.

CECIL G. MILES,
Director, Bureau of Restraint of Trade.

BEFORE FEDERAL TRADE COMMISSION, UNITED STATES OF AMERICA

(File No. 681 0145)

In the matter of
Philip Morris, Incorporated, a Corporation

AFFIDAVIT

Ross R. Millhiser, being duly sworn, deposes and says:

That he is President of Philip Morris Domestic and an Executive Vice President of Philip Morris Incorporated, a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 100 Park Avenue, New York, New York, 10017. Philip Morris Incorporated manufactures and sells razor blades, shaving accessories, men's grooming products, and toiletry preparations through the American Safety Razor Company, Staunton, Virginia, a division of Philip Morris Incorporated. Philip Morris Incorporated sells and distributes the vast majority of such products outside the Commonwealth of Virginia and is engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

Philip Morris Incorporated, through the American Safety Razor Company, sells its various razor blades, shaving accessories, men's grooming products and toiletry preparations to wholesaler, jobber, retailer, and toiletry merchandiser customers for resale within the United States and other places subject to the jurisdiction of the United States. American Safety Razor Company's list price for the aforesaid products is the same to each such customer.

Philip Morris Incorporated, through the American Safety Razor Company, has, for many years past, utilized written agreements with its retailer and toiletry merchandiser customers purchasing directly from American Safety Razor Company (ASR) by which ASR agrees to pay such customers a sum of money equal to a maximum of thirteen percent (13%) of each customer's net purchases of designated American Safety Razor Company products during each calendar quarter. ASR's retailer customers may earn a three percent (3%) allowance by agreeing to maintain an adequate warehouse and store stock of ASR products, not to switch customers who ask for ASR products to competing products, to install promotional material or self-service displays, and to make available current inventories. Retailer customers may earn an additional five percent (5%) allowance as reimbursement for various enumerated promotional ex-

penses. An additional five percent (5%) allowance may be earned as compensation for other promotional activities, including major promotions. Toiletary merchandiser customers receive three percent (3%) of net purchases and, in turn, agree, *inter alia*, to maintain adequate stocks and display ASR's principal products in serviced stores, to maintain ASR's product merchandisers or acceptable substitutes at check-out stations and permit the address of salesmen's meetings at reasonable times. Toiletary merchandiser customers who make health and beauty aid products—including ASR's products—available to consumers through retail stores on racks, fixtures and/or shelves which they control, receive an additional five percent (5%) allowance as reimbursement for enumerated promotional expenses, and an additional five percent (5%) allowance as compensation for promotional activities which must include at least one major promotion on ASR products each calendar quarter.

During the same time and with respect to the designated ASR products, Philip Morris Incorporated, through the American Safety Razor Company, has utilized written agreements with its wholesaler customers by which ASR agrees to pay such customers a sum of money equal to three percent (3%) of the customer's net purchases of the designated ASR products. ASR's wholesaler customers, in turn, agree, *inter alia*, to maintain adequate stocks of ASR products, to issue instructions to salesmen and to promote such products by various means, such as carrying adequate samples, assisting dealers in display, using current ASR catalog pages, etc. and to feature ASR products, holding at least one major promotion on ASR's products each calendar quarter and paying salesmen's commissions equivalent to any paid on competitors' products. These written agreements contain no provision for any payments, comparable to those made to direct buying retailers as aforesaid, to be made to competing retailer customers purchasing ASR products of like grade and quality from wholesalers or jobbers.

Furthermore, from time-to-time, special allowances or discounts in addition to those described above were offered on certain ASR products, and the effect of the calculation of the applicable special allowance or discount on some occasions was that wholesalers paid higher net prices on the occasions in question than direct-buying retailers paid on the same products.

American Safety Razor Company also, from time-to-time, made special payments to wholesalers and direct-buying retailers as compensation for certain promotional activities, generally newspaper or broadcast advertising. No provision was made for making comparable payments available to competing retailers buying through wholesalers.

By letter dated June 28, 1968, File No. 681 0145 addressed to Philip Morris Incorporated, the Federal Trade Commission advised that it had docketed an investigation of certain American Safety Razor Company pricing and merchandising practices under Section 2 of the Clayton Act, as amended, and requested information pertaining to such practices. Subsequently, certain information and documents were voluntarily submitted to the Commission by Philip Morris Incorporated pursuant to this written request. This investigation is still pending. Affiant hereby represents that he has the authority to make and hereby does make the following assurances on behalf of Philip Morris Incorporated and the American Safety Razor Company:

That the fund for special payments to certain direct-buying customers, as described in the second paragraph immediately preceding, has been discontinued and that the existing agreements with respect to ASR products with wholesalers, jobbers, retailers, and toiletary merchandisers heretofore described will be cancelled as of December 31, 1968,* and that thereafter no payments or allowances for promotional or advertising purposes and no services or facilities will be made or furnished to any customer, or customers, unless such payments, allowances, or services or facilities are made available on proportionally equal terms to all customers competing in the resale and distribution of ASR products of like grade and quality, said customers to include those customers purchasing such products through wholesalers or jobbers. Furthermore, affiant assures the Commission that Philip Morris Incorporated will not discriminate in price between competing purchasers of ASR products of like grade and quality within the meaning of Section 2(a) of the Clayton Act, as amended (15 U.S.C. Sec. 13(a)).

*Accrued obligations arising under these agreements will be honored. Payments will be confined to orders dated on or before December 31 and received by Philip Morris Incorporated no later than January 4, 1969, shipped by January 31, and to performance occurring by March 31.

Philip Morris Incorporated reserves the right to avail itself of any defense under the Robinson-Patman Act (15 U.S.C. Sec. 13).

Philip Morris Incorporated promises as a part of these assurances to submit such reports of compliance as may be required by and acceptable to the Commission at six-month intervals during a one-year period commencing with the Commission's acceptance of these assurances. Each such report will contain a full and detailed account of compliance showing the steps actually taken to carry out these assurances. Philip Morris Incorporated further promises to distribute fully these assurances to all officers and key employees of all divisions of Philip Morris Domestic.

The foregoing statements and assurances are made to the Commission for settlement purposes only in accordance with the disposition herein requested and do not constitute an admission by Philip Morris Incorporated or its said division that said acts or practices were unlawful.

It is understood that the furnishing of these assurances by Philip Morris Incorporated does not in any way bind or obligate the Commission as to its action in this matter. It is further understood that the assurances given herein may, except for good cause shown, be placed on the public record as provided in Section 4.9(f) of the Commission's Rules of Practice and Procedure.

On the basis of the assurances contained in this Affidavit, Philip Morris Incorporated requests that this matter be disposed of and the file closed in accordance with Rule 2.21 of the Commission's Rules of Practice and Procedure.

ROSS R. MILLHISER,
*President, Philip Morris Domestic and
Executive Vice President, Philip Morris, Incorporated.*

Sworn to before me this 20th day of November 1968.

LOUISE GRIFFIN,
Notary Public.

FEDERAL TRADE COMMISSION,
Washington, D.C.

Re File No. 681-0145.

PHILIP MORRIS, INC.,
*American Safety Razor Division,
New York, N.Y.*

GENTLEMAN: The Commission has conducted an investigation of your advertising and promotional programs. On the basis of the assurances in your affidavit of November 20, 1968, that the practices which were under investigation have been discontinued, this matter has been closed pursuant to Section 2.21 of the Commission's Procedures and Rules and Practice which provide for voluntary compliance. Under the terms of this affidavit you are required to file reports of compliance at six month intervals for a period of one year, the first such report to be due six months from the date of this letter. This report shall contain a full and detailed account of compliance showing the steps actually taken to carry out the assurances contained in your affidavit.

The Commission may at any time take such further action as the public interest may require.

Sincerely,

JOSEPH W. SHEA, *Secretary.*

MEMORANDUM

FEBRUARY 13, 1969.

To: The Commission.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: Request for Confidential Treatment of Various Materials by The Gillette Company, File No. 661 0081.

The staff has received a letter of January 31, 1969, from Charles F. Woodard, Vice President and General Counsel, The Gillette Company, Boston, Massachusetts. Mr. Woodard is responding to a letter dated January 9, 1969, from the Secretary advising Mr. Woodard that the Commission denied his request for an opportunity to make an oral presentation in support of Gillette's request for confidential treatment of various materials submitted in connection with the investigation and proposed disposition of this matter. Mr. Shea's letter further advised Mr. Woodard that he was being granted twenty days in which to submit

additional written comments in support of his position.¹ In a minute dated January 7, 1969, the Commission directed the staff to expeditiously submit its analysis and recommendation on the request for confidentiality upon receipt of Mr. Woodard's response to the Secretary's letter of January 9.

The materials for which Gillette requests confidentiality can be separated into two categories: (1) The various submissions by Gillette during the course of the investigation of this matter including general pricing and promotional information, customer lists, and customer sales data, and (2) the factual statements and assurances contained in the affidavit submitted by Gillette in disposition of the matter. With regard to the greatest part of the materials for which Mr. Woodard requests confidential treatment his concern is unnecessary since these comprise the investigatory file which is regularly accorded confidential treatment under Section 4.10(a) (6) of the Commission's Rules of Practice, except for good cause shown. The staff advised Mr. Woodard of this fact when, during the course of negotiations in this matter, he expressed concern over the public disclosure of the materials. Consequently, we view Mr. Woodard's request as being relevant only to the affidavit—the assurances and statement of facts therein.

Mr. Woodard's letter of January 31 (1) repeats his earlier request that all the aforementioned materials in this matter be classified as confidential information and neither be published nor made available to the public inspection; and (2) if the Commission denies confidential treatment to the Affidavit and Assurances of Voluntary Compliance, Mr. Woodard requests that the Commission divide the latter into two portions, "leaving the 'Background' and 'Assurances' portions unclassified, and granting confidential status to the preceding recitals of fact." Mr. Woodard advised the staff that the affidavit is not contingent upon the granting of confidential status by the Commission.

Having already discussed the first part of Mr. Woodard's request of January 31, we turn now to the Gillette Affidavit. At the outset let us say that we do not favor a course of treatment under Rule 2.21 which calls for two separate affidavits, as was suggested by Mr. Woodard in his latest letter. Furthermore, the reasons given for confidentiality in the Gillette request of January 31 are no more persuasive than those initially put forward in the request of September 6, 1968. In our view, Gillette has presented no substantial arguments why confidential treatment should be granted its assurances. The fact that Gillette discontinued its promotional programs because of Commission pressure is already known in the trade. Finally, we believe that the Gillette request for confidential treatment of its Affidavit of Voluntary Assurances must be considered in the light of the action taken by the Commission against its competitors.

Each of the three remaining manufacturers of razors and/or razor blades in the United States has submitted affidavits containing assurances similar to those given by Gillette.² Each company's share of the razor blade market in this country is substantially smaller than that of The Gillette Company. None of these companies has requested that its affidavit be kept confidential. Each company could probably present at least equal, if not more compelling, reasons for withholding its affidavit from the public record.

It might be that releasing notice of Gillette's affidavit of discontinuance before publication of the fact of its competitor's affidavits—there is likely to be a substantial time lag until publication of the Eversharp affidavit—conceivably could result in some inequity. This possibility would be seemingly minimal since all four competitors have taken the identical action of terminating existing advertising programs which were questioned by this Bureau and thereby have presumably already incurred the same customer reactions. Publication of this data

¹ Mr. Woodard filed an initial written request for confidential treatment of the subject material in a letter dated September 6, 1968.

² The three competitors, in order of the size of their market share are: (1) Schick Safety Razor Company, a division of Eversharp, Inc. (approximately 25% of market); (2) American Safety Razor Company, a division of Philip Morris, Inc. (approximately 14% of market); (3) Wilkinson Sword, Inc. (approximately 6% of market). Gillette's share of the market is estimated to be approximately 54%. These market share estimates were made by Wilkinson Sword in its affidavit and we believe them to be sufficiently accurate for our purposes at this time.

The affidavits of Philip Morris (American Safety Razor) and Wilkinson Sword are being processed now for submission to the Commission. The affidavit of Eversharp (Schick Safety Razor) is being withheld pending additional investigation in that matter, which will be explained in detail when forwarded to the Commission.

should cause little additional reaction in the trade. However, since inequities might result from publication of the affidavits seriatim, we respectfully recommend that the Commission withhold publication of the affidavits of assurances until all four matters have been considered by the Commission.

Respectfully submitted.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

Approved :

WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint of Trade.

APRIL 8, 1969.

Re Sales Opportunities, Inc., File No. 693 7116.

From : James M. Nicholson.

To : Comm. Dixon ; Comm. Elman ; Comm. MacIntyre ; Comm. Jones ; Secretary (J. Kuzew) ; General Counsel ; Program Review Officer ; Bur. of Economics ; Bur. of Restraint of Trade ; Bur. of Deceptive Practices ; Bur. of Industry Guidance ; Bur. of Textiles and Furs ; Executive Director ; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

APRIL 8, 1969.

To : Commission.

From : James M. Nicholson.

Subject : Sales Opportunities, Inc., File No. 693 7116.

The Commission's Guides are useful as supplements to, not substitutes for, advisory opinions. Yet the Division of Advisory Opinions proposes here to respond to a question as to the legality of a specific proposal, which appears to be covered by the provisions of Section 2(e) of the Clayton Act, as amended, by furnishing the requesting party with a copy of the recently issued Guides for Advertising Allowances and advising him that 2(e) applies. Here it is noted that the Digest submitted goes beyond the opinion prepared by stating that the supplier would be required to offer the same service to all competing resellers or to offer usable and suitable alternatives.

Aside from the propriety of issuing a Digest which does not accurately reflect the opinion rendered, I cannot understand why we cannot respond more specifically to the question asked. The Chief, Division of Discriminatory Practices has indicated his view that successful implementation of the plan can only be accomplished through violations of Section 2(e) and hence he would amend paragraph 3 of the letter and paragraphs 1 and 3 of the Digest to indicate that implementation of the plan may bring it within the scope of 2(e).

I concur in the latter view insofar as it goes, but would add to the opinion, in appropriate language, that implementation of the proposal would be likely to result in a violation of 2(e) if, as the staff seems to believe, its benefits will be offered only to chains and if no suitable and usable alternatives are offered to those competing customers who cannot use the basic plan.

I move the matter be returned to the staff for revision of the opinion in the manner outlined above.

MEMORANDUM

MARCH 25, 1969.

To : Commission.

From : Arthur R. Woods, Attorney-Adviser, Bureau of Industry Guidance, Division of Advisory Opinions.

Subject : File No. 693 7116, Sales Opportunities, Inc., Request for Advisory Opinion re Tripartite ; Promotional Assistance Plan—Statute Claimed to be not Controlling.

Statute : Amended Clayton Act—Section 2(e).

Recommendation : Requesting party be advised that proposal comes within scope of Section 2(e).

The Requesting Party

The requesting party is Sales Opportunities, Inc., of New York City by John N. Chivily, Esquire.

The Request

Sales Opportunities, Inc., proposes to offer suppliers a means whereby the supplier's advertising of its own products can be brought to the attention of purchasing agents for chain stores. Visual aids and other presentations will be used to enlist interest and encourage purchases.

A major difficulty, it is said, is to get enough time and attention from such officials to present a message. As a quid pro quo, the requesting party will undertake to provide certain merchandising services to those who will give the requisite time and attention.

The offered services need not necessarily be associated with products being pushed. For example, in return for time and attention given to a sales pitch for soap, the intermediary may offer to furnish merchandising services as to meat. Such services are not specified, but to take an ultra simple example might amount to "use plastic see-through rather than plastic containers."

Discussion

On Wednesday, March 5, 1969, the Commission issued its final Guides for Advertising and Other Merchandising Services and Allowances to become effective May 1, 1969. Although these Guides are subject to revisions prior to May 1, 1969, should further revision be required, and although they are to be reconsidered after they have been in operation for 18 months, they are, as now set forth, the standard by which any requests for advisory opinions are to be measured under Sections 2 (d) and (e) of the amended Clayton Act.

For our present purpose one point is clearly made in the Guides: if a supplier has a retailer oriented program, he, himself, is under a very considerable obligation to see to it that his plan on proportionally equal terms is made available to, and is usable by, those retailers who compete in the resale of his goods, no matter how many intermediaries there may be between him and the competing resellers.

It remains true, of course, that if a proposed plan necessarily embodies the requisite availability and proportionality, there can be no objection to it if honestly implemented.

If, on the other hand, as is so often the case, it cannot be determined that a proposed plan has built-in availability and proportionality, or if there is no adequate way of knowing how a proposed plan will work out in practice, then positive advice cannot easily be given.

Looking at the presently proposed plan, we find an intermediary positioned between suppliers and retailers. Since the presence of the intermediary in no way changes the obligation of the suppliers and the supplied, the intermediary can for present purposes be disregarded.

Looking, then, solely at the supplier and his retailing customers, we find that under the proposal in hand the supplier is furnishing a service cognizable under Section 2(e) of the amended Clayton Act. Clearly all concerned believe this service to be of some value. If accepted, it will be of enough value to pin down the time and attention of retailing officials who would not otherwise be an audience. This is true whether or not the service is directly connected with the sale of identifiable specific merchandise.

Although Example 6 under Guide 7 appears basically to have been written to deal with demonstrator services, the language is sufficiently broad to cover the present situation since here we have an arrangement "with a third party to furnish personnel to perform work for a customer". This being so, the requirement is that the "services under the plan must be made available to all competing customers on proportionally equal terms." If there are those retailing competitors for whom the offered services are not usable or suitable then the supplier must "offer usable and suitable alternatives of equivalent measurable cost" to such customers.

We do not know whether such alternatives will in fact be offered either by the supplier acting for himself or through the intermediary, although on its face the present plan is clearly designed for large chains rather than for the small independent retailer. It is further clear that the plan is directed toward large retailing chains and does not pay even lip service to the requirements of smaller competitors.

In the papers supplied and in conversation, the requesting party urges that what he proposes is not subject to the requirements of Section 2(e) of the

amended Clayton Act. His argument essentially is that the services to be furnished may have no connection whatsoever with a specific sale of supplier goods. In light of our earlier discussion this position does not appear tenable.

We believe, therefore, that the requesting party should be advised that in the Commission's view the proposal is subject to the requirements of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. For further information he should be sent a copy of the present Guides. We believe this is to be preferred to an attempt to paraphrase in a letter language which the Commission has so painstakingly hammered out.

Both a proposed press release and a proposed letter to the requesting party are transmitted herewith.

Respectfully submitted,

ARTHUR R. WOODS,
*Attorney-Adviser,
Division of Advisory Opinions,
Bureau of Industry Guidance.*

Approved :

ARTHUR R. WOODS,
*(Acting for Hugh B. Helm, Chief,
Division of Advisory Opinions, Bureau of Industry Guidance.)*

March 18, 1969.

CHALMERS B. YARLEY,
Director, Bureau of Industry Guidance.

Concurrence :

Digest approved for publication :

WILLIAM F. JIBB,
Director, Office of Information.

March 24, 1969

FRANCIS C. MAYER,¹
*Chief, Division of Discriminatory Practices,
Bureau of Restraint of Trade.*
FRANCIS C. MAYER.

ADVISORY OPINION DIGEST No. —

SUPPLIER SERVICES FURNISHED THROUGH THIRD PARTY

The Commission advised a requesting party that his proposed plan would be governed by the provisions of Section 2(e) of the amended Clayton Act, as interpreted by the Commission's recently issued Guides for Advertising Services and Other Allowances.

In return for chain officials' time in considering supplier proposals, a third party intermediary proposed to provide merchandising advice of a perhaps general nature. The requesting party considered his proposed action to be outside the scope of Section 2(e).

In the Commission's view, Example 6 under Guide 7 was applicable; i.e. the proposal amounted to an arrangement "with a third party to perform work for a customer". Under the plan, then, the supplier would be required to offer the same service to all competing resellers of the supplier's goods or would be required to offer usable and suitable alternatives of equivalent measurable cost on proportionally equal terms to those competing customers unable to use the basic plan.

NOTE: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

¹ It is my opinion that, in pure theory, the request lies more in the area of commercial bribery; but it is also my confirmed opinion that the successful implementation of the plan only can be accomplished through violations of Section 2(e) and, therefore, I concur in the recommendation. Paragraph 3 of the letter and Paragraphs 1 and 3 of the digest should be rewritten to indicate the implementation of the plan *may* bring it within the scope of Section 2(e).

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

JOHN N. CHIVILY, Esq.,
Naylon Huber Magill Lawrence & Farrell,
New York, N.Y.

DEAR MR. CHIVILY: Reference is made to your request on behalf of your client, Sales Opportunities, Inc., for the Commission's views as to a proposed service known as "Executive Vision".

The Commission understands that your client, acting for suppliers, proposes to promote the sale of supplier products to retailers through an audio-visual presentation. It is contemplated that such presentations are made to top executive management. In order to induce such management to view the sales message, Sales Opportunities, Inc., will include in its presentation a three minute analysis of a specified department of the retailer's store.

In the Commission's view, the supplier in the circumstances described would be providing through an intermediary a service cognizable under section 2(e) of the amended Clayton Act.

The obligations, liabilities, and entitlements of supplies, intermediary, and retailer are set forth in the enclosed copy of the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services herewith to which references may be made.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary.*

Enclosure.

NAYLON HUBER MAGILL LAWRENCE & FARRELL,
New York, N.Y., March 5, 1969.

Re Sales Opportunities, Inc.,
Norwell, Mass.

ARTHUR R. WOODS, Esq.
Federal Trade Commission,
Bureau of Advisory Opinions,
Washington, D.C.

DEAR MR. WOODS: Please be advised that no analysis of departments for retailers has been made as yet. However, I would like to reiterate the salient facts in connection therewith.

The retailers will select the departments to be analyzed and the manufacturer will have absolutely no control over the selection of the departments to be analyzed. Accordingly, a Bread Manufacturer's commercial may be shown in conjunction with an analysis of meat departments. In any case, all the products in the department will be considered, and not those of any one manufacturer.

Very truly yours,

JOHN N. CHIVILY.

NAYLON HUBER MAGILL & FARRELL,
New York, N.Y., February 7, 1969.

Re Sales Opportunities, Inc., Norwell, Mass.

FEDERAL TRADE COMMISSION,
Bureau of Advisory Opinions,
Washington, D.C.

1. INTRODUCTION

GENTLEMEN: This letter is to request an advisory opinion with regard to the proposed activities and operations of Sales Opportunities, Inc. (the "Company") which provides a service known as "Executive Vision". The Company will be engaged in the preparation and sale of commercial messages, advertising to retailers new and old products of manufacturers. No consumer advertising is done by the Company. The sales messages on video tape will be directed to the

top executive management of retailers who purchase or may purchase the goods of the manufacturers who are clients of the Company. In order to induce the top management of the retailers to view the sales messages, the Company will include in its presentation a three-minute analysis of a specified department of the retailer's store. The service may include discussion of various products not manufactured by the manufacturer whose commercial is to be seen.

Based on the above facts, we believe that the service to be performed by the Company in obtaining better communication between the manufacturer and retailer, opening up new avenues of exploration for the products of the manufacturer with the top management of the retailer and giving the manufacturer the ability to communicate directly to top management of the retailer, does not in any way violate the provisions of the Robinson-Patman Act.

2. HOW THE COMPANY WORKS

The Company will, for a fee, produce a one-minute sales presentation on any subject pertinent to the manufacturer's business. The manufacturer is assured that this presentation will be seen by the executives of retail food outlets. The presentation is made on a video tape. It is seen and approved by the manufacturers before being shown to the retailers.

In order to induce the retailers to view the sales presentation of the manufacturer, the Company will, on a video recorder, analyze a cross-section of specified departments for the retailer. This analysis will be shown to the retailer before or after but in connection with the sales presentation of the manufacturer.

3. POLICY.

The Company's policy, as set forth at the outset of this application, is to provide a more effective forum for the manufacturer to present his products to the retailer. It is contemplated that the services will be available to all competing retailers. The Company will not engage in any consumer advertising.

The Company's President, Charles J. Foley, at 37 Old Plain Street, Marshfield, Massachusetts 02050, telephone 617 834-7106, and the Company's attorneys, Bradford S. Magill and John N. Chivily, of 61 Broadway, New York, N.Y. 10006, telephone 212 344-3080, are ready to answer all questions and agree to make themselves available for conferences in Washington or New York, as requested by you. We will be more than happy to supply you with any information you may desire and only request that this matter be acted upon promptly. Please feel free to call collect at any time.

Very truly yours,

JOHN N. CHIVILY.

NAYLON, HUBER, MAGILL, LAWRENCE & FARRELL,
New York, N.Y., February 20, 1969.

Re Sales Opportunities, Inc., Norwell, Mass.

ARTHUR R. WOODS, Esq.
*Federal Trade Commission,
Bureau of Advisory Opinions,
Washington, D.C.*

DEAR MR. WOODS: In accordance with your request, I am enclosing herewith copies of the script for the two commercials prepared by Sales Opportunities, Inc.

Very truly yours,

JOHN N. CHIVILY.

PEPPERIDGE FARM STUFFING COMMERCIAL

During the Thanksgiving, Christmas and New Years Holiday Season in 1967, one poultry stuffing outsold the next three brands combined by exactly 40%.

The 1968 Pepperidge Farm promotion and merchandising plan will help you sell even more of the nation's number one stuffing. Three full weeks of concentrated radio support, both network and spot, featuring Titus Moody; 130-60 second spots per week; a total of 200 gross rating points in New York, Connecticut and Boston.

P. O. P. materials include this giant new stuffing bin (holds 12 cases), a four color turkey banner with your own brand name imprinted free of charge and 150,000 of these attractive four color recipe booklets to be given away in Pepperidge Farm Tea Loaves, special display, and selected magazines.

From November 11 through November 23, Pepperidge Farm will offer a 24 cent case allowance on all three Pepperidge Farm stuffing products, an extra 24 cent profit per case or a 26.1% profit on the 1 pound size and a 25.7% profit on the 8 ounce size.

For stuffing profits this year, take advantage of Pepperidge Farms promotion and merchandising aids.

P.O.P. materials, saturation network and spot radio, recipe booklets and a 24 cent case allowance on all varieties from November 11 through November 23.

GORTON'S SEAFOOD COMMERCIAL

America's fastest selling frozen seafood, Gorton's English-Style Fish and Chips is now available in a one pound package. This new product is attractively packaged in a red, white and blue box that is sure to get the customer's attention.

Test market results have been very exciting. Sales related to facings demonstrate that this product is the fastest moving item in the frozen seafood line. . . . two to five cases per week per store.

Gorton's is going all out to assure high consumer acceptance of this new product.

Thirteen local TV spots per week—January through March. Two full-color Sunday Supplement ads—February 3rd and February 24th. Two local newspaper ads with 10¢ store-redeemed coupons.

Gorton's Fish and Chips also provide you, the retailer, with maximum incentive to effectively merchandise the product. Profit at suggested retail is 35%. Gorton also provides a quantity discount, cooperative advertising and P.O.P. materials.

Gorton's Fish and Chips will be a real profit-maker for you. It is attractively packaged, it has proven successful in test markets, has an effective advertising and promotion program and is priced for profit.

NONAGENDA MATTER

MAY 28, 1969.

Re American Radiator & Standard Sanitary Corp., File 651 0093; Day & Night Manufacturing Co., Division of Carrier Corp., File 651 0094; Crane Co., File 651 0095.

From: James M. Nicholson.

To: Commissioner Dixon; Commissioner Elman; Commissioner MacIntyre; Commissioner Jones; Secretary; General Counsel; Program Review Officer; Bureau of Economics; Bureau of Restraint of Trade; Bureau of Deceptive Practices; Bureau of Industry Guidance; Bureau of Textiles and Furs; Executive Director; Assistant Executive Director; Bureau of Field Operations.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

The staff's proposed closing letter to Carrier Corp. contains this intriguing language—

"The Commission has rejected your Assurance of Voluntary Compliance as legally insufficient and has determined that no further action is required at this time."

This is no way to impress a proposed respondent with the gravity of submitting a "legally insufficient" Voluntary Assurance. I move for the stronger sanction—no closing letters at all, to anyone. This would be an appropriate finale to this classic piece of trivia. A case initiated on the basis of an irresponsible (and apparently unevaluated) complaint, a case subsequently over-investigated in Colorado, New Mexico and other picturesque settings, and a case which ultimately wasted over 2,500 man-hours.

My sympathies are all with Miss Kloze who did yeoman service in disposing of (she did *not* initiate) these five year old dogs.

AGENDA MATTER

APRIL 10, 1969.

Re Scott Finks Company, Inc., et al., File No. 611 0813.

From : James M. Nicholson.

To : Commissioner Dixon ; Commissioner Elman ; Commissioner MacIntyre ; Commissioner Jones ; Secretary (J. Kuzew) ; General Counsel ; Bureau of Economics ; Bureau of Restraint of Trade ; Bureau of Deceptive Practices ; Bureau of Industry Guidance ; Bureau of Textiles & Furs ; Executive Director ; Assistant Executive Director ; Bureau of Field Operations.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

APRIL 10, 1969.

To : Commission.

From : James M. Nicholson.

Subject : Scott Finks Company, Inc., et al., File No. 611 0813.

I approach the task of circulating this Section 2(c) consent order with some trepidation because I have no desire to revive anew the controversy which recently arose over the issuance of 2(c) complaints in the fresh fruit and vegetable industry, although the similarities between the two situations would be obvious to anyone who studied the voluminous files which were submitted to my office. Scott Finks stands convicted of a clear-cut violation of the law in that it paid brokerage or discounts in lieu of brokerage to brokers buying for their own accounts. There is no real question as to this fact and respondent has affixed his signature to a consent order which will effectively terminate the practice.

Was it worth the cost? I have my doubts. Ordinarily, one does not complain about a consent order for it means the government has obtained compliance without undergoing the expense of litigation. However, this does not take into account all that went before in our efforts to reach this blissful state. This investigation began in January of 1962 on our own motion. Since that time, I am advised that 1,032 hours have been charged to the case. Whether that is a completely accurate figure or not, it having been alleged that our staff is sometimes less than completely candid in filling out time cards, it at least represents a substantial expenditure of money and manpower on the part of our headquarters staff and three different field offices and at least 1,000 hours not spent on something else.

Some historical references might aid our perspective. On January 18, 1962 an expeditious field investigation was requested to verify suspicions that respondent was making payments to brokers purchasing for their own accounts. In what must have been a record for such responses, the investigation was completed and reported on February 15, 1962, with a well-documented recommendation that complaint issue based upon numerous such transactions with ten different brokers purchasing for their own accounts. At this stage some of the urgency appears to have gone out of the matter, for three years and eight months later, without any intervening action, the case was reassigned to a new attorney. Three years and nine months later it was reassigned to still another. Then four years and four months later a supplemental investigation was requested into the question of whether illegal brokerage payments were being made to respondent's direct accounts, a question not theretofore raised.

To resolve this point, three different field offices subsequently became involved and it was ultimately determined that respondent did not pay brokerage to its direct accounts, although additional evidence was accumulated as to payments to brokers on purchases for their own accounts. Far be it from me to suggest that the supplemental investigation, ostensibly to look into payments to direct accounts, was necessary in order to gather fresh evidence upon which to base an order prohibiting payments to brokers purchasing for their own account, a step which was taken some seven years and one month after the Kansas City Office had recommended complaint based upon the same charge and substantially the same type of evidence.

So much for history. On the merits, it appears that respondent accomplished the same illegal result by two different methods. As to some brokers, brokerage deductions were made before remitting to respondent (pure brokerage) and, as to others, respondent deducted the equivalent of brokerage in its net billing to them on purchases made for their own accounts (allowances in lieu of broker-

age). In either case, the amount was invariably 10¢ per 100 lbs. and, as best as I can tell, all brokers were treated alike in this respect, although it would take a more careful evaluation of the supporting documents than I care to make to fully support this assumption which I have made from a study of the various memorandums submitted.

This brings me then to the point where I found myself when I prepared my dissent in connection with the fresh fruit and vegetable complaints. I question the utility of this proceeding for the same reasons. But since complaints there have been issued, I see no reason for withholding action on a consent order covering potatoes and onions or anything to be gained by renewing the previous controversy each time the question arises.

Consequently, I move the consent order—reluctantly.

MEMORANDUM

APRIL 3, 1969.

To: Commission.

From: Division of Consent Orders.

Subject: Scott Finks Company, Inc., et al., File No. 611 0813.

Recommendation: Join in the Bureau's recommendation that the consent agreement submitted under § 2.14 of the Rules be provisionally accepted.

Reviewed and forwarded herewith is executed agreement containing consent order which order, in this Division's view, adequately prohibits the acts and practices alleged to be unlawful in the complaint contemplated by the agreement.

Also submitted in conformity with the revised procedure set forth in the Commission's minute of September 18, 1968 is draft of decision and order for the Commission's consideration and provisional approval.

Respectfully submitted,

ROBERT H. DUNN,
*Acting Assistant General
Counsel for Consent Orders.*

If the agreement is accepted, the following counsel should be notified by the Division of Legal and Public Records: None.

MARCH 27, 1969.

To: Commission.

Via: Division of Consent Orders.

From: Howard Friedman, Attorney, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: File No. 6110813; Scott Finks Company, Inc., et al.; Recommendation for acceptance of Consent Order; Violation of Section 2(c) of the amended Clayton Act through the granting of price allowances in lieu of brokerage and by paying brokerage to a buyer purchasing for his own account; Produce.

Pursuant to Section 2.14(a) of the Rules of Practice and Procedure, a proposed draft of complaint and executed agreement containing a consent order to cease and desist in the above-captioned matter is forwarded herewith. The agreement was obtained by the Kansas City office.

The applicant in this matter is the Commission.

Proposed respondents are Scott Finks Company, Inc., a corporation and W. S. Finks, individually and as president and a director of said corporation. Their principal office is located at 203 Merchants-Produce Bank Building, Kansas City, Missouri 64106. Gross sales for the period from 1962 to 1967 have averaged about one and one-half million dollars annually. Net profit is about 1¼% of gross sales. Scott Finks Company, Inc. (SFCo) buys and sells potatoes and onions, although it deals mainly in potatoes.

FACTS OF THE CASE

The investigations revealed very strong evidence that SFCo was in fact paying brokerage to brokers who were buying for their own account. (TBF pp. 34-35, 39-132, 1206, 1210, 1220, 1227). It was quite clear that as to certain brokers, brokerage deductions were made before remitting to SFCo. (Finks Ex. 61-63f. TBF pp. 573-598.) They then resold at whatever price they could get for the produce, frequently realizing profits over and above the usual and customary brokerage. On some sales, SFCo deducted the equivalent of brokerage in its net billing to them on purchases made for their own account. (Finks Ex. 47-48f, TBF pp. 454-469; TBF pp. 1202-1203).

A detailed explanation of how SFCo conducts its operations is set out in a letter from Mr. Finks dated July 20, 1961. This letter also contains information concerning the firms receiving brokerage from SFCo. Also contained in the PGF (p. 2) immediately following this letter is a worksheet summarizing some of the essential parts of the voluminous documentary evidence in the files. A supplement to the information contained in the letter of July 20, 1961 is contained in a field report from Kansas City (TBF, Vol. I, pp. 2-5).

SFCo sells on a net delivered basis. Title to the goods, therefore, passes to the buyer at the designated delivery point, which sometimes may be a buyer's dock. SFCo assumes all liability up to the point of delivery. This includes damaged or spoiled goods due to loading, handling or hauling. SFCo makes any claims against the railroad or shipper (PPE, p. 60).

COMPLAINT AND ORDER

Although the Kansas City office initially recommended disposition pursuant to informal procedures, after due deliberation by the staff at Headquarters, it was decided that this matter was not appropriate for such procedures. It was further recommended by the Kansas City office that the buyer recipients of brokerage should be offered consent orders. By memorandum from this Bureau to the Bureau of Field Operations dated August 19, 1968, it was suggested that "an order entered against SFCo—the source of illegal brokerage—would effectively thwart the illegal practices," (PPF, p. 62).

It is believed the accompanying consent agreement containing an Order to Cease and Desist (to which the complaint draft is attached), constitutes an appropriate disposition of this matter, and it is recommended that complaint draft issue and the order be issued in accordance with the consent agreement. The Division of Consent Orders prior to its return to the Kansas City Office for execution, reviewed the draft of complaint and agreement containing consent order to cease and desist and the proposed order has been approved by that Division.

The proposed respondent was not represented by counsel during the negotiation of this agreement.

COMMERCE AND PUBLIC INTEREST

The proposed respondent's business is interstate, both as to buying and selling. Shipments are made either from Kansas City or from the States of Idaho, Washington and California to the Middle West, East and South. Also, proposed respondent grossed over one and one-half million dollars annually from these interstate shipments. Further, it would be very much in the public interest to have this order on the record against a central source of illegal brokerage.

RECOMMENDATION

It is therefore recommended that the Commission accept the proposed Agreement Containing Consent Order to Cease and Desist, issue the proposed Complaint and enter the proposed Order.

Respectfully submitted,

HOWARD FRIEDMAN,
Trial Attorney, Division of Discriminatory Practices.

Approved:

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.
WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint of Trade.

BEFORE FEDERAL TRADE COMMISSION, UNITED STATES OF AMERICA

DOCKET No. —

In the Matter of

Scott Finks Co., Inc., a corporation, and W. S. Finks, individually as a president
and a director of said corporation

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (15 U.S.C. § 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Scott Finks Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 203 Merchants-Produce Bank Building, Kansas City, Missouri 64106.

Respondent Scott Finks Co., Inc., has been and is engaged in business primarily as a wholesale seller, buying and reselling produce. This respondent purchases its produce from a number of suppliers located in Montana and Idaho. Its volume of business in the purchase and sale of such products is substantial, estimated to be in excess of \$1 million annually.

Paragraph Two: Respondent W. S. Finks is the President and a Director of Scott Finks Co., Inc., and together with his wife Mildred G. Finks, owns two thirds of the capital stock of said corporate respondent. Respondent W. S. Finks formulates, directs and controls the acts, practices and policies of said corporate respondent. His address is the same as that of the corporate respondent.

Paragraph Three: In the course and conduct of their business for the past several years, respondents have purchased substantial quantities of produce in commerce, as "commerce" is defined in the Clayton Act, as amended, from suppliers or sellers located in several states of the United States other than the State of Missouri in which respondents are located. Said respondents transport or cause such produce to be transported from the places of business of suppliers located in various other states of the United States to respondents who are located in the State of Missouri or to respondents' customers located in other states of the United States. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in the purchase and resale of said produce by said respondents.

Paragraph Four: Respondents sell their produce to purchasers through brokers and pay said brokers a brokerage fee or commission for their services in arranging such sales. In many instances respondents have also paid a brokerage fee, or granted an allowance in lieu thereof, to brokers purchasing for their own account.

Paragraph Five: The acts and practices of respondents, in granting brokerage, or a commission, or an allowance or discount in lieu thereof, to brokers buying for their own respective accounts, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Wherefore, the premises considered, the Federal Trade Commission, on this
---- day of -----, A.D., 19----, issues its complaint against respondents.

By the Commission.

JOSEPH W. SHEA, *Secretary.*

BEFORE FEDERAL TRADE COMMISSION, UNITED STATES OF AMERICA

File No. 611 0813

In the Matter of

Scott Finks Co., Inc., a corporation, and W. S. Finks, individually
and as president and a director of said corporation.

AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The Federal Trade Commission, having initiated an investigation of certain acts and practices of Scott Finks Co., Inc., a corporation, and W. S. Finks, individually and as President and a Director of said corporation, and it now appearing that Scott Finks Co., Inc., a corporation, and W.S. Finks, individually and as President and a Director of said corporation, hereinafter sometimes referred to as proposed respondents, are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated:

It is hereby agreed by and between Scott Finks Co., Inc., by its duly authorized officer, and W. S. Finks, individually and as President and a Director of said corporation, and counsel for the Federal Trade Commission that:

1. Proposed respondent Scott Finks Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 203 Merchants-Produce Bank Building, in the City of Kansas City, State of Missouri 64106.

Proposed respondent W. S. Finks is President and a Director of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

2. Proposed respondents admit all of the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if, within thirty (30) days after acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft of complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34(b) of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and shall become final and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The complaint may be used in construing the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby, and they understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order, and that they may be liable for a civil penalty of up to \$5,000 for each violation of the order after it becomes final.

ORDER

IT IS ORDERED that respondents Scott Finks Co., Inc., a corporation, and its officers, and W. S. Finks, individually and as President and a Director of Scott Finks Co., Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of produce in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyers, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sales of produce to such buyer for his own account.

It is further ordered that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

Signed this —— day of October, 1968.

SCOTT FINKS Co., Inc., (a corporation)
By W. S. FINKS, *President*,
Kansas City, Missouri.

W. S. FINKS, individually and as
President
and a Director of said corporation.

HENRY J. FRIEDMAN,
Counsel for the Federal Trade Commission.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

WILMER L. TINLEY,

Assistant Director, Bureau of Restraint of Trade.

CECIL G. MILES,

Director, Bureau of Restraint of Trades.

BEFORE FEDERAL TRADE COMMISSION, UNITED STATES OF AMERICA

Commissioners: Paul Rand Dixon, Chairman, Philip Elman, Everette MacIntyre, Mary Gardiner Jones, James M. Nicholson.

DOCKET NO. ——

In the Matter of

Scott Finks Co., Inc., a corporation, and W. S. Finks, individually and as
President and a Director of said corporation.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of subsection (c) of Section 2 of the Clayton Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated subsection (c) of Section 2 of the Clayton Act, as amended, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Scott Finks Co., Inc. is a corporation organized, existing and

doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 203 Merchant-Produce Bank Building, in the City of Kansas City, State of Missouri 64106.

Respondent W. S. Finks is President and a Director of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered that respondents Scott Finks Co., Inc., a corporation, and its officers, and W. S. Finks, individually and as President and a Director of Scott Finks Co., Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of produce in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of produce to such buyer for his own account.

It is further ordered that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

JOSEPH W. SHEA, *Secretary*.

Issued:

(Prepared by Crumly April 1, 1969—(Office of Information) JIBB April 1, 1969)

BROKERAGE (RP)—CONSENT ORDER (FILE No. 611 0813)—(PRODUCE)

The Federal Trade Commission has provisionally accepted a consent order prohibiting Scott Finks Co., Inc., a produce wholesaler at 203 Merchants-Produce Bank Bldg., Kansas City, Mo., from making unlawful brokerage payments.

W. S. Finks, president and director of the concern, is also named in the agreed-to order. The agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law.

The complaint and consent order in this matter will remain on the public record from _____, 1969, through _____, 1969. During this time the Commission will receive and consider any comments or views concerning the adequacy of the order. Interested members of the public are urged to file such comments and views, all of which will become part of the public record of the proceeding. The FTC may withdraw its acceptance of the agreement if upon reconsideration it appears that the order is inappropriate, improper or inadequate.

The Commission's complaint alleges that Scott Finks sells its produce to purchasers through brokers and pays these brokers a fee or commission for their services. In many instances, the company has also paid a brokerage fee or granted an allowance in lieu of brokerage to brokers who buy for their own account.

These latter practices by the concern, the complaint charges, violate Section 2(c) of the Clayton Act, as amended.

APRIL 22, 1969.

Re Groveton Paper Co.; Docket No. 6592.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.
See attached memorandum.

MEMORANDUM

APRIL 22, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Groveton Paper Co.; Docket No. 6592.

The staff has again submitted the compliance report of Groveton Paper Company which raises the basic question of the compliance obligations of companies under pre *Fred Meyer* Section 2(d) orders. By minute dated November 27, 1968, we returned this matter to the staff with instructions "that the Guides under the Fred Meyer decision should specifically provides that they apply to those companies under existing orders." 'The staff construes this as meaning that the Commission refrained from taking a frontal position on whether respondents' compliance with pre-Meyer 2(d) orders is or is not properly measurable against the Meyer standard and reiterates its position that we are in a legally insecure position to assert that prior orders are governed de facto by the Meyer standards.

The compliance situation here seems to be that respondent is in compliance with the order as interpreted prior to the Meyer decision, but is not in compliance with the order as it would be interpreted by that decision. Approaching the matter from the standpoint of its understanding of our action, the staff recommends that we advise Groveton that its report has not been accepted and that its future compliance *under the statute* will be expected to conform with the Commission's revised Guides. The report itself would simply be received and filed. Clearly, the staff would not be insisting that respondent must comply with the Guides in order to comply with the order. The staff notes that our action here will set a precedent for the future handling of some thirty similar orders.

While I must admit that our prior instruction contained in the minute of November 27th was not a model of clarity, I do not think the staff has correctly interpreted our action. My understanding was that we clearly intended that respondents under pre-Meyer 2(d) orders would be expected to comply with the Guides in order to comply with the orders, which orders would be interpreted in light of the Guides.

When this matter was previously submitted, I indicated some sympathy with the staff's position, but did entertain some doubts on this score as all of the precedents cited dealt with situations in which a new interpretation was later placed upon an order which differed from that in effect at the time the order was issued and not with a situation where an appellate court had given a new construction of the statute on which the orders were based. Upon further reflection, I think my doubts were more firmly grounded than my sympathy and the Commission evidently agreed.

Any other construction would seem to lead to an anomalous result with across-the-board implications. If we adopted the present recommendation, we would have to separate each of the past orders we have issued in statutory language in point of time and interpret them only in light of the precedents which existed at the time they were issued. This could lead to a difficult, if not impossible, enforcement situation, for the principle involved would have application to any order phrased in statutory language, whether issued under 2(d) or some other provision of laws within our jurisdiction. In this regard, I see no essential difference between a consent order and a litigated order, as the staff also previously concluded, relying upon *United States v. Swift & Co.*, 286 U.S. 106 (1932).

If I have interpreted it correctly, I think our previous conclusion was a sound one which will withstand a court test if one is undertaken. Consequently, I move this matter be returned to the Division of Compliance to advise respondent that its report of compliance is not acceptable and to take such further action as will be required to bring the respondent into compliance with the order as presently interpreted.

MEMORANDUM

APRIL 4, 1969.

To: Commission.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

Subject: Groveton Paper Co.; Docket No. 6592.

Resubmittal of Supplemental Report of Compliance—Filing Recommended: Clayton Act, Section 2(d); Household Paper Products.

This matter was previously submitted to the Commission by our memorandum dated March 25, 1968, with our recommendation that respondent's supplemental report of compliance be approved and that respondent be so notified. That memo-

random, a copy of which is attached for reference, sets forth the factual background of this matter and discusses the details of respondent's promotional activities.

Prepared prior to the Supreme Court's decision in *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968), the March 25th memorandum noted (at page 3) that:

"Although Groveton disclaims control over its wholesaler customers, it believes that, based upon performance, participating wholesalers do pass monies received under the (promotional) program on to those of their retailer customers who elect to meet the performance requirements."

The Court's decision in *Meyer* issued on March 18, 1968, held that in the matter of promotional allowances made available by a supplier to direct-buying customers, the statute obligates the supplier to insure that all customers who compete on the same functional level with the said customers are accorded proportionally equal treatment irrespective of the manner by which they purchase the supplier's products. Noting that Groveton's passive interest in this area constitutes insufficient compliance with the statute as interpreted in *Fred Meyer*, Commissioner Nicholson by a memorandum of April 3, 1968, recommended that the matter be returned to this Division and held pending formulation of a Commission policy as to how it should proceed to carry out the direction of the Court. The papers were accordingly returned by the Commission's Minute dated April 17, 1968, which also instructed the staff to submit its recommendations as to the implementation of the *Meyer* decision vis-a-vis all pre-existing Section 2(d) orders.

Our conclusions and recommendations in this connection were submitted in our memorandum dated September 25, 1968. On November 27, 1968, the Commission issued a Minute directing "that the Guides under the Fred Meyer decision should specifically provide that they apply to those companies under existing orders." By this action, the Commission in our opinion has refrained from taking a frontal position on whether respondents' compliance with pre-*Meyer* Section 2(d) orders is or is not properly measurable against the *Meyer* standard. However, as enunciated in our Groveton memorandum of September 25, 1968, we believe the Commission is in a legally insecure position to assert that prior orders are governed de facto by the *Meyer* standards. In any event, it is clear that such respondents' statutory compliance must and will be measured by the *Meyer* standard.

There are in excess of thirty Section 2(d) matters wherein the orders to cease and desist antedate the *Meyer* decision and respondents' compliance is currently under evaluation or investigation. Here presented is the first occasion wherein the applicability of the *Meyer* standard to such open, pre-existing compliance matters is directly involved, and it is noted that the action taken in this matter will obtain a precedential value in the compliance processing of these thirty-odd matters. Two alternative approaches are considered where, as here, these respondents do show compliance with the pre-*Meyer* order and statutory standard, but fail to demonstrate compliance with the statute as interpreted by *Meyer*.

Noting the uncertainty in whether such respondents' undertakings in compliance with their pre-*Meyer* orders can properly be rejected for the failure of such undertakings to constitute compliance with the statute as subsequently interpreted in *Meyer*, such undertakings can under the first suggested approach be approved with, however, a caveat that respondents' statutory compliance is expected to conform to the *Meyer* standard. Such notice would be accompanied by a copy of the Commission's forthcoming Guides.

Under the alternative suggested approach, respondent's report would be approved but the Commission would note the unacceptability of the report as it now relates to established statutory standards and simply receive and file the report. As under the first considered approach, respondent would also be provided with a copy of the Guides, and a caveat that its statutory compliance is expected to conform to the *Meyer* standard.

We believe that each of the foregoing approaches is consistent with the Commission's position as is reflected by the Groveton Minute of November 27, 1968. Each approach skirts raising the specter of imposing a new standard of compliance with pre-*Meyer* orders, and each leaves the matter of judicial resolution of this question to the Commission's discretion. Moreover, each approach avoids singling out certain companies under pre-*Meyer* orders and requiring them to report their compliance with the statute. Accordingly, it is our belief that either approach could properly be followed in all such routine matters.

In the present matter, respondent has not sought to use the order as a shield but has cooperated in supplying information on the *Meyer* problem. Moreover, the information so provided, while limited, does not in our judgment show a willful or flagrant violation of the *Meyer* standard. The same promotional program and allowances available to respondent's direct-buying retailer customers may be passed on to retailers who buy through intermediaries. All performance requirements are believed reasonable and do not present a problem of functional availability. The sole apparent shortcoming here is that respondent should tighten its procedures to insure the availability of these allowances to all indirect-buying retailers in competition with its favored direct-buying retail customers.

Accordingly, it is recommended that our second suggested approach be utilized here, i.e., that respondent be advised of the unacceptability of its supplemental report as it relates to now established statutory standards. Further, it is recommended that respondent be apprised generally of the statutory requirement imposed by *Fred Meyer*, and advised that its compliance with the statute is expected to conform to its requirements as enunciated in the *Fred Meyer* decision and as supplemented by the Commission's Guides. Should this recommendation be adopted, it is anticipated that a copy of these Guides would be made available to respondent at such time as they become effective.

Further if this recommendation is adopted, it is noted that respondent's report will not be approved and therefore it would ordinarily be accorded confidential classification pursuant to Section 4.9(f) of the Commission's Rules. This result would thus leave nothing on the public record in this matter. Because this is the first instance wherein the applicability of the *Meyer* standard to an open, pre-existing compliance matter is involved, we believe this result is unwise. We suggest that the Commission make an exception to the usual procedure in these matters—such an exception is allowed by Section 4.10(c) of the Rules. We therefore recommend that the Commission direct that respondent's supplemental report (except for those portions where we believe respondent's request for confidential classification to be justified, see discussion in attached memorandum of March 25, 1968) and the Commission's letter of notification be made public.

A proposed letter of notification is attached, and all papers, including our memorandum of March 25, 1968, which discusses respondent's programs and its limited request for confidential classification, are resubmitted herewith.

Respectfully submitted,

JOSEPH J. GERCKE,
Chief, Compliance Division,
Bureau of Restraint of Trade.

Approved:

WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint of Trade.

Attachments.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re Groveton Paper Co.; Docket No. 6592.

Mr. CHARLES C. WEMYSS,
Vice President, Vanity Fair Paper Sales Corp.,
Greenwich, Conn.

DEAR MR. WEMYSS: The Commission is in receipt of respondent's submittals dated November 8, 1967, January 16, 1968, and February 7, 1968, which have been submitted as a supplemental report of compliance in connection with the captioned matter.

The Commission has reviewed the supplemental report of compliance and notes that however acceptable said report may have been as enunciating standards of compliance acceptable prior to the United States Supreme Court's decision in *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (March 18, 1968), the report does not, in our opinion, objectively meet the statutory requirements as now developed and enunciated in the Court's opinion. Accordingly, the Commission cannot affirmatively or with propriety approve your report as conforming to the requirements of Section 2(d) of the Clayton Act, as amended, and the now clarified standards.

In its *Fred Meyer* opinion, the Court held that Section 2(d) of the amended Clayton Act obligates a supplier who makes available an advertising and promotional allowance to direct-buying customers to insure that all customers who compete on the same functional level with said direct buying customers are accorded proportionally equal treatment irrespective of the manner in which they purchase or procure the supplier's product.

Accordingly, in the event that your company intends in the future to utilize an advertising or promotional allowance program, it must conform to the statutory requirements of Section 2(d) of the Clayton Act, as amended. In this connection, the Commission has recently promulgated tentative Guides for Advertising Allowances and Other Merchandising Payments and Services. When the Guides are issued in final form and become effective, we shall send you a copy for your information.

The Commission has made no determination concerning the legality of any actions set forth in the report which do not come within the terms of the captioned order.

Your request for confidential classification, made pursuant to Section 4.9(f) of the Commission's Procedures and Rules of Practice, has been granted only with respect to the Sales Promotional Allowance Authorizations. The Commission has determined, pursuant to the above Section, that your request for confidential treatment of the Cooperative Merchandising Agreement and all comments related thereto is not justified, and that to grant your request in this regard would be contrary to the public interest.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary*.

APRIL 22, 1969.

Re Docket No. 8491, Chesebrough-Pond's, Inc., Docket No. 8496, The Mennen Co., Docket No. 8497, Eversharp, Inc., Docket No. 8500, White Laboratories, Inc., Docket No. 8505, Philip Morris Inc.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.

By memorandum of the same date I have circulated the compliance report of Groveton Paper Company, Docket 6592, which dealt with the basic question of the compliance obligations of companies under pre-Fred Meyer 2(d) orders. The conclusions I reached there with respect to a company under such an order would seem to have even more application to these companies which are all operating under assurances that the unlawful practices charged in the complaints would not be resumed.

Consequently, I move these matters be returned to the Division of Compliance with instructions to advise the respondents that their reports of compliance are not acceptable and to take such further action as will be required to bring them into compliance with existing law.

MEMORANDUM

APRIL 4, 1969.

To: Commission.

From: Chief, Compliance Division, Bureau of Restraint of Trade.

Subject: Docket No. 8491, Chesebrough-Pond's, Inc., Docket No. 8496, The Mennen Co., Docket No. 8497, Eversharp, Inc., Docket No. 8500, White Laboratories, Inc., Docket No. 8505, Philip Morris Inc.

Resubmittal of Reports of Compliance—Filing Recommended; Clayton Act, Section 2(d); Toiletary Articles.

By its Minute in the captioned matters dated May 10, 1967, the Commission instructed the staff "to resubmit the same at the appropriate time with recommendations as to action as may be warranted following" resolution of the *Fred Meyer* matter. Pursuant thereto, it is now recommended that respondents' reports of compliance be received and filed, and that respondents be advised that their compliance with the statute must conform to its requirements as enunciated by the Supreme Court's decision in *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968).

By its opinion in the Docket No. 8491 matter, the Commission on July 27, 1964, terminated the litigation in each of the captioned cases and twelve other related cases (in which respondents' reports of compliance have been approved or field investigations are in progress). This action was taken without the issuance of formal orders to cease and desist for the reason that each respondent had discontinued the promotional payments ultimately found to be unlawful, either before or immediately upon receipt of the first official notice that the Commission intended to issue a complaint under Section 2(d) of the amended Clayton Act. The Commission thereby accepted respondents' assurances that the unlawful practices would not be resumed, and set aside the initial decisions including the orders to cease and desist. However, each respondent was at that time ordered to file a report showing the manner and form of its compliance with the requirements of Section 2(d).

By Commission Minute dated May 5, 1965, these matters were referred to this Division "for further processing of the compliance reports." The staff was instructed that "the compliance reports are to be treated the same as regular compliance matters in which formal cease and desist orders are issued." In view thereof, this Division proceeded in this responsibility with the understanding that the Commission, in deciding not to issue orders to cease and desist, here sought to insure protection of the public interest by requiring reports of compliance with Section 2(d) of the statute generally.

Respondents in each of the captioned matters cooperated with this Division in supplying their reports of compliance, and no irregularities in the payment of allowances to customers within any given class were disclosed. However, information supplied by each indicated that these respondents in varying degrees were favoring their direct-purchasing retail customers in the granting of promotional allowances to the detriment of those retail customers who purchase from wholesalers or other intermediaries. The details of each respondent's promotional programs and other data not here relevant were discussed in our Memoranda to the Commission, dated March 24, 1967, wherein it was recommended that these matters be tabled and returned to the staff pending a resolution of the *Fred Meyer* matter. By its May 10, 1967, Minute, this recommendation was adopted and the matter returned to the staff to be resubmitted with appropriate recommendation after resolution of the *Fred Meyer* matter.

The Supreme Court issued its decision in *Fred Meyer* on March 18, 1968, holding that in the matter of promotional allowances made available by a supplier to direct-buying customers, the statute requires that all customers who compete on the same functional level with the said customers must be accorded proportionally equal treatment irrespective of the manner by which they purchase the supplier's products. Following thorough consideration of the application of this expanded interpretation of the statute to existing orders, the Commission by Minute dated November 27, 1968 (Groveton Paper Co., Docket No. 6592), directed "that the Guides under the *Fred Meyer* decision should specifically provide that they apply to those companies under existing orders."

By this action, the Commission, in our opinion, has refrained from taking a frontal position on whether respondents' compliance with pre-*Meyer* Section 2(d) orders is or is not properly measurable against the *Meyer* standard. However, as enunciated in our memorandum of September 25, 1968, in the Groveton matter, we believe that the Commission is in a legally insecure position to assert that prior orders are governed de facto by the *Meyer* standards. In any event, it is clear that such respondents' statutory compliance must and will be measured by the *Meyer* standard.

Although they do not involve pre-*Meyer* Section 2(d) orders to cease and desist, we have transmitted these cases together with our recommendation in the Groveton matter since we regard these cases as being in *pari materia* with those that do involve Section 2(d) orders to cease and desist which antedate the *Meyer* decision. We believe that the considerations applicable to Commission action in matters such as Groveton are of equal relevance to the present matters. In particular, because respondents' reports do show compliance with the pre-*Meyer* statutory standard while failing to demonstrate compliance with the statute as now interpreted by *Meyer*, we submit that approval of these reports would be inappropriate.

In each of the captioned matters, we recommend that since no orders to cease and desist are here involved and respondents have demonstrated compliance with the theoretical legal standards attendant their past submissions, that they now be considered like other companies not under order, that is subject to the requirements of the statute. As with the recommendation made in Groveton, we believe that this approach here is consistent with the Commission's position as is re-

flected by the Groveton Minute of November 27, 1968. It skirts raising the specter of imposing a new standard of compliance with pre-Meyer orders and, particularly relevant here, avoids singling out companies not under pre-Meyer orders to cease and desist and requiring them to report their compliance with the statute as now interpreted.

Accordingly, it is recommended that the reports of compliance submitted by these respondents not be approved but simply received and filed. It is also recommended that these respondents be informed generally of the statutory requirements imposed by Fred Meyer, and advised that their compliance with the statute is expected to conform to its requirements as enunciated in the Meyer decision and as supplemented by the Commission's Guides. Should this recommendation be adopted, it is anticipated that a copy of these Guides would be made available to respondents at such time as they become effective.

Further if this recommendation is adopted, it is noted that respondents' reports of compliance will not be approved and will be accorded confidential classification pursuant to Section 4.9(f) of the Commission's Rules.

Identical proposed letters of notification are attached, and all papers and files including our memorandum of March 24, 1967, and respondents' reports of compliance and supplemental materials, are resubmitted herewith.

Respectfully submitted,

JOSEPH J. GERCKE,
Chief, Compliance Division, Bureau of Restraint of Trade.
WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.

Approved:

CECIL G. MILES,
Director, Bureau of Restraint of Trade.

Attachments.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re Chesebrough-Pond's Inc.; Docket No. 8491.

MR. FRANK J. MCGROARTY,
Secretary, Chesebrough-Pond's, Inc.,
New York, N.Y.

DEAR MR. MCGROARTY: The Commission is in receipt of respondent's report of compliance, dated September 10, 1964, and its supplemental submittals dated September 3, and November 10, 1965, which have been submitted in connection with the captioned matter.

The Commission has reviewed the information and materials contained therein and notes that however acceptable respondent's report may have been as enunciating standards of compliance acceptance prior to the United States Supreme Court decision in *FTC v. Fred Meyer, Inc.*, *et al.*, 390 U.S. 341 (March 18, 1968), the report does not, in its opinion, objectively meet the statutory requirements as now developed and enunciated in the Court's opinion. Accordingly, the Commission cannot affirmatively or with propriety approve your report as conforming to the requirements of Section 2(d) of the amended Clayton Act and the now clarified standards.

In its *Fred Meyer* opinion, the Court held that Section 2(d) of the amended Clayton Act obligates a supplier who makes available an advertising and promotional allowance to direct-buying customers to insure that all customers who compete on the same functional level with the said buyers are accorded proportionally equal treatment irrespective of the manner in which they purchase or procure the supplier's product.

Accordingly, in the event that your company intends in the future to utilize an advertising or promotional allowance program, it must conform to the statutory requirements of Section 2(d) of the Clayton Act, as amended. In this connection, the Commission has recently promulgated tentative Guides for Advertising Allowances and Other Merchandising Payments and Services. When the Guides are issued in final form and become effective, we shall send you a copy for your information.

The Commission has made no determination concerning the legality of any actions set forth in the report which do not come within the terms of the Commission's order to file a report in the captioned matter.

By direction of the Commission.

JOSEPH W. SHEA, Secretary.

JUNE 9, 1969.

Re The Department Store Industry.

(Previously circulated by Commissioner Elman on June 5, 1969, as an Agenda Matter.)

For Agenda, Week of June 9, 1969.

From: James M. Nicholson.

To: Comm. Dixon, Comm. Elman, Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director; Bur. of Field Operations.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

JUNE 9, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Department Store Industry.

I concur in the recommendation of Commissioner Elman that this matter be referred to the Bureau of Economics to deal with the broader problems within the Department Store Industry referred to in the staff memorandum which would include the three largest retailers—Penney's, Sears, and Montgomery Ward. The fragmental study of discriminatory practices alone, and the elimination of the three largest chains which have taken on "... more and more the characteristics of the traditional department stores . . .",¹ is another manifestation of the traditional approach to Robinson-Patman enforcement that has brought that Act and the Commission's interpretation of it to its current low repute.² Only through such a study can the factors contributing to concentration and vertical integration, with resultant anticompetitive manifestations, be identified.

I disagree with Commissioner Elman that such study should be directed for FY 1970. I suggest instead that the Bureau expeditiously analyze the kind of study it would think necessary and desirable, evaluate the investment which would be required by such a study, evaluate its priority with respect to its projects on Major Concentrated Industries³ and its *Consumer Protection Studies*⁴ in light of the Bureau suggestions for *Economic Analysis of Commission Activities*.⁵ The Bureau should then include its recommendations to the Commission. It seems to me that this procedure is more likely to produce a considered determination of policy than to direct this study at this time. The Commission, I believe, should carefully avoid *ad hoc* determinations of policy out of the frame of reference of its overall activities and responsibilities.

I so move.

JUNE 18, 1969.

Re Marketers of Fresh Fruits and Vegetables; File No. 681 0040.

From: James M. Nicholson.

(Previous circulations.)

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Asst. Executive Director.

I request that this matter be placed on the Commission's meeting agenda. Attached is my dissenting statement for information.

¹ Staff Memo, p. 5.² See, *Task Force Report on Antitrust Policy*, IV, July 5, 1968; *Report of the Task Force on Productivity and Competition*, p. 26 et seq.³ Item 1, New Projects for Fiscal 1971, *Programs and Special Projects of the Bureau of Economics for Fiscal 1971*, p. 2, April 29, 1969.⁴ Item 3, p. 4, *ibid.*⁵ Item 5, p. 5, *ibid.*

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

It was not long after I joined the Commission that it became apparent to me that a thorough review of both the Commission's enforcement of the Robinson-Patman Act and the statute's provisions was long overdue.¹ However, I was of the opinion that the Commission, itself, would conduct such a reevaluation. In this respect, I was encouraged by the persistency of Commission efforts in recent years to reevaluate its policies and procedures and make necessary changes.

For one brief moment, it appeared that this general reevaluation would finally focus on Robinson-Patman enforcement.² Today's action, however, has shattered the illusion. Apparently, Robinson-Patman policy is the Commission's "sacred cow". While willing to approach enforcement of its other statutes with rationality and a concern with ultimate result, the Agency has reserved a different approach for the price discrimination statute—mechanical.

Since the Commission appears either incapable or unwilling to internally review its Robinson-Patman Act responsibilities in the light of modern day business realities, it is now apparent that this appraisal should come from without the Agency.

JUNE 25, 1969.

Re Pacek & Becker Distributors, Inc., et al.; File No. 671 0134.

(Previously circulated by Commissioner Elman on May 28, 1969 and June 24, 1969 both as agenda matters.)

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Directors; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

JUNE 25, 1969.

MEMORANDUM

To: Commission:

From: James M. Nicholson.

Subject: Pacek & Becker Distributors, Inc., et al.; File No. 671 0134.

Everyone agrees that this matter should not have been investigated in the first place. The proposed respondents are simply too insignificant for us to bother with. I do not accept the staff's arguments about "significant prophylactic effect" or "selective consideration." Trivia is still trivia even when dressed up in the new clothes of selectivity, priorities and planning. The fact that we *did* start an investigation of the goings on at the Paceks and the Beckers is no reason to keep this thing going. I concur in Commissioner Elman's motion to close.

However, I will not be a party to the little domestic deceit which is the subject of the AVC. This reads like a script for the sort of thing on TV which gets a healthy Nielsen. The plot is cute—"his" and "hers" auto parts businesses run with entirely separate books, each with its very own salesmen and trucks, and *even* individual blue cross blue shield contracts. All that's missing is the canned laughter and I move that the Federal Trade Commission not provide it by accepting the AVC.

I also do not accept Commissioner Elman's account of the amount of commerce involved. If he means \$48.95 (actually \$55.67) is the total interstate sales of the WD, this misses the point. There is unlikely to be much interstate commerce if the business of the WD (Mrs. P) consists of shoving a piston across her desk to her principal jobber customer who just happens to be Mr. P. As for the sales of Mr. P., these were almost \$400,000 and about 7%, or \$28,000 of that total was in interstate commerce. I think that amount, too, is insignificant.

If Commissioner Elman's query about Gulf and Western is a motion for initiating an investigation, my vote is "no." I will not support an unevaluated investigation of anyone.

¹ See, *Antitrust: Sound and Fury?*—Remarks before the Section of Antitrust Law, 91st Annual Meeting of American Bar Association, August 7, 1968.

² In April, the Commission voted to reevaluate, through a trade regulation rule proceeding, the problem of functional discounts to stocking dealers. See Advisory Opinion Digest No. 333 (April 18, 1969). See also Advisory Opinion Digest No. 263 (July 9, 1968), and accompanying dissenting opinions.

Finally, I concur entirely in Commissioner Elman's comments on the shortcomings of the Commission's priorities and program planning. But this case reveals another point besides the pernicious cycle of good money being thrown into bad investigations. It illustrates the kind of wasteful and to me, depressing exercises we as Commissioners must go through to dispose of a frivolous matter like this.

JULY 3, 1969.

Re The Circle Grocery and Delicatessen; Corres. File No. 049486.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director; Bureau of Field Operations.

I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

JULY 3, 1969.

To: Commission.

From: James M. Nicholson.

Subject: The Circle Grocery and Delicatessen; Corres. File No. 049486.

The staff has requested Commission direction on whether to initiate a Robinson-Patman investigation in a case "we would normally close." The difficulty the staff is having is in saying "no" to a Negro lady operating a tiny grocery store in the Cleveland ghetto whose son is a TV personality ("Mission Impossible"), who is a "close" friend of Mayor Carl Stokes, and apparently has taken her complaint to Congressman Vanik and Senator Stephen Young. I move we say "no" for the staff.

Basically what she is complaining about is that she is so small that she cannot meet the minimum quantity requirements of suppliers. She wants to buy less than five cases of Coke, less than three cases of Pepsi, less than 50 cases of milk a week, etc., etc. On this complaint there is no chance that anything would come of an investigation and the expenditure of funds is not justified.

Her other complaint relates to failure to receive advertising allowances and in-store displays. Unless we are prepared to return to that "Golden Age" of enforcement and the \$25 2(d) case, I say we close this matter. Nor do I recommend the staff initiate any form of informal "administrative process" to try and "persuade" the suppliers to help this lady. The current prattle about the Federal Trade Commission being a "service agency" should not be encouraged. Moreover, it would be a cruel hoax to hold out the prospect of some meaningful relief when none is forthcoming.

By letter dated May 21 the staff has informed the applicant that an investigation is being initiated. The staff should swallow its embarrassment and write to the applicant saying the Commission does not authorize an expenditure of federal funds on a matter where there is no violation of law indicated, where some of the suppliers are not engaged in interstate commerce, and where there is no general public interest but only the complaint of a single store owner.

In moving to close this matter, I cannot help but observe that after all these years of frivolous investigations and trivia, the Commission is being asked to give "direction" in a case where my sympathies are all with the applicant. I am willing to put aside my personal leanings, but as far as I am concerned the "direction" we are giving here is to be applied even more stringently to the whole mail-bag of individual complaints which have shaped our sad performance whether it comes from a small milk company, or a small auto parts jobber, or local gasoline dealer, or any other special pleader who has become a staff favorite.

Finally, I have observed here the nervousness of the staff when confronted with just the prospect of Congressional disapproval. I understand that whenever there is a Congressional inquiry the staff is thrown into near hysteria, everything else comes to a stop, and a reply is forwarded usually promising something which cannot be delivered. In my opinion the operating Bureaus and Divisions have no

business replying to Congressional mail, or worrying about Congressional displeasure, or courting Congressional approval. As I understand the present procedure, the inquiries are usually received by the Secretary who forwards them to the operating bureau for a detailed (and fast) response. I move that *all* Congressional inquiries, *oral or in writing*, whether directed to the Secretary or any Director or Chief be referred to the General Counsel or his Assistant for legislation. Congressional inquiries should be handled by someone who "calls them the way he sees them." The General Counsel has demonstrated that ability.

MEMORANDUM

To: Commission.

From: Francis C. Mayer, Chief, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: Complaint of Mrs. I. Roberta Morris, The Circle Grocery and Delicatessen, 10601 Euclid Avenue, Cleveland, Ohio, Correspondence File No. 049486.

Request for Commission Direction.

This matter arose as a result of an interview between Assistant Attorney in Charge, Joseph G. Smeraldi, of our Cleveland Office, and the applicant, Mrs. I. Roberta Morris, who operates a small grocery, delicatessen and carryout shop in a semi-ghetto area of Cleveland, Ohio. As is evident from the interview report, Mrs. Morris has made allegations that many of her suppliers engage in unfair practices in dealing with small business operators. In particular, among her complaints, are: (1) inability to obtain advertising assistance although she has made repeated requests for such assistance; (2) the minimum delivery requirements imposed on small businesses by suppliers; and (3) the fact that retail supermarkets sell merchandise at prices which are lower than she must pay for the same products from her wholesale suppliers.

Initially, the Bureau of Restraint of Trade contemplated the initiation of a preliminary investigation. However, after further consideration in the light of our budget problems, we are not convinced that the information furnished warrants this action.

We recognize and appreciate the plight of Mrs. Morris and other small business entrepreneurs who are endeavoring to establish viable and competitive businesses to serve the residents of their communities throughout the country. Furthermore, these problems may be multiplied by the current trends which are, now more than ever, encouraging innercity residents to engage in the ownership and management of businesses in their communities.

The alleged unfair and discriminatory practices about which Mrs. Morris has complained and the companies against which she has complained are summarized in a memorandum for the file of May 22, 1969 transmitted herewith. Additional illumination concerning the nature of her complaint is also contained in a memorandum of April 3, 1969 to the Acting Director of the Bureau of Field Operations from the Cleveland Office, also transmitted herewith.

The complaint by Mrs. Morris is directed against large national distributors and their pricing practices, and service and allowance programs. Because of the size of her operation, Mrs. Morris is unable to purchase in the volume or quantity required or to advertise to the extent required to take advantage of the prices, services and allowances offered by the companies named in her complaint, and, in fact, it appears that she is unable to purchase directly from some of them.

We have no doubt that the circumstances about which Mrs. Morris complained are fairly representative of the circumstances faced by many small independent entrepreneurs in her category; and we have no doubt that the practices of the distributors against which she complained are fairly representative of the practices of many others similarly situated.

A limited investigation of this complaint could result in a limited degree of relief for Mrs. Morris along the lines sometimes achieved by our small business procedures. But an investigation sufficiently comprehensive to provide meaningful relief to similar small operators generally, if such relief proves to be warranted, could be of unusually large proportions. It would necessarily include a representative number or areas in addition to Cleveland, Ohio, and a representative number of companies in addition to those named by Mrs. Morris, probably cutting across a variety of industries. Such an investigation would probably present very close questions of law and of fact, particularly with respect to matters of justification, availability and usability.

We seriously doubt that the extent of relief likely to be accomplished warrants the investment of resources which would be required to undertake a comprehensive investigation of the sort suggested above, and we are reluctant to undertake a limited inquiry which, insofar as it may provide any relief, would benefit this applicant alone. In these circumstances we would normally close a matter such as this without submitting it to the Commission, but in view of the political and social overtones which may be involved in this application and its possible consequence to many small operators in innercity areas, we believe that it warrants Commission consideration. It is our recommendation, however, that it be closed.

Respectfully submitted.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

Approved.

WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint Trade.

MEMORANDUM

APRIL 3, 1969.

To: Charles R. Moore, Acting Director, Bureau of Field Operations.
From: Joseph G. Smeraldi, Assistant Attorney in Charge, Cleveland Office.
Subject: Complaints Re Practices of Several Grocery Product Suppliers in the Cleveland, Ohio Area.

Accompanying this Memorandum is a Report of Interview outlining, in detail, the complaints made by the owner of a grocery and delicatessen and a carry-out food service concerning the alleged failure of a number of her grocery product suppliers to furnish advertising and promotional aid and assistance, despite repeated requests therefor. The Applicant, Mrs. I. Roberta Morris, has recently expanded her carry-out food store in a semi-ghetto area of Cleveland and, as the Report of Interview reflects, has been experiencing considerable problems in obtaining service and promotional assistance from the National Dairy Product Company (Sealtest), the National Biscuit Company (Nabisco), and the local bottlers of Coca-Cola, Pepsi Cola, and Canada Dry beverages. Mrs. Morris is a highly articulate, forceful, and persuasive advocate of the proposition that, if immediate assistance is not granted the small businessman and, particularly, the small grocery store, small business will be shortly extinct.

Mrs. Morris appears to be quite knowledgeable about the Federal Trade Commission and its jurisdictional limitations and is also aware of the import of the Fred Meyer Decision. Because of her difficulties since opening her grocery and delicatessen in January 1969, Mrs. Morris has filed complaints with and has been in personal contact with Senator Stephen Young of Ohio and with Congressman Charles Vanik of the 22nd District of Ohio. Both individuals have allegedly expressed a keen interest in Mrs. Morris' problems and both have asked her to furnish them with written statements concerning the nature of her complaints. Both are also aware that Mrs. Morris intended to also file complaints with the Federal Trade Commission. When Mrs. Morris was advised that a Report of her complaints would be prepared and forwarded to the Commission, in compliance with established procedures, for consideration by the Commission and for such action as may be deemed warranted in the public interest, she requested that copies of correspondence addressed to her by the Commission be sent to Senator Young and Congressman Vanik.

It is believed that Mrs. Morris is quite prominent in certain social circles in Cleveland, and that she is a close friend of Mr. Carl B. Stokes, the Mayor of Cleveland.

Respectfully submitted,

JOSEPH G. SMERALDI,
Assistant Attorney in Charge, Cleveland Office.

Approved:

VERNON E. TAYLOR,
Attorney in Charge, Cleveland Office.

AGENDA MATTER

JULY 11, 1969.

Re: Continental Baking Co.; File No. 681 0038.

(Previously circulated by Commissioner MacIntyre as a non-agenda matter on July 8, 1969.)

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

See attached memorandum.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

JULY 11, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Continental Baking Co.; File No. 681 0038.

This is basically a private matter which the applicant would not press because "of possible adverse customer relations, being of the opinion that customers might feel that Metz was trying to raise prices." The staff apparently followed its conception of Commission policy and doggedly pursued the matter until the very last paragraph of the closing letter to Senator Miller which contains an excellent summary of the effectiveness of our Robinson-Patman efforts in this matter, to wit:

"Parenthetically, from the information obtained from the investigation, it appears that the prices of bread and buns in the Omaha market are higher now than they were when the investigation began, and the prices of restaurant buns are substantially higher."

I note that the staff also recommends that we send letters to the applicant and Senator Miller in which we go on record as stating ". . . we have concluded that Continental's pricing activities in the Omaha market do not constitute a violation of Section 2(a) of the Clayton Act." Yet the staff does not propose to send a closing letter to Continental ". . . since such might be construed as condonation of Continental's practices." What practices? If after investigation of Continental we determine that it has not violated the law, it has a right to be told as much.

I believe this matter crystallizes the need for a complete reappraisal of our Robinson-Patman enforcement policies. I have urged such a reappraisal on several occasions, and I repeat it now. Unless contrary direction is given, the staff will continue as it has in the past. Is this what Congress intended? Is this representative of the kind of enforcement activity which the Commission intends its staff to pursue?

AUGUST 26, 1969.

Re Schick Safety Razor Co., Division of Eversharp, Inc., File No. 681-0144.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director.

I request that this matter be placed on the Commission's meeting agenda.

See attached memorandum.

MEMORANDUM

AUGUST 26, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Schick Safety Razor Co., Division of Eversharp, Inc.; File No. 681-0144

On March 24, 1969 the Commission accepted AVCs from Gillette (File No. 681 0081) and American Safety Razor (ASR) of Philip Morris (File No. 681 0145). On April 3, 1969 the Commission accepted an AVC from Wilkinson Sword (File No. 691 0011). All three companies gave assurances that they would discontinue granting discriminatory promotional allowances. The Commission with-

held publication of the contents of these three assurances pending completion of the instant matter against Schick, Gillette, ASR, and Wilkinson were all notified by letter of May 19, 1969 from the Secretary that their respective assurances were accepted under Sec. 2.21 but that publication of the contents would be withheld pending completion and disposition of certain companion matters.

The staff now recommends that an AVC from Schick to the same effect be accepted¹ and that all four AVCs be published.

I moved the acceptance of the AVCs from Gillette, ASR, and Wilkinson. I now believe we should take another hard look at the entire razor blade industry. Market shares are as follows:

Company:	Approximate share (percent)
Gillette -----	60
Schick -----	20
ASR -----	12
Wilkinson -----	8

The Division of General Trade Restraints has pending a monopolization investigation against Gillette (File No. 661 0008) which includes alleged patent suppression and other misuse² and various predatory actions allegedly designed to block entry into selected geographic areas.

It seems to me the essential problem on which the Commission should focus its attention is the dominance of Gillette³ and whatever anticompetitive conduct may accompany that dominance. Acceptance and publication of identical AVCs in this four-company industry, going only to the question of discriminatory payments would not, in my opinion, eliminate or diminish the critical problems—Gillette dominance and failure of new entry. It seems to me these AVC's could possibly work harmful effects. They would tend to perpetuate the existing non-competitive structure; rigidify pricing and discounts and thus further solidify Gillette's stranglehold; and enhance already existing barriers to entry. They might very well encourage Gillette, with its enormous advertising budget⁴ to dispense entirely with cooperative promotions and channel an even larger share of its budget into national advertising. In short, these AVCs do nothing to challenge the real problems in this industry—its structure and Gillette's dominance.

I favor seeking a 2(a) and 2(d) order against Gillette only. Such discrimination engaged in by a firm with 60% of a four-company market could be attacked as part of a monopolization or an attempt to monopolize case. I think the Commission should withdraw its actions on the AVCs and consolidate the RP matters with the pending restraint of trade investigation. This would enable the staff handling the restraint of trade investigation to have the broadest possible case before it and, if it finds additional violations, fashion the most effective possible remedy.

Economic considerations are clearly important in determining (1) whether violations exist and (2) appropriate relief. I believe the Bureau of Economics should work closely with the staff in pursuing this matter.

Accordingly, I move that the staff be directed to inform Gillette, ASR, and Wilkinson that the Commission's acceptance of their respective assurances of discontinuance has been withdrawn, and to inform Schick that the Commission has declined to accept its assurance. All four companies should be informed that

¹ The staff is troubled by Schick's delay and misuse of staff communications in effecting discontinuance of the alleged discriminatory promotional practices. During this time Schick appears to have made large concessions to favored customers. However disingenuous Schick's actions may have been, I believe the structure of this market, and particularly the dominant position of Gillette, is the pertinent basis for Commission action.

² I understand this investigation includes an inquiry into the circumstances surrounding the introduction of the stainless steel blade into the U.S. market by Wilkinson (an English company) in 1963. Gillette allegedly had developed and patented the coating process for this blade (a crucial feature) but had failed to introduce it commercially until Wilkinson entered the market. In an address delivered before the Georgia Bar Association on June 6, 1969, Attorney General Mitchell remarked that: "... leading firms in two of our most highly concentrated industries—automobiles and razor blades—only offered the American consumer important new products in response to aggressive foreign competition."

³ Gillette's return on invested capital was 28.4% in 1968. Among *Fortune's* 500, Gillette ranked third in this category in 1968, and second in 1967. *Fortune*, p. 174-75 (May 15, 1969).

⁴ Gillette's world advertising and promotion costs for 1967 represented almost 23% of sales. Gillette was the twentieth largest national advertiser in 1967. *Advertising Age*, p. 144 (Aug. 26, 1968). Gillette was the ninth largest network TV advertiser in 1968. *Broadcasting* p. 38 (Feb. 24, 1969).

the Commission has decided to restudy the entire razor blade industry. I further move that these four matters be consolidated with File No. 661 0008, that the Bureau of Economics be directed to assist and work with the staff, and that the staff be directed to make a status report to the Commission in 30 days.

MEMORANDUM

JULY 10, 1969.

To: Commission.

From: Division of Discriminatory Practices, Bureau of Restraint of Trade.
Subject: Schick Safety Razor Co., Division of Eversharp, Inc.; File No. 681 0144.

Acceptance of Assurances of Voluntary Compliance With Supporting Affidavit Recommended. Sections 2(a) and 2(d) of the Clayton Act, as amended. Razors, razor blades, shaving accessories.

This matter is companion to The Gillette Company, File No. 661 0081, The American Safety Razor Company Division of Philip Morris, Inc., File No. 681 0145, and Wilkinson Sword, Inc., File No. 691 0011, in which the Commission accepted assurances of voluntary discontinuance and advised that publication of them would be withheld pending completion of certain associated matters, i.e., the instant case.

The investigation of Gillette had indicated that the problem there encountered was industry-wide, and hence this and the American Safety Razor and Wilkinson Sword matters were instituted, as well as investigations of a number of toiletries manufacturers. By letter of October 22, 1968, proposed respondent, as by that time had Gillette and as subsequently did American Safety Razor and Wilkinson Sword, submitted assurances of discontinuance with supporting affidavit which were satisfactory to the staff in content and form. However, the method and manner of Schick's discontinuance suggested that proposed respondent had taken the occasion as a last opportunity to make massive concessions to hitherto favored customers, causing measureless detriment to their non-favored competitors and, considering the quantities involved, with adverse effect on Schick's own competitors for months to come. The circumstances appeared serious enough to warrant development of the facts of Schick's discontinuance before forwarding its assurances to the Commission. Accordingly, this Division made a second detailed request to Schick for information—e.g. comparative sales figures, purchase orders, invoices, rebate checks, production and shipping records, correspondence and intracorporate communications—concerning the implementation of its pricing and promotional changes. Attorneys from this Division were granted access to most of the records requested at the end of January 1969. Schick later supplied copies of documents selected, and an analysis of those documents confirms that Schick did indeed capitalize on the discontinuance necessitated by the Commission investigation to "raid" the market by means of mass discriminations to favored chain retailers, not available to their non-direct competitors. Adverse effect was necessarily felt both between favored and non-favored customers and by Schick's own competitors. Nevertheless, for the reasons stated below, this Division recommends—with reluctance—that Schick's assurances, dated October 22, 1968, be accepted by the Commission and that two reports of compliance be directed, in the manner of disposition of the Gillette, American Safety Razor, and Wilkinson Sword matters.

SCHICK'S PRIOR PRICING AND PROMOTIONAL ARRANGEMENTS

Schick Safety Razor Company, whose principal office and plant are located at Webster Road, Milford, Connecticut 06460, is a division of Eversharp, Inc.; Eversharp is a Delaware corporation. Schick manufactures and distributes razors, razor blades, shaving accessories and men's grooming products. With total sales of \$45,811,737 in 1967 and \$20,103,220 for the first half of calendar 1968, Schick is the second largest seller of razors and razor blades. Gillette dominates the industry, having annual sales of over \$400,000,000 and some 54% to 60% of the manual razor and razor blade market.

Schick's questionable pricing and promotional policies—which it discontinued effective October 31, 1968—were as follows. As far as basic invoice price is concerned, Schick operated, and continues to operate, a one-price system to all customers regardless of business function. So-called "promotional allowances", however, were granted in varying amounts and percentages depending on the business classification of the customer. As in the case of Gillette, the primary

Section 2(a) concern here was not with Schick's basic pricing structure. Rather, both the Section 2(a) and 2(d) questions arose from written promotional and display agreements executed by Schick and its several classes of customers.

Schick sells directly to some retailers—larger retail chains for the most part—to wholesalers who resell to other retailers, and to toiletry merchandisers who are a type of rack jobber distributing through retail stores by means of racks they own, control or service. By the provisions of its "Cooperative Advertising Display and Promotion Agreement" with all *direct* retail accounts, Schick agreed to pay them 14% of net purchases each calendar quarter. Of the total, 5% was for cooperative newspaper advertising and the other 9% was to be paid for such things as maintaining adequate stocks of Schick products, maintaining blade racks and counter or floor displays at selling stations, promising not to switch consumers to competing products and conducting special promotions from time to time which were to be approved by Schick. Toiletry merchandisers were dealt with by Schick in the same fashion as direct-retailers, receiving the same percentage of purchases. Wholesalers, on the other hand, received 3% of net purchases each calendar quarter for featuring Schick products and instructing salesmen to promote those products by various means.¹ No provision contemplated either wholesalers or Schick, directly, making comparable allowances available to retailers buying through the wholesalers and competing with direct retail accounts.

The violation of Section 2(d), as interpreted by the Supreme Court, is evident. Schick did not make available to retailers buying through wholesalers payments on proportionally equal terms that would have corresponded to the regular, contractual allowances paid to competing direct retailers and/or toiletry merchandisers. *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

This Division, of course, views only a part of the contractual payments by Schick as true promotional expenditures cognizable, and to be tested, under Section 2(d); the remaining, and perhaps larger, percentage we would regard as price concessions properly governed by Section 2(a). We have treated this aspect at length in the Gillette matter [Memorandum of this Division, dated December 4, 1968, Recommending Acceptance of Assurances in File No. 661 0081], and have no desire to burden by repetition here. Briefly, we simply wish to point out that most of the so-called "promotional" services for which Schick nominally paid were so nebulous as to defy relating to cost of performance. For instance, the direct retailer agreement made specific provision only for employment of 5% of the 14% total. This had to be used for cooperative newspaper advertising approved in advance by Schick; in all probability it was, therefore, a Section 2(d) payment. Six percent (6%) of the remainder, however, was for "special sales promotion efforts, displays, campaigns, and other special sales promotional activities", and 3% for maintaining stocks, not switching customers, maintaining blade racks and counter displays. These are hazy in the extreme. Although we do not have actual evidence from customers in this particular file, it seems entirely reasonable to expect, from our experience in the Gillette investigation, that the greater portion, perhaps all, of the 9% that is apart from cooperative newspaper advertising was used by direct retail accounts for lower, heavily-advertised consumer pricing, if not on a regular basis then at least sporadically.

The monies paid by Schick to direct retail accounts were directly tied to and were, in fact, a set percentage of the amount of goods purchased and resold. In the circumstances, there is precedent for regarding as Section 2(a) price concessions the monies exceeding, and arbitrarily unrelated to, the cost of performance of the so-called "services." *National Tea Co.*, 46 F.T.C. 829 (1950); *Fred Meyer, Inc.*, Docket 7492 (March 29, 1963). *Com. Op.*, pp. 10-14, *aff'd in part*, *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 362 (9 Cir. 1966). To the extent the excess in payments to direct retailers, over the 3% paid wholesalers, may, or should, be treated as Section 2(a) price concessions, direct retailers received a lower price than wholesalers. An actionable price discrimination therefore existed. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Krug v. IT&T Corp.*, 142 F. Supp. 230 (D.N.J. 1956); *Fred Meyer, Inc.*, Docket 7492, *supra*.

¹ It may be worth a note in passing that while Gillette's promotional program paid 10% of net purchases to direct retailers and 3% to wholesalers, Schick's was for 14% to retailers and 3% to wholesalers.

SCHICK'S DISCONTINUANCE

This investigation commenced with a letter to Schick, dated June 28, 1968, asking for detailed pricing, promotional, sales, marketing and corporate information, intracorporate communications and invoices, correspondence and records of dealings with certain named customers. Letters, of the same date, were sent to the six largest retail drug chains requesting records of their dealings with Schick. Schick responded on July 30, 1968, with supplement on August 21, 1968; the six chains responded at varying intervals. That information established the practices described above. It was also apparent, from intra-corporate communications, that Schick was quite aware of Gillette's recent (May 1, 1968) discontinuance of its similar "promotional" contracts, felt that this conferred a sales advantage, and fully expected that an end to that competitive edge might impend. Bulletins issued to sales personnel cited Gillette's cancellation and adverse reaction among inconvenienced accounts, exhorting extra sales effort and saying now they not only had a superior product² but this could be the last month the salesmen would have the advantage of promotional contracts over the representatives of Gillette. This happened in more than one month.

On September 3, 1969, this Division notified by telephone the Schick official, Mr. S. L. Highleyman, Vice President, who had signed the submission, that it appeared Schick's advertising and promotional agreements were in violation of the Robinson-Patman Act. A meeting within two weeks was requested. On September 26, 1968, attorneys from this Division met with Mr. Highleyman and Schick's antitrust counsel, Irwin F. Woodland, Esq., of Gibson, Dun & Crutcher, Los Angeles, California. The staff attorneys explained to the Schick representatives the respects in which they felt the Schick program violated Sections 2 (a) and (d) of the Robinson-Patman Act. They asked whether Schick would be interested in disposition under Section 2.21 of the Commission's Rules. Mr. Woodland said they certainly would. He was thereupon presented with a draft of assurances the staff felt appropriate in the circumstances. Mr. Woodland stated that he thought the written contracts did not tell the whole story, that the picture might not be so bleak as he was under the impression that Schick from time to time had made something available to retailers buying through wholesalers. He proposed to check, and if it were the fact, a statement so saying could be included in the affidavit.³ The staff attorneys emphasized that they expected Schick to take the necessary corrective action no later than October 31, 1968. No objection was raised upon this point.

Mr. Highleyman inquired as to what Schick might say to customers in its notice of cancellation as it would be beneficial if Schick could say that the Federal Trade Commission had required cancellation of the agreements. Attorney Ernest G. Barnes replied that he wished it clearly understood the Commission was not requiring cancellation, merely that Schick bring its program into compliance with the Robinson-Patman Act. How Schick removed the discrimination was not our concern, provided the fact were accomplished. Mr. Barnes did suggest that if Schick determined upon cancellation it could say the action had been taken after an investigation of the Company's practices by the Commission. That much would be true.

By letter dated October 7, 1968, Schick notified all accounts that its current promotional contracts would be discontinued October 31st; a copy was furnished the staff. The letter in pertinent parts read:

"The Federal Trade Commission has just notified the Schick Safety Razor Company that all current promotional contracts *must be discontinued* by October 31, 1968. They have *declared* that our promotional contracts are in violation of the Clayton Act and *have stipulated* that we sign an affidavit to *cancel our contracts*. In compliance with this action, we are announcing to our customers that effective October 31, 1968, all Schick Safety Razor Company Retail and Wholesale contracts are cancelled."

"We at Schick have always felt, and have expressed this to many of you personally, that we would maintain the promotional and profitability structure you need to continue promoting Schick products. We want to assure you that in the future, under the new procedure, Schick will be as promotionally oriented as possible."

² The introduction of the "Krona-Krome" blade, which is chromium-plated and is claimed by Schick to be superior to mere stainless steel.

³ In the end, this was not pursued.

"Therefore, we are increasing the net discount on all our razors and blades to 40% across the board. This discount is reflected in all the prices shown on the attached price sheets."

"The Federal Trade Commission has *required that we cancel* our contracts by October 31, and until that date we will continue to sell all razors and blades under our current contract. All orders dated and *postmarked* October 31, 1968 or before will accrue all current contract allowances. All monies accrued will be paid in accordance with our current contracts."

[To this point, emphasis is supplied *passim*; continuing:]

"In addition to accruing all contract allowances for the remainder of October, we are making our new discount structure effective with all orders dated October 7, 1968 and subsequent. All your orders, therefore, for both open stock and promotional items, will be billed at our new increased discount structure *and* accrue all contract allowances until October 31, 1968." [Emphasis in this paragraph is in the text.]

This letter was disturbing for two reasons. First, the explanation offered for Schick's discontinuance was directly counter to what staff attorneys had advised the Schick representatives. Second, by increasing the net discount (i.e. lowering the price) *and* continuing to pay the so-called "promotional" percentage allowances on all orders up to October 31, it appeared that Schick may have designed this attractive offer to convert the required discontinuance into a sales "raid" on its competitors. We were later to learn just *how* attractive this offer was.

Upon receipt of the Schick letter, Attorney Barnes contacted Schick's counsel by telephone to object to the characterization in the letter of the Commission's action. Mr. Woodland said he would consult Schick officials with a view toward securing clarification. By letter of October 31, 1968, Mr. Woodland forwarded a draft of a clarifying letter he proposed Schick send its accounts. The staff suggested several changes.

Schick issued the letter on November 18, 1968. It recited the history of the investigation: notification of investigation, request for information, communication of staff opinion that Schick's program *might* violate the Robinson-Patman Act with request to meet, agreement on voluntary discontinuance with the condition it be effectuated no later than 31 October. The letter continues:

"In view of the uncertainties and extreme difficulties involved in defending this kind of prosecution, and in view of the virtual impossibility of replacing in a timely and economically feasible manner the then existing promotional programs with new programs, the company, without any admission that the existing contracts were unlawful, reluctantly decided to defer to the FTC staff's opinion and discontinue the use of these contracts and to assure the FTC by way of an Affidavit of the President of the Company that it would no longer use those contracts."

"In view of the nature of these negotiations, and the fact that the FTC did not commence a formal investigation and prosecution, it was technically incorrect if our letter of October 7, 1968, gave the impression that the FTC had made a formal determination with respect to our contracts."

"We regret, therefore, if our letter of October 7, 1968, may seem to have improperly characterized the action or position of the Federal Trade Commission."

Mr. Highleyman signed the letter.

At the same time, negotiations were in progress with American Safety Razor Company, Schick's competitor. The staff had advised ASR that we expected cancellation⁴ of its promotional agreements no later than December 31, 1968, and that orders postmarked after December 31, received by ASR after January 4, 1969, or to be shipped by ASR after January 31, 1969, would be ineligible for promotional monies under the previous contract. On November 15, 1968, counsel for ASR, Daniel Leavitt, Esq., of Arnold & Porter telephoned Attorney Barnes. He requested additional time in which ASR could ship orders in accordance with the provisions of the cancelled agreements. Mr. Leavitt said he had information that, although in his understanding⁵ Schick had a cut-off date of October 31, 1968 on their promotional agreements, "Schick was taking orders for delivery as late as two months after the [end of the] October cut-off date"; he requested the same leeway. Mr. Leavitt was told that we would insist on the schedule of

⁴ Or, alternatively, as in the Schick matter, the making available of promotional monies hitherto paid only to direct-buying retailers to competing retailers buying through wholesalers.

⁵ This was also our understanding. Ours was based on direct communication from Schick. Mr. Leavitt, of course, through ASR representatives, had his own sources of information in the trade.

dates previously proposed, but he was also assured that we would explore his allegation respecting Schick's implementation of its discontinuance. This was done.

In response to our inquiry, Attorney Barnes received a letter, dated December 13, 1968, from Mr. Gary P. Thomas, whose title in the Schick Company division of Eversharp is Vice President in Charge of Sales. Mr. Thomas' letter reiterated that the cut-off date on contract allowances was October 31, 1968. His attorneys has apprised him, he said, "that you have received information to the effect customers of ours have been permitted to place orders and receive contract allowances for deliveries after October 31, 1968." He offered this explanation and assurance:

"Because of our extensive promotional sampling activities and heavy pre-existing orders for our new Krona-Krome razor blades, our factory in Milford was unable to promise prompt shipment on orders taken through October 31, 1968. We therefore were forced to allocate shipments to some accounts in November and December, on which, as you know, we are obligated to pay allowances under the terms of our discontinued contracts."

"However, we have not given, and hereby assure you that we will not give, any allowances under the terms of the cancelled contracts on any order received after October 31, 1968. . . ."

These assertions are misleading or false or both.

Mr. Thomas' response appeared indecisive. On the recommendation of the staff attorneys responsible, the Chief of the Division of Discriminatory Practices authorized further investigation of the method and manner of Schick's termination of its prior agreements and initiation of the newly announced pricing policy. In a letter of December 27, 1968, to its counsel, access to Schick records for purposes of inspection and copying if deemed necessary, was requested to all purchase orders, invoices, credit memoranda, rebate checks, etc., issued to ten each of the larger retail grocery and retail drug chains in the country from October 1, 1968, to December 31, 1968, and, from September 1, to the end of the year, correspondence with and intra-company documents concerning *all* direct retailers, plus comparative sales (by total and by customer classification), shipping and production figures for the corresponding periods in 1967 and 1968.

The documents made available⁷ by Schick confirm that it had indeed designed and used the discontinuance to make an extraordinarily attractive offer to direct retail chain accounts, reap the good will of those customers vis-a-vis its competitors, and in the process tie-up the customers' warehouse inventory of razors and razor blades in Schick products for months to come.⁸

On the question of Schick's intent and expectations with regard to the course of action it adopted, sales bulletins and communications promulgated to sales supervisory and regular personnel are revealing. A random sampling, in sequence by date of issuance, would show:

General Sales Bulletin: "We are attaching several copies of the [Oct. 7] letter being sent to all of your accounts this week . . ."

Date: October 7, 1968.

General Sales Bulletin: "The F.T.C. has just notified us that we must cancel all our current promotional contracts . . ."

* * * * *

" . . . Schick has always been a promoting company and we will continue to offer our accounts profitable and volume-producing promotions. Your accounts must realize that Schick will continue to be the leader in our industry with exciting promotions with allowances for them to work with and that

⁶ The next sentence assures that no order for delivery after December 31 would receive allowances. This, alone, may be true. In light of the rest, this Division would not care to vouch for it, but we have no evidence to the contrary.

⁷ Although Schick's plant and main offices are in Milford, Conn., Schick maintains its sales offices in Culver City (Los Angeles), Calif. Most records pertaining to the sales office are maintained in, and all payments under the "promotional" program were issued from, Culver City exclusively. Schick's counsel said it was impractical to move these records to Milford for inspection, but offered to make them available in Culver City. For the purposes here, this Division did not consider it necessary physically to examine the rebate checks, etc. It would be otherwise in the case of a full investigation anticipating the issuance of complaint.

⁸ This should have had the inevitable effect that the customers would make special efforts to move Schick merchandise. A good rate of inventory turn-over, of course, is considered to be essential to efficient chain operation. Merchandise cannot be allowed to sit and take up space in the chain warehouse.

*we are discontinuing our contract only under direct instructions from the F.T.C."*⁹ [Emphasis in text.]

* * * * *

"You should call your key accounts and urge them to place as large an order as possible for all our products, prior to October 31 deadline. Our liberal delivery schedule should permit them to make tremendous buys. This is a sales opportunity that come very infrequently and you should capitalize on it. Your accounts pick up all contract advertising and promotional allowances *on all their purchases* (text emphasis), which we cannot make available again under contract. . . ."

"Make sure your accounts take advantage of the opportunity to buy at our new 40% discount, plus accrued contract allowances, for the limited time remaining in October. You have very little time to sell with contract allowance. The October 31st deadline was set by the F.T.C. and can't be extended. . . ."¹⁰

Date: October 8, 1968.

District Managers Bulletin: "Fourth Quarter—Most of you are off to a flying start this quarter and I am confident that this will be the biggest quarter in the history of the Schick Safety Razor Company. . . ."

Date: October 17, 1968.

General Sales Bulletin: "We are keeping a very close check on our inventory and shipping schedules from Milford. This quarter is going to be very tight because of the tremendous increase in business. You should be sure to inform your accounts of any shipping problems which will affect their operation so that they are not expecting merchandise which we are going to have to back-order. . . ."

Date: October 25, 1968.

General Sales Bulletin: "At the end of the first two weeks some of you are really flying and the figures are changing every day with the tremendous October sell-in. . . ."

Date: October 25, 1968.

General Sales Bulletin: "We have just concluded one of the largest sell-ins in the history of the Company and I want to congratulate each and every one of you for the tremendous effort you put forth in the month of October to make this possible. *We had an awful lot going for us* [emphasis supplied], but without your efforts to give your territories complete coverage during this very short period of time we should not have been able to realize the sales volume that we have currently on the books. . . ."

"There are several important areas that must be reviewed. First of all, we cannot accept returns on merchandise which was purchased in October. Your accounts should understand this, and before the end of the year you must constantly review your customer inventories to make sure you are getting the store distribution and promotions you need to move our merchandise out of the warehouse. . . ."

* * * * *

"We cannot over-emphasize the importance of squaring your territories away before the expiration dates of contract accruals, and also the use of extreme caution in shipping merchandise to accounts before the end of the year which overloads your accounts and creates return problems that we cannot honor in 1969. . . ."

Date: November 15, 1968.

When a Schick representative has solicited a sale, he fills out a form purchase order, listing the date of the order, the items and the quantity desired, the dollar total, and the date of shipment specified by the customer. The purchase order is then forwarded to Milford. When received, it is stamped in by the Credit Department and sometimes, apparently, by the Sales Department as well. It seems there is often a day's lapse between receipt and stamping by the sales and credit departments. There is also a time lag of several or more days, depending on the customer's location in relation to Schick's plant, between the date of the purchase order which is marked thereon by the salesman and the date of receipt stamped at Milford. During the critical period October 7–October 31, however, these intervals of time seem miraculously to have vanished. To illustrate: Stop & Shop, Inc., Readville, Mass., placed an order by date of August 17, 1968, which was stamped received in the sales department on August

⁹ This statement is not true; it is the contradictory of what Attorney Barnes advised Mr. Highleyman.

¹⁰ Schick, unfortunately, did not live up to this declaration, as appears *infra*.

20, and in the credit department on August 21st. On September 10, Stop & Shop placed an order for shipment on September 25; this was stamped received on September 13, or an interval of three days. On September 20, Stop & Shop placed an order for shipment on the 26th; this was stamped received on September 24, or an interval of four days. By purchase orders dated October 31, however, Stop & Shop placed two large orders for shipment in *December*; these were stamped received on October 31. No interval. On the other hand, Stop & Shop ordered again on December 12, long after the alleged cut-off date for contract accruals, for shipment December 30; this purchase order was stamped received on December 18, an interval of six days. Similarly, Food Fair Stores of Philadelphia placed an order dated May 3 for shipment "at once"; it was stamped received May 8, an interval of five days. Food Fair submitted a number of purchase orders dated October 30, for shipment at various times in November and December; these were stamped received by *both* the sales and credit department on October 31, a one day interval. Colonial Stores, Norfolk, Virginia, placed an order dated August 23 for shipment at once; the stamp of receipt is dated August 26. An interval of three days. By purchase order dated October 31, Colonial placed an order for shipment on December 31; the stamp date is October 31. No interval. Schick's counsel had an interesting reaction in this shrugging admission: "... [S]o they held the clock back awhile—So?"¹¹

In the afternoon of January 31, 1969, at Schick's offices, Attorneys Athridge and Witherington of this Division had an interview, in the presence of Mr. Woodland, with Mr. J. Robert Flagg, who has been controller of the Schick Division since 1964. Mr. Flagg produced for inspection by the Commission attorneys a document, a bar graph, which portrays the production record and projection of the Schick plant capacity for the last quarter of 1968 and the first quarter of 1969. His purpose was to show why the Schick plant could not complete production and shipment of the quantities ordered during the October 7–October 31 frenetic sales period. This was the very document he had taken, he said, to Culver City to demonstrate the same point to Schick sales officials when they projected the volume expected from the October 7 pricing change with continuation of contract accruals until October 31.

The document,¹² however, is susceptible of quite an other inference. As Mr. Flagg explained it, plant capacity for all double edge blades [Krona-Krome and super stainless] is about 250,000 per day. [Production capacity for injector blades in which Schick has long been preponderant is about 263,000 per month, but double edge comprise by far the larger market.] Normally, Mr. Flagg would have tried, as of October 1, to have production capacity equal expected demand for the month. However, he said, when that date came along and the sales people gave him their revised forecast of volume as a result of the change in pricing and promotional policy, he assessed the problem and was forced to advise them that it would take a couple of months to reach full production, i.e., by December 1,¹³ and that shipment of orders taken in October could not be completed until the end of the year.

The bar graph bears this out. It also shows something else.

Schick makes wide use of samples only with a new product; when one is developed "they go after the market," e.g., consumer acceptance, with samples. This being so, they have never sampled injectors, in which they have always been the sales leader, and have not sampled super stainless blades in years. However, with the introduction of the Krona-Krome (chromium-plated) blade, Schick committed itself during the months October through December 1968 to produce 50,000 Krona-Krome blades per day, one-fifth of production capacity but a third of actual production as of October 1, for a massive promotional distribution of samples after the first of the year.¹⁴ Actual production in double

¹¹ The literal representation of Schick's Mr. Gary P. Thomas in his December 13 letter to Attorney Barnes will be recalled: "However, we have not given, and hereby assure you that we will not give, any allowances under the terms of the cancelled contracts on any order received after October 31, 1968."

¹² Schick regards it as highly confidential and was extremely reluctant to furnish a copy. The staff attorneys decided not to press the point, but advised Schick's counsel that they expected the document would not be destroyed pending disposition of this matter. Attachment 1 hereto is a reproduction of a rough approximation of the graph, drawn from memory immediately after the interview with Mr. Flagg.

¹³ Actually, from the graph (see Attachment 1), Schick seems to have reached full double-edge production in November.

¹⁴ Although they did not directly inquire, staff attorneys gained the impression that Schick intended to try to reach just about every adult male it conceivably could with a free sample dispenser of two Kona-Krome blades.

edge in October [which, according to Mr. Flagg's statement of his policy, should at that point have been equal to expected demand] was about 150,000 per day, of which 50,000 were Krona-Krome blades for future sample distribution and 45,000 were Krona-Krome blades earmarked for current sales. With the October 1 revision of expected volume and consequent gearing of production upwards, actual double-edge production jumped to full capacity (250,000 per day) by the end of November. Of that November-December output, the 50,000 figure of Krona-Krome blades for future distribution as samples remained constant, but production of Krona-Krome blades for current sales reached 89,000 per day in November and 73,000 per day in December. This apparently took care of the October 7-31 selling. The graph then projects Schick's production at full double-edge capacity for the first quarter (January through March) of 1969. Production of Krona-Krome blades for distribution as samples was to increase slightly to 53,000 per day throughout the period. Production of Krona-Krome blades for current sales, however, was to drop off *sharply* and remain constant at 30,000 per day in each month. A modest upturn to 45,000 per day was forecast for April. This means that Schick expected to sell in the first quarter of 1969 less than half (43%) the amount of Krona-Krome blades it sold in the turbulent period October through December! Not until April did Schick anticipate demand on production to equal that existing at the beginning of the October "sell-in."

Comparative sales figures for the last quarters of 1967 and 1968 appear rather conclusively to establish the magnitude of Schick's sales *coup*. Sales increased, often spectacularly, to all classes of accounts, but wholesale accounts (drug, grocery, hardware, mercantile, and tobacco) of course, received only 3% of purchases as "promotional" allowances. Direct retailers received 14% of purchases. 1967-1968 comparison of sales figures for retail chains are, therefore, most interesting:

OCTOBER

Description	1967	1968	Percent of 1968 increase (approximate)
Chain drug.....	\$96,269.24	\$477,143.75	+500
Chain grocery.....	315,526.86	378,152.40	+17
Chain mercantile.....	56,475.99	275,457.47	+487
Chain variety.....	89,702.38	112,286.84	+25

NOVEMBER

Chain drug.....	\$670,144.91	\$769,727.57	+15
Chain grocery.....	515,458.74	822,188.56	+60
Chain mercantile.....	109,050.49	227,861.90	+104
Chain variety.....	134,363.79	158,664.56	+18

DECEMBER

Chain drug.....	\$640,278.16	\$1,140,364.09	+78
Chain grocery.....	888,042.86	1,063,830.41	+20
Chain mercantile.....	217,330.50	323,746.79	+50
Chain variety.....	105,331.04	161,297.88	+53

As a measure of the impact upon Schick's competitors, total sales to all accounts for the comparable periods are as follows:

Month	1967	1968	1968 increase	
			Dollars	Percentage (approximate)
October.....	\$1,272,385.74	\$2,587,279.20	\$1,314,893.46	+103
November.....	3,830,023.48	4,579,999.20	749,975.72	+20
December.....	4,877,488.11	6,787,915.33	1,910,427.22	+39
Total.....	9,979,897.33	13,955,193.73	3,975,296.40	+40

¹ The majority of delayed or unfillable orders taken during the October "sell-in" were for delivery in December rather than November, and recorded as sales in the month of shipment. That is, date of invoice is date of shipment, despite the fact the order may have been placed in an earlier month.

Assuming the market for manual razors and razor blades remained reasonably constant in the last quarter of 1968 as compared with 1967,¹⁰ and assuming the increase in Schick sales is not due in any substantial way to a rising consumer preference for the technical virtues claimed for the new Krona-Krome blade [and Schick itself did not expect the full effects of its massive promotion of Krona-Krome to be felt until after the first of the year], then Schick's October sales foray through the medium of its ostensible discontinuance, at the expense of Gillette, American Safety Razor, and Wilkinson Sword, is in the vicinity of four million dollars (\$4,000,000). During the three-month period October-December 1968, at a rate of 14% of purchases, calculated from sales figures, this Division estimates that direct-buying retailers received not less than \$925,000 in "promotional" contract accruals. On the same basis, at a rate of 3% of purchases, wholesalers whose customers compete with direct-buying retailers would have received about \$53,000. In all likelihood, payments to both direct-buying retailers and wholesalers were higher, but the ratio of disparity (11%) would be unchanged.

RECOMMENDATION

Were it not for Gillette, this Division would have no hesitation in recommending both rejection to Schick's assurances and full investigation looking to the issuance of complaint for violation of Sections 2(a) and 2(d) of the Clayton Act, as amended. In the circumstances, the fact that informal disposition had been accorded American Safety Razor and Wilkinson Sword would not seem of controlling significance. *Federal Trade Commission v. Universal Rundle Corp.*, 287 U.S. 244 (1967). Gillette, however, has hitherto dominated the manual razor and razor blade industry in near-monopolistic proportions. Schick is apparently the only factor capable of safeguarding or making inroads upon that market structure. Voluntary assurances have been accepted from all other industry members.

Accordingly, this Division recommends, with utmost reluctance, that Schick's assurances of discontinuance in affidavit dated October 22, 1968, be accepted. This Division further recommends a departure from the usual form of notification of such acceptance by the Commission. A draft of letter is forwarded herewith advising Schick that its assurances have been accepted but stating that the Commission is dissatisfied with the method and manner of Schick's implementation of its discontinuance and, in the event of future adoption of practices which are questionable within the subject matter of the assurances and the relevant statutory provisions, informal, administrative treatment will no again be available. We also recommend that Schick's request for confidential treatment of its affidavit, in the letter accompanying submission, be denied; a similar request on the part of Gillette has been refused by the Commission. Schick expects this—its request is essentially *pro forma* in case confidential treatment were to be accorded with its competitors—and so the letter simply advises that the content of Schick's assurances may be placed on the public record at any time.

Drafts of letters to Gillette, American Safety Razor and Wilkinson Sword are also forwarded, notifying them that the companion matters—because of which the Commission had previously withheld publicity (Commission Minutes of March 24 and April 3, 1969)—have been concluded and their assurances may at any time be placed on the public record.

Respectfully submitted,

FRANCIS C. MAYER,
Chief,
Division of Discriminatory Practices.

Approved.

WILMER L. TINLEY,
Assistant Director,
Bureau of Restraint of Trade.
CECIL G. MILES,
Director,
Bureau of Restraint of Trade.

¹⁰ Apart from some inevitable increase in the population of shaving age, it seems a fair supposition that users of manual razors and blades, at least over a three-month period, do not shave more often, and hence buy more blades, merely because larger retailers have specially attractive prices on one or more manufacturers' products.

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

In the Matter of Eversharp, Inc., a corporation.

Affidavit, file No. 681 0144.

Frank H. Seyer being duly sworn, deposes and says :

That he is President of Eversharp, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Webster Road, Milford, Connecticut. Eversharp, Inc., manufactures and sells razors, razor blades, and men's grooming products through the Schick Safety Razor Company ("Schick"), a division of Eversharp, Inc. Eversharp, Inc. sells and distributes the vast majority of such products outside the State of Connecticut and is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

Eversharp, Inc., through Schick, sells its various razors, razor blades, and men's grooming products to wholesale accounts, toiletry merchandisers (rack jobbers), and retail accounts. All products are sold to each customer at the same invoice price.

Eversharp, Inc., through Schick, has for many years utilized written agreements with its direct retail customers (Retailers), whereby Schick agreed to pay to Retailer a sum equal to 3% of Retailer's net purchases of Schick products. Retailers agreed in turn, *inter alia*, to maintain adequate stock of Schick products, to maintain blade racks and floor displays.

These written agreements further provide that Schick would set aside as a reserve, amounts equal to 5% and 6% of Retailer's purchases of Schick products each calendar quarter. Retailer would be paid from these reserves for advertising and promotional services approved by Schick.

Toiletry merchandisers (Rack Jobbers) are customarily considered by Schick to be direct retail customers.

During the same time and with respect to the same products, Eversharp, Inc., through Schick, has also utilized written agreements with its wholesale customers (Wholesalers), whereby Schick agreed to pay Wholesaler a sum equal to 3% of Wholesaler's net purchases of Schick products. Wholesaler in turn agreed, *inter alia*, to feature such products and to instruct its salesman to promote such products by various means, e.g., carrying adequate samples, and advertising material. These Wholesaler agreements contained no provision for payments or allowances to customers of the Wholesaler.

By letter, dated June 28, 1968, File No. 681 0144, addressed to Schick, the Federal Trade Commission advised that it had docketed an investigation of certain of Schick pricing and merchandising practices under Section 2 of the Clayton Act, as amended, and requested information pertaining to such practices. Subsequently, certain information and documents were submitted to the Commission by Eversharp, Inc., pursuant to this written request. This investigation is still pending.

Affiant hereby represents that he has the authority to make and hereby does make the following assurances on behalf of Eversharp, Inc. and the Schick Safety Razor Company:

1. That the existing promotional agreements will be cancelled as of October 31, 1968, and that on all purchases from Schick thereafter made, no payments or allowances for promotional or advertising purposes and no services or facilities will be made or furnished to any customer, or customers, unless such payments, allowances or services or facilities are paid, granted, or furnished on proportionally equal terms to all customers competing in the resale and distribution of Eversharp and Schick products of like grade and quality, said customers to include those customers purchasing such products through wholesalers or jobbers. Furthermore, Affiant assures the Commission that Eversharp, Inc. will not discriminate in price between competing purchasers of its products of like grade and quality within the meaning of Section 2(a) of the Clayton Act, as amended. (15 U.S.C. Sec. 13(a)) Eversharp, Inc. reserves the right to avail itself of any defense under the Robinson-Patman Act (15 U.S.C. Sec. 13).

Eversharp, Inc. promises as part of these assurances to submit reports of compliance as may be required by and acceptable to the Commission at six month intervals during the one-year period commencing with the date of the Commission's acceptance thereof. Each such report will contain a full and detailed account of compliance showing the steps actually taken to carry out these assurances. Eversharp, Inc., further promises to distribute widely these assurance to all of its operating divisions.

The foregoing statements and assurances are made to the Commission for settlement purposes only in accordance with the disposition herein requested, and do not constitute an admission by Eversharp, Inc., or its said division, that said acts or practices were unlawful.

It is understood that the furnishing of these assurances by Eversharp, Inc. does not in any way bind or obligate the Commission as to its action in this matter. It is further understood that assurances given herein may, except for good cause shown, be placed on the public record as provided in Section 4.9(f) of the Commission's Rules of Practice.

On the basis of the assurances contained in this Affidavit, Eversharp, Inc. requests that the matter be disposed of and the file closed in accordance with Rule 2.21 of the Commission's Rules of Practice.

FRANK H. SEYER, *President.*

STATE OF CONNECTICUT,
County of New Haven, ss :

On this 18th day of October, 1968, personally appeared before me, Elinor B. Mahoney, a Notary Public, FRANK H. SEYER, President of EVERSHARP, INC., a corporation, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed as President of the above-described corporation, and the free act and deed of said corporation, before me Elinor B. Mahoney.

WITNESS my hand and seal this 18th day of October, 1968.

ELINOR B. MAHONEY,
Notary Public in and for said County and State.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re American Safety Razor Company, Division of Philip Morris, Inc.; File No. 681 0145.

AMERICAN SAFETY RAZOR CO.,
Division of Philip Morris, Inc.,
100 Park Avenue,
New York, N.Y.

GENTLEMEN : Reference is made to my letter of May 19, 1969, in which you were informed that the assurances of discontinuance you submitted were accepted by the Commission, under Section 2.21 of its Rules, in disposition of the above-styled matter but that publication of the contents thereof would be withheld pending completion and disposition of certain companion matters. You are hereby advised that said companion matters have been completed and your assurances accordingly may be placed on the public record at any time.

Sincerely yours,

JOSEPH W. SHEA, *Secretary.*

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re The Gillette Co.; File No. 661 0081.
Attention: Charles F. Woodard, Esq., General Counsel.
THE GILLETTE CO.
Prudential Tower Building,
Boston, Mass.

GENTLEMEN : Reference is made to my letter of May 19, 1969, in which you were informed that the assurances of discontinuance you submitted were accepted by the Commission, under Section 2.21 of its Rules, in disposition of the above-styled matter but that publication of the contents thereof would be withheld pending completion and disposition of certain companion matters. You are hereby advised that said companion matters have been completed and your assurances accordingly may be placed on the public record at any time.

Sincerely yours,

JOSEPH W. SHEA, *Secretary.*

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re Wilkinson Sword, Inc., File No. 691 0011.

WILKINSON SWORD, INC.,
1121 Bristol Road,
Mountainside, N.J.

GENTLEMEN: Reference is made to my letter of May 19, 1969, in which you were informed that the assurances of discontinuance you submitted were accepted by the Commission, under Section 2.21 of its Rules, in disposition of the above-styled matter but that publication of the contents thereof would be withheld pending completion and disposition of certain companion matters. You are hereby advised that said companion matters have been completed and your assurances accordingly may be placed on the public record at any time.

Sincerely yours,

JOSEPH W. SHEA, *Secretary*.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re Schick Safety Razor Co., Division of Eversharp, Inc.; File No. 681 0144.

SCHICK SAFETY RAZOR CO.,
Division of Eversharp, Inc.,
10 Webster Road,
Milford, Conn.

GENTLEMEN: Your assurance of discontinuance and voluntary compliance with applicable law, in affidavit forwarded by letter of counsel dated October 22, 1968, have been accepted by the Commission, under Section 2.21 of its Rules, in disposition of the above-styled matter. You are advised, however, that the Commission is dissatisfied with the degree of good faith exhibited by your company in the method and manner of implementation of said discontinuance, and in the event of repetition or subsequent adoption of practices which are questionable within the subject matter of your assurances and the relevant statutory provisions, informal, administrative treatment will not again be available.

The content of the assurances submitted by you and accepted by the Commission may be placed on the public record at any time. Further, you are required to submit to the Commission on September 30, 1969, and March 31, 1970, reports of compliance, each report to contain a full and detailed statement of compliance showing the steps actually taken to carry out the assurances contained in your affidavit.

This action is without prejudice to the right of the Commission to take such action in the future as the public interest may require.

Sincerely yours,

JOSEPH W. SHEA, *Secretary*.

SEPTEMBER 8, 1969.

Re Joseph M. Zamoiski Co., et al., File No. 631 0003.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director. I request that this matter be placed on the Commission's meeting agenda. See attached memorandum.

MEMORANDUM

SEPTEMBER 5, 1969.

To: Commission.

From: James M. Nicholson.

Subject: Joseph M. Zamoiski Co., et al., File No. 631 0003.

There are 14 investigational files here, involving 2(a), 2(d) and 2(e) practices. The investigation began in 1962 and additional proposed respondents were picked up as the investigation proceeded. The staff focused on distributors in the Philadelphia area and found discriminatory practices to be pervasive. It was unable to obtain acceptable AVCs.

The staff's experience, developed from these and other matters, is that flagrant discriminatory practices are widespread and deeply entrenched in the industry.

The staff has concluded that "... efforts at dealing with these practices on less than an industry-wide basis [would be] little more than costly exercises in futility." It now proposes that the 14 subject files be closed and that an industry-wide investigation be initiated against some 150 manufacturers and a pilot group of distributors. This will "... take much effort and time on the part not only of this Division, but on the part of the Division of Accounting and the Bureau of Economics as well."

More than 9500 man-hours have been spent on these 14 files. Apparently the principal result has been to confirm the staff's belief that discriminatory practices pervade the industry. I am extremely reluctant to recommend that the Commission authorize a Gargantuan investigation which, I conclude from the staff's own analysis, would have an excellent likelihood of producing a report substantially similar to the present one, namely, this is a huge confused and confusing industry characterized by a staggering variety of distributional practices flagrantly violating 2(a), 2(d) and 2(e). I find no factual or conceptual analysis in the staff memorandum to warrant assuming an industry-wide investigation—taking perhaps two to three years and thousands and thousands of man-hours—will achieve anything.

If the channels of distribution in this industry are as gnarled, snarled, knotted and inextricably tangled as the staff indicates, we should consider the possibility that the Commission may not be able to stop this labyrinthine maze of discriminations if it were to devote its entire Robinson-Patman effort to this problem for the next decade. The staff's experience is that it is futile to attempt to bring "orderly competition"¹ to a single geographic area. But the staff has not demonstrated that like futility would not attend an industrywide investigation of the same practices.

It is not chiseled in stone that the Commission, once it begins an investigation, must obstinately proceed until it comes up with something. After seven years of futility, perhaps it is time for the Commission to acknowledge the distasteful reality that we are not likely to help manufacturers, distributors, retailers, consumers, competition, or if you will, the Federal Trade Commission, by investing an additional ten or fifteen or twenty thousand man-hours.

It appears to me that the "industry" approach of the staff could develop into the classic and abysmal record of the Commission in the department store industry beginning with the orders against the manufacturers and ending in the AMC dismissal. Perhaps this matter offers an opportunity for the Commission to begin a new and brighter era of enforcement of the Robinson-Patman amendment to the Clayton Act.

The files in this matter with perhaps some additional limited investigation, may, upon proper analysis, provide a frame of reference for an evaluation of an appropriate Commission program. Perhaps, on the other hand, these files should be consolidated with the evaluation presently being made of the department store industry. In any event, I concur with the staff that these matters be closed, and so move. Further pursuit of these matters have already proved to be "... costly exercise in futility." Disposition of the files should be discussed at the table.

MEMORANDUM

JUNE 23, 1969.

To: Commission.

From: Lawrence E. Gray, Attorney, Division of Discriminatory Practices.

Subject: The Jos. M. Zamoiski Co., File No. 631 0003, Sections 2(a), (d) and (e) of the Amended Clayton Act; Philco Distributors, Inc., File No. 621 0167, Sections 2(a), (d) and (e) of the Amended Clayton Act; D. & H. Distributing Co., File No. 681 0114, Sections 2(a), and (d) and (e) of the Amended Clayton Act; Fisher Radio Corp., File No. 693 7056, Section 2(a) of the Amended Clayton Act; Commission Minute of April 30, 1969: Closing Recommended; Policy Directive.

Philadelphia Distributors, Inc., File No. 621 0165, Sections 2(a), (d) and (e) of the Amended Clayton Act; Raymond Rosen, Inc., File No. 621 0166, Sections 2(a), (d) and (e) of the Amended Clayton Act; Elliott-

¹ I do not perceive our statutory responsibility under Robinson-Patman to include concern for "orderly competition"—whatever that means. It is our function in my view to remove impediments to *vigorous* competition by selectively attacking price discrimination practices which have monopolistic or significantly anticompetitive consequences. I assume, for purposes of this discussion, that any complaint the staff might recommend would be grounded in an effort to strengthen dealer and retailer competition for the purpose of *encouraging* price competition generally.

Lewis, File No. 621 0168, Sections 2(a), (d) and (e) of the Amended Clayton Act; Pierce-Phelps, Inc., File No. 651 0122, Sections 2(a), (d) and (e) of the Amended Clayton Act; Samuel Jacobs Distributors, Inc., File No. 651 0123, Sections 2(a), (d) and (e) of the Amended Clayton Act; General Electric Company, Hotpoint Division, File No. 651 0124, Sections 2(a), (d) and (e) of the Amended Clayton Act; Calutron, File No. 681 0134, Section 2(a) of the Amended Clayton Act; Borg-Warner Corporation, Norge Division, et al., File No. 611 0579, Section 2(d) of the Amended Clayton Act; Graybar Electric Company, Inc., File No. 631 0244, Section 2(a) of the Amended Clayton Act; Admiral Corporation, File No. 651 0166, Section 2(d) of the Amended Clayton Act. Closing Recommended; Policy Directive.

The Major Household Appliance Industry,¹ Institution of Industry-Wide Investigation.

This memorandum is intended to be responsive to Commission Minute of April 30, 1969, and, at the same time, to discuss a major problem area in American business and suggest an approach for Commission activity in that area. The first part of this memorandum is devoted to the industry generally, the second part to the April 30 Minute.

THE INDUSTRY GENERALLY

The major household appliance industry is huge, its methods of distribution amazingly confused and confusing, and characterized by wildly discriminatory practices. Some 300-odd manufacturers will produce, in 1969, over eight-and-a-half billion dollars of major appliances. Some 3000 wholesalers will sell the products to retailers ranging from the neighborhood primarily-repair-shop-sometimes-retailer to Sears, Roebuck & Co. and other giants. The effectiveness of their efforts may be reckoned, perhaps, by the fact that, in 1968, 94.6 percent of American households had one or more television sets.² This industry is significant not only because of its impact on the Gross National Product, but because it affects directly just about every person in the nation.

Over the years, experience with the above-designated matters, as well as with numerous other formal and informal matters, has provided a picture of obvious and flagrant discriminatory practices so widespread and deeply-entrenched in the industry as to make efforts at dealing with these practices on less than an industry-wide basis little more than costly exercises in futility. There is no single pattern of distribution in the industry; individual companies frequently distribute in several ways not only in different trade areas, but sometimes within the same area. There are factory-direct sales; there are sales through factory-owned distributors; there are sales through independent distributors. Intentionally or unintentionally, all three types of distribution may exist in a single trade area. Philco-Ford, for instance, sells to some types of accounts in the Washington, D.C. area on a factory-direct basis, and to others through its wholly-owned subsidiary, Philco Distributors, Inc. Zenith products are sold in the area primarily through the Jos. M. Zamoiski Co., but, according to Mr. Zamoiski, seven other Zenith distributors, including the factory-owned distributor in New York City, compete for business in this area. We have, then, not only inter-brand competition, but intra-brand competition as well, with a constant crossing over and tangling of lines of distribution.

This leads to tremendous complications in any attempt to deal with discriminatory practices. If you pursue an independent distributor, for instance, he will, almost reflexively (and most often with great accuracy and justification) insist that he must meet the competition of other distributors of the same line, factories selling other brands on a direct basis, distributors selling competitive brands, plus factory-assisted programs offered by "independent" distributors. The problem is that, even if it were possible to prophylaxize a trade area, the situation would fall apart almost immediately as uninhibited distributors from other areas shipped goods into the "clean" area.

¹ As used in this memorandum, the terms "Major Household Appliance Industry," and "The Industry" will refer to the aggregate of companies engaged in the manufacture and/or sale of white goods (washers, dryers, dishwashers, refrigerators, freezers, and stoves), room air conditioners, and non-specialized consumer electronics (television and radio sets, phonograph and tape playing equipment, exclusive of those companies dealing solely in high-fidelity components or traffic items, e.g., low-priced radios and tape recorders).

² Figures from Business and Defense Services Administration and the Bureau of the Census, both U.S. Department of Commerce. Prices are at factory level: the retail figures will be considerably higher, of course.

This Division has learned from disheartening experience the futility of trying to help bring orderly competition to a single geographic area where the chaotic patterns typical of the industry exist. Our first—and major—experience was in Philadelphia where, recognizing the impossibility of achieving even-handed justice by pursuing individual matters on a catch-as-catch-can basis, we attempted to deal concurrently with all the distributors of major appliances in that area who were alleged to be engaging in discriminatory practices. To the original four files which had been opened in Fiscal 1962 and returned from the field with incomplete but substantial evidence of Robinson-Patman Act violations, we added three others in Fiscal 1965. Rather than pushing a single matter at a time, we elected to treat them, and move them, as a group. We recognized that this necessitated delay in the disposition of individual matters, but felt that the broader objective we sought made the delay worthwhile.

Negotiations intended to produce acceptable Assurances of Voluntary Compliance, all of which were to become effective at the same time, were the order of the day. Cooperative advertising and other promotional programs were revised, cost studies developed, many conferences held, . . . and the program failed. It failed because Philadelphia-area distributors, as a matter of business necessity, had to pass on factory-sponsored package deals that were discriminatory at the retailer level; because they were faced with constant competition from out-of-area distributors; because the "regular lines" and "variation (or derivative) lines" produced by the factories inexorably kept the spinning circle of "meeting competition" moving at top speed; because the pricing practices of private-brand giants like Sears, Roebuck & Company (estimated by industry sources to sell 30% of all the home laundry equipment in the country) made big independent retailers clamor for deals; and because chain operators like E. J. Korvette, buying groups like MARTA, and looser federations like the National Association of Television Dealers (known as "The Forty Thieves") either bought out-of-area at lower prices or used the threat of such buying to force lower prices to favored customers in Philadelphia. Ineluctably, in a situation like this, non-favored customers are even less-favored, and the effects on competition which the statute would prevent flourish.

As would be expected, discriminatory practices in the industry are frequently in one of the classic patterns, but there are some which are of special note.

Among the classics:

Cumulative volume rebates.

Package promotions with non-proportionalized benefits.

Size of order or shipment discounts.

Free delivery to some and not others.

Extra advertising allowances to certain favored customers.

Push money and other salesmen incentives for certain customers only.

Individually negotiated prices for certain customers.

Lower prices all year or season long for dealers meeting certain initial purchase criteria.

Among the "special" situations:

Factory sponsoring, in whole or in part, of retailer-oriented package promotions which are not available on proportionally equal terms to competing retailers. Factories customarily attempt to escape liability by insisting that (a) the packages are available to all *their* customers, (b) their customers, the distributors, are free to decide whether they wish to participate and (c) retailers are not customers of the factories.

"Variation" or "derivative" models, representing better value than models in the regular line, sold to certain customers or categories of customers only. These may be higher or lower priced than models in the regular line, but represent "more bang for the buck" in either event. Brushing aside any talk of anticompetitive effects, factories and distributors argue vigorously that variation models are not of grade and quality like that of regular models since mechanical specifications are not identical in most instances; they argue, too, that the right of customer selection provided by the statute protects them. (It should be noted in passing that a much looser standard of comparability is invoked when a competitor's price is being met.)

Factories dealing in whole or in part with certain retailers in areas where the products are generally sold to retailers by distributors.

Factory-imposed conditions on distributor-administered retailer-oriented cooperative advertising programs. Participation in these programs by distributors is supposedly on a voluntary basis.

Special price sheets for retailers whose purchases allegedly would permit them to take advantage of all package deals, rebates, etc., but whose book-keeping systems are incompatible with these varying arrangements.

Sales to builders at special prices for installation in new construction of appliances which the builders resell in the retail market, thus competing (with an unfair advantage) with retailers who buy through regular channels at higher prices.

Discriminatory pricing and promotional practices by intrastate distributors with whom interstate distributors and factory sales organizations compete.

Area pricing and special sales by large private-brand retailers of appliances which are often made by major manufacturers (and are frequently very close in appearance and specifications to the same items bearing the manufacturer's nationally-advertised brand). Thus, a distributor of Whirlpool laundry equipment will be pressed to provide his (major) customers with deals that will make them more competitive with the Sears, Roebuck store selling Whirlpool-made Kenmore laundry equipment.

Over the years, we have received allegation after allegation from retailers and distributors of injury flowing from these practices. Retailers complain of lost sales and profits, distributors of lost sales and threats to their franchises as they attempt to comply with the law while their competitors arrantly discriminate. Allegations of the widespread existence and pernicious effects of these practices were forwarded to the Secretary on April 8, 1969, by Edwin S. Rockefeller, Esquire, in his capacity as counsel for The Jos. M. Zamoiski Co., File No. 631 0003. Attached to this memorandum as Appendix "A" is a letter of February 8, 1968 to Richard A. Palewicz of the Commission's Chicago Office, from Luther C. McKinney, Esquire, of Chadwell, Keck, Kayser, Ruggles & McLaren, representing the Magnavox Company, File No. 661 0127.³ In that letter, Mr. McKinney details page after page of discriminatory pricing and promotional activity by factories and distributors in the industry. A letter of September 2, 1965, from Messrs. Melville C. Williams and Andrew F. Oehmann, Counsel for Admiral Corporation, sets forth additional facts and views on the industry-wide aspects of the problem and is attached as Appendix "B."

It is the conclusion of this Division, and our recommendation to the Commission, that an industry-wide approach is not only warranted, but is, in fact, the only method by which the pervasive and highly pernicious discriminatory practices which have become a way of life for the industry can be rooted out.

Although, as we have pointed out *supra*, the distribution of major appliances on their way to the retailer is confused and confusing, what with factory-direct sellers competing with factory branch sellers competing with independent distributors, we believe that a logical and orderly procedure for approaching this huge industry and its complex problems can be developed. Government figures, it is true, show approximately 300 manufacturers and 3000 distributors in the industry, but we suspect that these are gross overestimates. The Association of Home Appliance Manufacturers, for instance, advises that its 26 members account for the bulk of the nonhome entertainment part of the industry, while the Electronic Industries Association estimates that there are some 40 to 50 significant producers of radio and television receiving sets in this country. Even if we assume that their figures err on the side of conservatism by 100%, that still means only about 150 manufacturers to investigate. Similarly, the Williams-Oehmann letter (see Appendix "B") estimates that there are only some 800 distributors in the industry and, as has been noted, many of them sell only intrastate (and are not subject to the Commission's jurisdiction). If this figure, too, is too conservative by as much as 100%, we arrive at a gross potential of 1600 distributors, with an unknown number of them not subject to the Commission's jurisdiction.

The most orderly and effective way to approach the problem, as this Division sees it, is to concentrate at first on manufacturers, with a pilot group of distributors⁴ being covered at the same time, in order that the complete pre-retailer chain can be viewed at one time. Many of the problems in the industry, we are convinced, have their geneses in manufacturers' activities, either vis-a-vis retail-

³ This file is in the Division of General Trade Restraints. It is our understanding that a complaint in this matter is being prepared, including charges of violation of Section 2(a), (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act. Our recommendation, if sought, would be to eliminate the Robinson-Patman counts from any complaint which might issue in this matter.

⁴ Distributors in such market areas as Philadelphia, Washington and St. Louis are likely to sell in interstate commerce, thus be subject to the Commission's jurisdiction.

ers or vis-a-vis distributors. Attempts have been made in the past to fix upon manufacturers liability under the Robinson-Patman Act for the discriminatory practices of their wholly-owned distributors, but failed because of the pre-Fred Meyer "indirect purchaser" test could not be met. It is this Division's opinion that Fred Meyer may presage further changes in the fixing of responsibility for discriminatory practices under the Clayton Act, as amended by the Robinson-Patman Act. Should this not be the case, however, we believe that manufacturers who organize, suggest, and underwrite in whole or in part, discriminatory pricing and promotional schemes which their purportedly independent distributors, as a matter of practical business necessity, pass on to retailers, can be held in violation of Section 5 of the Federal Trade Commission Act for placing in the hands of another the means by which to discriminate in price, promotional allowances, or the furnishing of services or facilities.

We would propose that the initial investigations (manufacturers and a pilot group of distributors) be conducted through Orders to File Special Reports and investigatory hearings. This should provide enough data for an informed decision to be reached as to the best method of follow-up. It appears to us that the problems are much too broad and complex to lend themselves to solution via a rule-making proceeding. It seems apparent, too, that the methods of doing business are so deeply-ingrained, and the stakes so high, that little is likely to be changed without at least the possibility of adjudication. One approach which seems feasible would be for the Commission, at the completion of the investigation, to announce its findings and an enforcement policy for the industry as a whole. A period of time could be announced, during which period those who wished to avoid the possibility of an Order to Cease and Desist could file Assurances of Voluntary Compliance. At the expiration of that period, those not filing would no longer have non-adjudicative disposition available to them and, of course, should be proceeded against with dispatch.

Anticompetitive activities do not appear to be restricted to those directly affecting retailers alone. Growing concentration at the manufacturer level and increasing vertical control over distribution seem to be part of the industry's pattern, and are surely worthy of further inquiry. Standard & Poor's reports that, in July, 1968, American Motors Corporation sold the Kelvinator division to White Consolidated Industries, which had already acquired appliance makers Hupp Corporation and the Franklin Appliance division of Studebaker-Worthington. Also in July, 1968, Borg-Warner Corporation sold the Norge Division to Fedders Corporation, a major manufacturer of room air conditioners, among other appliances. Montgomery Ward (now part of Carcor Corporation), since 1964 owner of roughly one-half of Hoffman Products Corporation, a manufacturer of television sets, console stereo sets, and portable phonographs, acquired the balance of the stock on October 1, 1968, and is now owner of 100% of that company. Sears, Roebuck & Co., which buys 60% of the output of Whirlpool Corporation, owns 502,384 shares of Whirlpool stock and thus, with 43% ownership of the company, is probably its largest single shareholder (the Securities and Exchange Commission reports no holder of more than 10% of Whirlpool's outstanding stock). In addition to the foregoing publicly-reported stock). In addition to the foregoing publicly-reported information, trade sources advise that Westinghouse Corporation recently has gone out of the television manufacturing business and report that trade rumors have Admiral Corporation in serious financial trouble.

The size of the industry, both in dollars and numbers, plus the complexity of the problems, is such that it cannot be dealt with properly "in addition to other duties." For this reason, we had already included the major appliance industry as one of the Division's major projects in our budget submittal for Fiscal 1971. We would hope, however, that the availability of manpower will permit us to begin preliminary work in Fiscal 1970. Proper investigation of this "wheeling and dealing" industry will take much effort and time on the part not only of this Division, but on the part of the Division of Accounting and the Bureau of Economics as well. We believe, however, that the time will be well spent and the public interest well-served by this investigation. We urge most respectfully that the Commission approve this proposal, closing the matters designated above, and permitting the Division to utilize its resources more effectively in the public interest.

COMMISSION MINUTE OF APRIL 30, 1969

While disposition of the matters referred to in Commission Minute of April 30 falls within the recommendation made above, we have continued to pursue ac-

tively the Philco Distributors, Inc. and D & H Distributing Company matters on individual bases.

A number of conferences have been held with attorneys for Philco Distributors, Inc. and D & H Distributing Company. These conferences have been highly productive of information and productive, too, of actions designed to achieve a higher degree of compliance with Section 2 of the amended Clayton Act than has characterized past selling and promotional practices. Evidence of some of these actions is contained in May 23 and May 26 letters to me from Don B. Blenko, Esquire, Associate Counsel, Consumer Products, Philco-Ford Corporation (copies attached as Appendix "C"), and letters of May 20 and May 27 from Arent, Fox, Kintner, Plotkin & Kahn, attorneys for D & H Distributing Company (copies attached as Appendix "D").

Specifically, Philco has reduced its "stocking dealer" qualifying purchase to six units of any product (including small radios); anyone, it would appear, can qualify. Package promotions are on their way out, only three having been offered in 1969, and a stated declaration having been made of a "present intention . . . to offer package deals to retailers on a very limited basis, and perhaps eventually to abandon such offerings altogether." In addition, Philco Distributors, Inc. has developed and introduced a new reporting form to be used where competitive, off-sheet pricing and promotional deals are requested by salesmen; this form is intended to minimize the risk of improper invoking of the meeting competition defense. Finally, an entirely new pricing system is being developed; this is to be put into effect after completion of a cost study which is presently in work.

D & H Distributing Company is tightening its "competitive" pricing and promotional practices by development of a new form and insistence on closer adherence to higher reporting standards. Their cost study, according to Lawrence F. Henneberger, Esquire, of Arent, Fox, Kintner, Plotkin & Kahn, with whom the writer conferred on May 8, was expected to be ready for submission to the Commission's Division of Accounting within 45 days of that time. The "O" price sheet referred to by Mr. Rockefeller in various communications is to receive specific reference in that study. The statement on several D & H price sheets that "Non-displaying dealer must take the L & W" is dealt with in Mr. Henneberger's letter of May 27 (See Appendix "D"); he has advised the writer in conversation that amplification to reflect the actual intent of the statement will be made on future price sheets. Representations have also been made that minimum package promotions were functionally available to all dealers: price advantages to buyers of larger packages are to be cost justified, of course. In their May 20 letter, Messrs. Kintner and Henneberger speak of the continuing effort of the client to meet the objections of Commission personnel. They speak, too, of a loss of sales volume which, by implication, results from this closer adherence to the law's requirements.

SUMMARY

The pervasiveness of discriminatory practices in the industry leads us to the conclusion that an industry-wide approach offers the only viable means of solving a major problem. Accordingly, we recommend, for Fiscal 1971, an industry-wide approach to the elimination of discriminatory practices violative either of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, or of Section 5 of the Federal Trade Commission Act.

We recommend too, that the individual matters listed above be closed, since continued pursuit of those matters would result in wasteful duplication of effort.

The actions recommended herein being somewhat out of the ordinary, and the files being in many different postures, we suggest that no closing letters be sent.

Respectfully submitted,

LAWRENCE E. GRAY,
Attorney, Division of Discriminatory Practices.

Approved:

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.
WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.

Six-18—See note below.

CECIL G. MILES,
Director, Bureau of Restraint of Trade.

Note: The minute of April 30, 1969 directed that this report (at least the part which deals with File Nos. 621 0167, 681 0114 and 693 7056) be submitted by May 30, 1969, extended by minute of June 10 to June 16, 1969. This memorandum was received from the Division of Discriminatory Practices on June 16 but was held in this office for consideration until now because of our primary concentration upon budgetary matters.

It should be noted that the Bureau recommendation concerning the considerations referred to in Footnote 3 on page 7 of this memorandum will be included in our submission to the Commission of File No. 661 0127.

W. L. TINLEY.
C. G. MILES.

APPENDIX A

CHADWELL, KECK, KAYSER, RUGGLES & McLAREN,
Chicago, Ill., February 8, 1968.

Re FTC-661-0127.

RICHARD A. PALEWICZ, *Esq.*,
Attorney, Federal Trade Commission,
Chicago, Ill.

DEAR MR. PALEWICZ: We are on behalf of The Magnavox Company furnishing herewith certain documents which you have requested, as well as responses to Requests Nos. 28 and 29 attached to your letter of October 4, 1967.

The documents consist of the advertising and promotional materials that you designated during your examination of documents in our offices, and bear the following numerical designations: 49-61; 417; 418; 626; 627; and 874. In addition there are included copies of the Magnavox franchise agreement applicable in fair trade states, the franchise agreement currently being implemented in non-fair trade states, and the Magnavox fair trade agreement used in fair trade states. These documents are numbered 2339, 2340 and 2341 respectively.

We are in the process of securing examples of trade-in schedules in accordance with your recent request.

Request No. 28.—"Furnish a list of the names and addresses of all competitors of Magnavox and its divisions. Identify the trading areas and products in which said competitors compete. If possible, indicate the share of the market held by each of the competitors in the trading areas concerned."

Numerous companies compete with Magnavox in the manufacture and sale of consumer electronic products, including the following:

Radio Corporation of America 30 Rockefeller Plaza New York, New York 10020	Curtis-Mathis Mfg. Co. 2220 Young Dallas, Texas 75201
Zenith Radio Corporation 1900 N. Austin Avenue Chicago, Illinois 60639	General Electric Corporation Schenectady, New York
Motorola, Inc. 9401 W. Cortland Chicago, Illinois 60647	Philco Corporation Division of Ford Motor Company Philadelphia, Pennsylvania
Sylvania Electric Products Co., Division of General Telephone & Electronics Corp. 730 Third Avenue New York, New York 10017	Clair-Tone Corporation, Canada Sony Corporation, Japan Matsushita Corporation (Panasonic), Japan
Warwick Electronics, Inc., partially-owned subsidiary of Whirlpool Corporation (supplier to Sears, Roebuck & Company)	Packard Bell Electronics, Division of Teledyne Corp. 12333 W. Olympic Boulevard Los Angeles, California Westinghouse Electric Corp. 3 Gateway Center Pittsburgh, Pennsylvania 15230

It is believed that all of the foregoing companies have national distribution. Most of these companies are as large or larger than Magnavox in terms of assets and/or dollar sales. While market share information with respect to radio and television sales is closely guarded by all members of the industry, it is generally believed that Zenith and RCA are the major producers, accounting for over half of industry sales with the remaining domestic manufacturers and a number of foreign concerns accounting for the balance. Sales figures of consumer electronic products are reported in confidence to the Electronic Industries Association, a trade association, which, in turn, publishes industry-wide statistics without

identifying individual manufacturer's market shares. Magnavox's percentage share of the consumer electronic products market (radio, television, phonograph and tape recorders) is 4.99% based on units produced in 1966, the most recent year for which we have industry figures available.

Request No. 29.—"If Magnavox has engaged in price discrimination, it is invited to submit information relating to meeting of competition and/or cost justification in connection with said discrimination."

Magnavox has not engaged in price discrimination in violation of section 2(a) of the Clayton Act, as amended. Such price differences as may apply to Magnavox products are offered to all Magnavox dealers alike and, in any event, do not have the potential of adversely affecting competition.

MEETING COMPETITION

We are, however, responding to your invitation to submit information regarding competition faced by Magnavox. We submit this information as background against which you may contrast the Magnavox program which you have reviewed, and to illustrate that defensive action by Magnavox has been and is presently justified under section 2(b) of the Clayton Act, as amended.

The information consists of current examples of the deals and discounts which Magnavox in good faith believes have prevailed for years in this industry. Since this matter is in the investigational stage, we have set forth a cross section of general examples rather than the extensive presentation which would be necessary if we attempted to exhaust Magnavox's full information and belief on these subjects.

Corroboration of the fact that Magnavox's competitors do differentiate in price and allowances among purchasers may be found *In the Matter of Admiral Corporation*, Docket 7094. There, the complaint indicates that Admiral in various sections of the United States "classified its retail customers [for pricing purposes] as 'dealers'; 'M' dealers; 'Key' dealers and 'A.D.' accounts and issued separate price lists to each type dealer." Less favorable treatment, according to the complaint, was accorded to non-favored purchasers with respect to discounts, list prices, discounts on quantity purchases, promotional payments and advertising allowances. In 1965 the Commission ordered dismissal of that complaint without passing on the merits. In so doing, the Commission referred to a "welter of deals and discounts" saying there "can be no doubt that respondent did in fact discriminate in price in favor of certain dealers" and "respondent may be to this day continuing to grant discriminatory cooperative advertising payments in the several trade areas considered." Similarly, the complaint in *Emerson Radio Associates, Inc.*, Docket 7969, alludes to allowances not available to all customers. A consent order in that case was vacated in view of the dismissal of the Admiral complaint on the ground, *inter alia*, that "it appears that equitable treatment of competitors, and the public interest, would not be advanced by making a cease and desist order effective at this time." FTC News Release (6/4/65).

Magnavox is particularly vulnerable to the type of competition described below since it is relatively small both in terms of market share and absolute size. The right to defend itself in this market is especially essential because, unlike its larger competitors who sell to over 100,000 outlets through multiple distribution steps, Magnavox sells direct to less than 3000 dealers.

Multiple price lists are selectively used to differentiate in price among dealers by competing manufacturers who sell direct as well as by their distributors with whom Magnavox must also compete.

Zenith, through Zenith Radio Distributing Corporation, a Chicago area factory branch, has used price lists coded C Schedule, C1 Schedule and CD Schedule. Each reflects a different dealer price for an identical set. Moreover, large department stores buy Zenith products at prices substantially below the best of these coded sheet prices.

On the West Coast, a Zenith distributor, H. R. Basford Co., sells from five price sheets, each of which is coded through the word V-I-D-E-O. The "V" sheet reflects the highest price and the "O" sheet shows a 3 to 7% lower price, with the intervening sheets being lettered I, D and E. Department stores buy at 2% below the "O" sheet. The Zenith distributor in Milwaukee, Wisconsin, Davenport, Iowa and Jacksonville, Florida sell in a similar fashion. In Cleveland, Zenith's distributor sells from five price sheets on non-color products and two price sheets on color TV. Department Admiral distributor's price lists refer to "major" and "master" Admiral dealers.

In Chicago, *Sylvania* recently represented in writing to Magnavox dealers that due to Sylvania's many rebates these dealers would make more money with the

Sylvania line than with Magnavox. Similar representations have been made to Magnavox dealers in other parts of the country. Sylvania sells direct at lower prices to large accounts while Sylvania products are sold to others through a distributor at 8 to 10% higher prices. Additionally, these distributors sometimes use multiple price sheets.

Large accounts are sold by *Philco* direct as "associate distributors" at lower prices than are available to customers buying *Philco* product through distributors. *Philco* distributors such as Brightman Distributing Company of St. Louis, distinguish on the face of their price sheets between "regular" and "key" dealers. *Curtis-Mathis Sales Co.* distinguishes between "key dealers" and "associate distributors." *Packard-Bell Electronics* sell at lower prices to key dealers.

Westinghouse sells to certain key dealers and in so doing bypasses its wholesale distributors. These dealers purchase at distributor's cost, whereas other dealers in the market are required to purchase through the distributor at 7 to 15% higher prices.

Unlike its competitors, *Magnavox* does not differentiate in price among its dealers by dual distribution, multiple price sheets, dealer classification, selective negotiation of discounts or the like. On the contrary, the same pricing program is available to all Magnavox dealers whether they be department stores, groups or appliance stores.

However, these competitive offers to large volume customers make it essential that Magnavox offer quantity prices. You have reviewed these quantity prices as they appear on Magnavox's price sheets, as well as offers to all dealers of buy-ins of short duration, truckload-carload discounts and the incentive program made available to all dealers. In 1967 the incentive offer consisted of a maximum award of 2½% for improved performance in selling Magnavox products. It was offered to and was functionally available to all dealers.

Compared to the industry, these programs are conservative and are necessary if Magnavox is to remain a factor in this market. These prices are also justified as defensive measures to particular volume incentive programs and quantity discounts offered by competitors, specific examples of which are set forth below.

Annual volume discounts are granted by Magnavox's competitors. Sometimes the discounts are allowed at the time of purchase and in other instances multiple shipping point buyers are permitted to aggregate purchases for rebate purposes (e.g., Sylvania to certain voluntary chains).

Sylvania on direct sales offers the following Volume Rebate program which is cumulative to the first dollar:

12-month purchases	V.I.D. percentage
\$16,000-\$34,999	0.5
\$35,000-\$59,999	1.0
\$60,000-\$124,999	1.5
\$125,000-\$199,999	2.0
\$200,000-\$324,999	2.5
\$325,000-\$449,999	3.0
\$450,000-\$624,999	3.5
\$625,000-\$999,999	4.0
\$1,000,000-\$1,729,999	4.5
\$1,730,000-\$2,499,999	5.0
\$2,500,000 and up	5.5

As in the past V.I.D. will be given on shipments of Television and Stereo for the period January 1, 1967 through December 31, 1967. *Radio is not included.* V.I.D. will be computed off invoiced unit price before application of other 'PLUS PROFIT PROGRAM', i.e., Carload and Half Carload Discounts.

Also in the Cleveland area Sylvania has offered 2% annual discounts to department stores.

General Electric's volume rebate program for 1967 was as follows in its Gulf District:

Volume classification	Payment Percent
0-\$25,000	0
\$25,001-\$50,000	½
\$50,001-\$100,000	1
\$100,001-\$125,000	1¼
\$125,001-\$175,000	1½
\$175,001-\$300,000	2
\$300,000-up	2½

Zenith products offered through California Television Corporation were subject to the following rebates during the period indicated :

Total Zenith purchases January 2, 1967 thru May 31, 1967

<i>Volume</i>	<i>Rebate (percent)</i>
\$25,000 to \$39,999.99 (for balanced performance)-----	1½ plus ¹ 1½
\$40,000.00 to \$49,999.99 (for balanced performance)-----	2½ plus ¹ 1½
\$50,000.00 to \$84,999.99-----	4
\$85,000.00 to \$199,999.99-----	5.2
\$200,000.00 to \$349,999.99-----	6.5
\$350,000.00 and over-----	8

¹ Extra incentives for balanced performance will apply if at least 25% of the total volume is for purchases of Zenith products other than Color television.

Motorola's Products sold through The L and P Electric Co. in New York were subject to the following volume rebate :

<i>Total Net Purchases From 6/27/67 through 12/31/67 :</i>	<i>Retroactive volume incentive (percent)</i>
\$6,000.00 or more-----	1
\$10,000.00 or more-----	2
\$20,000.00 or more-----	3
\$40,000.00 or more-----	4
\$75,000.00 or more-----	5
\$110,000.00 or more-----	6

Motorola Sales, Inc. offers a "3% incentive allowance" on "all M.S.I. purchases shipped direct from factory to dealer" plus a rebate at the end of the year.

RCA's distributor in Cleveland grants annual volume rebates in the magnitude of 2½ to 3% on a sliding scale. In calculating the quotas applicable to this rebate program, retailers are divided into three classes consisting of (1) retailers engaged in only home entertainment or the home appliance business; (2) retailers engaged in both; and (3) retailers engaged in both but dealing with the RCA distributor in only one. Additionally, extra incentive is offered for exclusivity in the RCA line.

Quantity discounts are offered by Magnavox's competitors and appear on price lists or are offered for truckload or carload purchases.

Sylvania grants discounts on quantities of 1-3, 4-13, 14-23 and over 24. Also, it affords truckload and carload discounts. General Electric grants discounts on purchases of 10, 25, 50 and 100 units—the latter three categories are equivalent to truckload and carload quantities, depending on the particular product. Motorola distributors allow discounts on quantities of 1-4, 5-11 and 12 or more. RCA distributors grant discounts on quantities of less than 12, 12-18, 19-24, 25-49, and 50 plus. Claus, the RCA dealer in Peoria, Illinois, allows dealers to pool orders to reach the 50 piece limit.

In addition to these specific quantity and incentive programs, Magnavox's competitors pursue the additional means of granting concessions outlined below :

Package deals appear in varied form. RCA Distributing Corporation of Atlanta, Georgia offers package deals, an example of which is set forth below :

	<i>G1645-W</i>	<i>G1655M-W</i>
Regular dealer cost-----	\$406.97	\$429.39
Less average stocking allowance ¹ -----	16.00	16.00
Total-----	390.97	413.39
Less summer allowance ² -----	15.00	² 25.00
Average net cost-----	375.97	388.39

¹ Based on purchase of approximately 20 sets on stocking program.

² If the dealer purchases the G1645 and G1655 on a 1-for-1 basis, the summer allowance on the G1655 will be increased to \$37.42, making it the same net cost as the G1645.

Raymond Rosen & Co., the RCA distributor in Philadelphia, offers certain models at reduced prices or at no cost if the dealer purchases a specified number of other models. The RCA distributor in Hartford, Connecticut, offers free merchandise in return for specified volume as a loading device and the RCA distributor in Cleveland has a stocking program under which the dealers ac-

cumulate points for volume orders which may be converted to cash. In New York, a \$23 per set reduction was offered for purchases of 75 or more color sets. *Zenith* gives free portable TV's on quantity purchases. In Chicago, 8 pieces of merchandise are given at no charge if a dealer buys 100 pieces.

Admiral's distributor in Peoria, Illinois, Appliance Distributors, Inc., has offered multiple packages, e.g., its "Pkg. C" provided that if a dealer bought 50 pieces of color he could buy 3 additional pieces at \$26.00 each for a saving of \$1,317.00 plus a 4% discount on the 50 pieces.

Philco and others offer packages of white and brown goods at a lower price than would prevail if purchased separately.

Additionally, other inducements are granted by competitors. *Sylvania* grants dealers 1% of their total purchases in S & H Green Stamps. The *RCA* distributor in Hartford extends in-store promotional allowances to larger dealers. *Zenith's* distributor, Kain & Bultman, grants a $\frac{3}{4}$ to 1% bonus to salesmen of a large dealer in Orlando, Florida on their sales of *Zenith* products. *Motorola* pays cash spiffs to salesmen of a large Chicago department store while none are paid to the salesmen of smaller dealers. Similarly, preference is shown in the furnishing of fixtures; extension of credit lines; offering of discontinued merchandise; granting of free trips; and sale of special models.

ADVERTISING ALLOWANCES are often granted to larger purchasers in greater amounts than are accorded to small dealers. In some instances no performance is required of these larger customers and in others inflated allowances permit a profit to the larger customer which does perform.

Motorola Sales, Inc. on "M.S.I." purchases shipped direct from the factory allows a "7% advertising" allowance 100% paid. The "M.S.I." has the alternative of 10%-100% if it foregoes the 3% incentive offered by *Motorola*. Those dealers buying through distributors receive less and in some instances nothing.

Motorola's New York distributor, the L and P Electric Company, has made the following offer:

"CO-OP ADVERTISING—will be accrued on your *Show Purchase* only as follows:

Show purchase by July 31, 1967:	Advertising accrued (percent)
\$3,000.00 or more-----	7
\$5,000.00 or more-----	3
\$10,000.00 or more-----	4
\$20,000.00 or more-----	5
\$35,000.00 or more-----	6
\$50,000.00 or more-----	7

Advertising is accrued on *all* *Motorola* products except accessories, parts and service. Advertising will be credited on a 75/25 basis."

Sylvania offers extra advertising allowances to large buyers at a higher participation ratio (75/25), which allowances are not incorporated in *Sylvania's* 3% accrual—50/50 program for its regular dealers. For example, on a Model CF 220, a regular dealer would receive an advertising allowance of \$16 whereas the larger buyer would receive \$48.55. To some purchasers an advertising allowance is paid without proof of performance.

Zenith products sold to a large department store accrue advertising at the rate of 5% with a participation ratio 75/25. *RCA* products sold to that account accrue at 4%—100% paid. *Sylvania* products sold to that account accrue at 3% on purchases at 75/25 coop.—rate allowed \$10.35 per column inch. The contract rate to this store is \$6.82. Thus, on a full page advertisement it would make \$169.65 under the *Sylvania* program. *Zenith's* distributor in Cleveland has no set advertising program but instead places money primarily with department stores. In the Chicago area, *Zenith* purchases billboard space from a large customer as well as advertising space on trucks and cars operated by the customer. Additionally, it and others contribute to special give-aways such as Christmas trees and the like used by the customer to promote sales.

Philco products sold to large accounts in the Cleveland area as associate distributors accrue at the rate of 10%—100% paid.

RCA's distributors negotiate the payment of advertising money. The distributor in Hartford gives up to 7% on purchases at a ratio of 75/25. The *RCA* distributor in Cleveland negotiates advertising payments.

Westinghouse district managers allocate advertising funds to key dealers in various markets on a negotiated basis. These key dealers would get between 2% and 10% of their purchases in advertising funds, depending on how well they

have negotiated with the district manager. This money is spent on a 50/50 coop. basis or on a 100% basis, depending on the arrangement which has been negotiated.

In contrast, *Magnavox* requires proof of performance with respect to cooperative advertising expenditures and has a program for all of its dealers.

However, the competitive offers which have for some time prevailed in this industry, of which the foregoing is only illustrative, require that *Magnavox* grant cooperative advertising at rates ranging from 1.8% to 4%. Additionally, *Magnavox* offers advertising accruals in greater magnitude on truckload and carload purchases in lieu of discounts thereon as do its competitors. Participation ratios with respect to these alternatives to quantity discounts vary from 50/50 to 100%.

COST JUSTIFICATION

We believe that the quantity of discounts granted by *Magnavox* are justified under the cost proviso of section 2(a) of the Clayton Act as amended. As to the quantity brackets appearing on the price lists as well as the truckload-carload discounts, cost savings are realized during the course of processing of the orders as well as assembling of the units for shipments. Additionally, actual freight cost savings are realized. Furthermore, fewer goods are damaged in the course of quantity shipments and the selling cost is lower, as is the cost of placing the goods in the dealer's store.

It is our intent to work with you in connection with the document review which has already been planned and we shall advise you as to when we will be able to comply with your additional outstanding requests.

Sincerely yours,

LUTHER C. MCKINNEY.

APPENDIX B

POPE, GALLARD, URIELL, KENNEDY, SHEPARD & FOWLE,
Chicago, Ill., September 2, 1965.

Re Pending Investigation of Admiral Corporation under Section 2(d) of the Clayton Act.

JOSEPH W. SHEA, Esq.
Secretary, Federal Trade Commission,
Washington, D.C.

DEAR MR. SHEA: This letter comments on the "public interest" aspects of the present investigation of the practices of Admiral Corporation under Section 2(d) of the Clayton Act. It points out why it would not be in the public interest to continue the investigation. (For purposes of this letter, it is assumed Admiral is giving discriminatory allowances. No admission is made, however.)

Background—The present investigation arises from the Commission's dismissal of a complaint against Admiral which was filed about April 16, 1958. The complaint alleged in its Count II that Admiral, as a distributor, was violating Section 2(d) of the amended Clayton Act by the payment of discriminatory advertising and promotional allowances to competing *retailers*. The Commission's opinion of April 7, 1965, dismissed this count for the reason that Admiral had not been afforded a proper and adequate opportunity to present its defense of meeting competition. At page 6 of its opinion, the Commission said:

"But this leaves the problem unsettled, for insofar as this record reveals, respondent may be to this day continuing to grant discriminatory cooperative advertising payments in the several trade areas considered. Whether these discriminations are legally justified or unlawful has not been determined. In situations of this type, remand to the hearing examiner for perfection of the record will usually be ordered but in this case such a course would not be appropriate. Instead, we have instituted an investigation to determine whether a new complaint dealing with current practices is required by the public interest." [Italic supplied.]

It is Admiral's position that this investigation should be closed for the reason that it is not in the public interest to commit the limited funds and personnel of the Commission to an investigation and lengthy litigation where, even if a cease and desist order is eventually obtained, the order will be ineffective in depriving large retailers of their discriminatory allowances. The reasons why such an order would be ineffective are stated below.¹

¹ This point was not raised in the 1957 investigation of Admiral because the Commission was then of the opinion that Section 2(b) provided no defense to a 2(d) charge.

It is also Admiral's position that if the Commission can find a way to enter effective orders in the industry, the Commission should, in the public interest and in fairness to Admiral, proceed on an industry-wide basis.²

The nature of the industry—Neither the 1958 complaint nor the present investigation is concerned with any business transactions between Admiral *as a manufacturer* and its customers. The complaint related only to transactions between Admiral, then acting *as a distributor*, and its retailer customers. The present investigation is similarly restricted by the Commission's instruction to initiate the investigation.

The products in the industry consist of televisions, radios, phonographs, and major appliances such as refrigerators, freezers, ranges and air conditioners.

These products are distributed in three ways:

1. Through independent distributors who purchase them from manufacturers,
2. By manufacturers selling direct to retailers, thus performing their own distribution function, and
3. By distributor corporations that are either partly or wholly owned by a manufacturer and who buy from the manufacturer and resell to retailers.³

Precise figures are not available but it is estimated that about 100 of these distributors are owned by manufacturers and that the remainder, about 700, are independents. Their aggregate sales are estimated to be about \$4 billion annually.

As is frequently the case in other industries, many of the independent distributors in this industry sell entirely within the boundaries of a single state and are thus not in interstate commerce within the meaning of the Clayton Act.

Consequently, they are beyond the Commission's jurisdiction, at least under present law, and can, and do, lawfully discriminate among their customers in granting cooperative advertising and other promotional allowances. It is believed the files of the Commission will support this statement.

It is our understanding, for example, that Bruno-New York, the RCA distributor in New York City, confines its operations to New York State and has, for this reason, prevented the Commission from seeking a cease and desist order against it under the Robinson-Patman amendment to the Clayton Act.

The Commission cannot obtain effective relief against discriminatory allowances by the use of cease and desist orders because it cannot prohibit intrastate distributors from discriminating, nor can it prohibit interstate distributors from meeting such lawful discriminations.—The manager of the Admiral distributor subsidiary in New York City has information that Bruno-New York has offered a number of its larger accounts as much advertising as the account desires. He has informed us that he has seen advertising appropriations issued to specific accounts for \$10,000 per month for October, November, and December, 1964. It is highly unlikely that Bruno-New York made such allowances available to its smaller customers on proportionally equal terms. This is especially true if, as we believe, Bruno-New York is convinced the Robinson-Patman Act does not apply to it because it sells only in intrastate commerce.

We have made a preliminary check with managers of the distributing subsidiaries of Admiral and, based on the reports received, believe an investigation by the Commission would disclose that there are one or more intrastate distributors in every geographic market of consequence in the industry and that they grant discriminatory allowances to their retail customers. If these distributors were subject to the Robinson-Patman Act, the discriminations would be in violation of Section 2(d).

If this belief is true, any cease and desist orders prohibiting discriminations by interstate distributors would accomplish nothing. The interstate distributors could justify their discriminations as meeting the competition of the immune intrastate distributors.

As Commissioner Elman said concerning a similar situation in his dissenting opinion in *Abby Kent, Co., et al.*, (Docket Nos. C-328—C-566, C-639—C-671, C-717, C-769—C-775, C-794, C-803, C-834—C-836, C-841, C-882, 8625, 8626, 8630, 8632, 8633), dated August 9, 1965, ¶ 17.310, Trade Regulation Reports at p. 23.467:

² This point was raised during the 1957 investigation and in Admiral's answer to the complaint. However, Admiral was not permitted to introduce evidence on it.

³ The 1958 complaint related only to Admiral's direct sales to retailers (the second of these three methods of distribution). Admiral no longer uses this method but uses only the first and third methods listed above. This, of course, raises the question of whether Admiral exercises such control over its partially and wholly owned distributors that a cease and desist order could properly be issued against Admiral based on acts of such distributors.

"Besides the equities of the matter, I am concerned with whether entry of cease and desist orders is an effective method of preventing discriminatory advertising allowances, even by the firms subject to the orders, where many of their competitors are not under order and continue to make such payments. The effect of orders in these circumstances may simply be to divert business to the firms not under order. If this is the result, powerful buyers in this industry will continue to enjoy unimpaired unfair advantage over weaker competitors, notwithstanding the entry of orders against some suppliers. Further, since the defense of good faith meeting of competition will probably be read into every order . . . they may well prove ineffective to prevent the respondents from matching allowances offered by competitors not under order. . ."

What would the Commission accomplish if it obtained cease and desist orders under Section 2(d) against all of the distributors in this industry who engaged in interstate commerce? We submit that no tangible results could be obtained.

Discriminatory allowances are industry-wide and it would be unfair to subject only Admiral to a cease and desist order—It would be unfair to handicap Admiral by subjecting it to a cease and desist order while its competitors are free to continue the forbidden practice.

If, therefore, the Commission concludes it cannot get jurisdiction over the intrastate distributors, it should close its investigation.

However, since the law is not a static thing, it is not impossible that the Commission might be able to devise a means of obtaining jurisdiction over the intrastate distributors. We shall, therefore, consider what the Commission might do if it had such jurisdiction.

If the Commission can devise a means of obtaining jurisdiction of intrastate distributors, the approach to discriminatory allowances in this industry should be on an industry-wide basis—If the Commission can obtain jurisdiction over the discriminatory practices of intrastate distributors, it is suggested that the proper approach to the problem—which is industry-wide—should also be industry-wide. It might be by a trade practice conference, a Trade Regulation Rule under Section 1.63 of the Commission's Rules of Practice, or a hearing to take evidence on the nature and extent of discriminatory allowances.

Regardless of the procedure used, the crux of any successful attack must be means of abolishing the present discriminations as of a specific date. Before that date, an opportunity could be afforded distributors (perhaps they should be required) to submit to the Commission their cooperative advertising plans proposed for use after such date. Publicity as to these plans to which the Commission did not object should restrict the number of variant plans actually reviewed by the Commission to a manageable size.

In any event, if there were a common date for abolishing old practices and putting new plans into effect, the Commission's evidentiary problem of proving who violated Section 2(d) thereafter would be greatly simplified because it could be fairly easily determined whether a competitor's allowance, relied upon by a respondent to justify his discrimination, was or was not a lawful one.

Suggestions for Commission action—We submit the following suggestions to the Commission for its consideration in the further handling of this matter:

1. That the Commission check its files on the industry to ascertain whether those files support the statements made in this letter.

2. If the Commission believes further investigation is necessary, that the Commission select for further investigation one or more cities where there is an Admiral distributor subsidiary. (A list of such cities has already been delivered to the Commission's Chicago investigators.)

3. Upon being informed of the selection, we will undertake to supply the Commission's investigators with the following information for the selected cities, insofar as possible: names, addresses and brands handled by all distributors, along with our best information as to whether each distributor is intrastate or interstate in its operations.

4. That the Commission's investigators then make whatever investigation is deemed necessary by the Commission.

5. That, if the Commission finds the facts are as stated in this letter, the investigation of Admiral Corporation be discontinued as not being sufficiently in the public interest to warrant the required expenditure of the Commission's limited funds and personnel.

Conclusion—To summarize—the Commission will be unable to prevent discriminatory allowances in this industry as long as the Commission lacks jurisdiction over the numerous distributors who sell only in *intrastate* commerce.

Such distributors can, and do, lawfully discriminate as they please and their competitors, such as Admiral, are free lawfully to meet those discriminations. Therefore, the entry of cease and desist orders against sellers in this kind of situation will not prevent large retail buyers from continuing to receive discriminatory allowances.

Is an investigation in the public interest that cannot hope to achieve any substantial relief for the retailers discriminated against?

If it is assumed that the Commission can find a way to obtain jurisdiction over the *intrastate* distributors, the Commission should act against discriminatory allowances only on an industry-wide basis. The situation is like that in *Atlantic Products Corp.* (Docket No. 8513), decided Dec. 13, 1963, final order entered January 26, 1965, ¶¶ 16,676 and 17,192, *Trade Regulation Reporter*.

If the Commission is still of the opinion that a cease and desist order against Admiral might be in the public interest, an opportunity is requested to discuss the matter further with the Commission staff. A preliminary discussion has already been held.

Very truly yours,

MEVILLE C. WILLIAMS.
ANDREW F. OEHMAN.

APPENDIX C

PHILCO-FORD CORPORATION,
Philadelphia, Pa., May 23, 1969.

Mr. LARRY GRAY,
Federal Trade Commission,
Washington, D.C.

DEAR MR. GRAY: This is to describe new basic pricing and promotional policies of Philco Distributors, Inc., including PDI's district offices in Baltimore and Washington. PDI, which is a wholly-owned subsidiary of Philco-Ford Corporation, functions as a wholesale distributor of Philco-tradenmarked home appliances and consumer electronics products. PDI offers such products to retail dealers in the Baltimore and Washington markets for resale to consumers. I am writing pursuant to PDI's request for a non-adjudicatory disposition of your current investigation in those markets.

You are familiar with the pricing and promotional policies previously applicable to PDI sales. These are summarized in the letter dated May 20, 1966, from C. E. Lantz, to the Commission, which was mailed to your attention, as supplemented.

Among other things, the 1966 policy provided for a significant retail dealer category designated as "accommodation" customers, who by definition purchased less than \$4,000 worth of merchandise per year. The 1966 PDI policy further contemplated use of package-deal offerings, in accordance with differential incentive limitations which the letter spelled out in detail. Further, we submitted in 1966 a detailed reporting mechanism for PDI's use in meeting low competitive offers, which, as I am sure your experience with the industry will have indicated to you, is commercially necessary in a highly competitive business, as well as being consistent with the substantive policy of Robinson-Patman, Section 2(b).

In January 1969, PDI decided to implement significant changes in its pricing and promotional policies. Several significant steps along this line have already been taken. Other such steps will require additional time to carry out, and, as you will recall, I have solicited the cooperation of the Commission's accounting and legal staffs in the development of specific new measures.

One basic change in PDI's policy is that the former accommodation-dealer concept, as of January 1969, has been effectively abandoned by way of a change in the purchase qualification procedure. Instead of meeting a \$4,000 annual volume requirement, any retailer may now qualify for PDI's stocking dealer prices by issuing a single order for six units of any Philco product. Since an order of this magnitude is functionally practical for any retail dealer, stocking dealer prices are now available to all. (PDI wishes to continue, at least for the present, its programs for a functional display allowance and a cost-justified allowance for factory-direct shipments. These are now being offered on the same terms as were described to you in 1966. Co-op advertising is likewise still being offered on a proportionally equal basis to stocking dealers, under a basic control system which was also detailed in 1966.)

A second significant change in PDI's marketing approach has been in the matter of package-deal incentives. Instead of widespread offerings in accordance with the 1966 policy, PDI's present intention is to offer package deals to retailers

on a very limited basis, and perhaps eventually to abandon such offerings altogether. To the best of my knowledge, PDI has offered only three package deals to its customers in 1969, and these were framed in accordance with the 1966 standards.

It is further PDI's intention to significantly reduce the extent of its competitive pricing through the reporting mechanism which we designate "P&Q". In order to accomplish this objective, we have already instituted a revised P&Q form and more detailed factory clearance procedures. Documentation of the new procedures is enclosed herewith, and as I think you will agree, the new forms represent a major improvement in terms of 2(b) justification.

Further to reduce the need for competitive pricing, as I have indicated to you, PDI is looking toward a substantial cost-justification study, in order that we may offer a cost-justified volume incentive as part of PDI's established price structure. As you know, this program is in its preliminary stages. However, I wish to express appreciation for the cooperation already extended by the Division of Accounting and by yourself, and to solicit your further help as this project proceeds.

In our meeting Wednesday, we discussed the extent of FDI's compliance with your earlier informal request for information.

Although it was my belief that we had already provided you with almost all necessary and relevant information responsive to your request, you asked that we supply in addition copies of all 1968 invoices to PDI's dozen largest customers in each of Baltimore and Washington. These are being collected and I will call you about them within the next few days.

With my warm personal regards,

Sincerely yours,

DON B. BLENKO,
Associate Counsel, Consumer Products.

PHILCO-FORD CORPORATION,
Philadelphia, Pa., March 21, 1969.

To: District Managers and District Operations Managers.

Subject: New price and quality comparison forms (No. PSDD684).

Under separate cover, you will be receiving a supply of the subject forms which should be used on all future requests for P & Q activity.

The attached sample will acquaint you with this new format. It has been designed to be used for requesting assistance when you are confronted with competitive offerings covering Volume Incentive, price, advertising, incentives and awards, service, excess fill-in privileges and special markets pricing matters. Each request should relate to *a product line or product models within a product line*. The only exception would be when you are requesting consideration for matters which cover more than one (1) product line (advertising, service, Volume Incentive, etc.).

Requests for non-standard credit terms should be submitted through Sales Financing channels. In the near future, Mr. W. Beathard will issue a Sales Financing Manual procedure which will distinguish between initial requests and renewals. At that time, a Sales Financing approval system will be adopted for non-standard credit terms.

INTERPRETATION

For clarity, we have defined below all areas in the form. Note that each explanation below is keyed by number to the same section on the sample form attached.

1. VOLUME INCENTIVE AUTHORIZATION

See Sales Engineering Letter CM-28-69 (revised) dated January 9, 1969, attached.

2. CO-OP PARTICIPATION EXCEEDING 75/25

Form must be submitted to request any dealer co-operative advertising in excess of 75/25.

3. COMPETITIVE PRICE ALLOWANCE

Form must be used to request price allowances which deviate from approved pricing programs.

4. CO-OP IN EXCESS OF PUBLISHED RATE

Form must be submitted to request usage of cooperative advertising with specific dealer when such usage is in excess of the cooperative advertising percentage published on your dealer price schedule.

5. APPROVAL OF INCENTIVE OR AWARDS

Requests made under this category would be for authority to use a portion of your budget for in-store promotion or retail salesmen's spiffs. These may be offered under your own initiative to all stocking dealers or to meet a competitive offering.

6. SERVICE ALLOWANCE

Practically all major competitive products have all or a part of service priced inboard. When competitive product pricing is being reviewed, it is most important to subtract the in-board service factor. Further, this factor must be interpreted as to the specific coverage (i.e. 30 day in-home service), so it can be related to our in-board service factor and our coverage. In the event that such interpretation renders our service coverage noncompetitive, you then could request under this category for a service allowance. All price allowance requests must relate competitive products to our offerings *net of the service factor*.

7. EXCESS FILL-IN PRIVILEGE

Requests for authority to use this category would result where competition is offering a more liberal fill-in privilege than the existing factory program.

8. OTHER

Use this section for all other types of P & Q Comparisons (requests for Special Markets, Leasing, Vendor's Advertising Rates higher than media rates, etc.).

9. DEALER'S NAME AND LOCATION

Identify dealer by his trade name and note his street, city and state.

10. DISTRICT

Note location of District.

11. PRODUCT

Note product line for which requested assistance is needed. Also indicate if dealer is "*Full Line*," "*Appliances*," "*Major Electronics*" and/or "*Personal Electronics*".

12. LAST YEAR'S VOLUME (ALL PRODUCTS)—LAST YEAR'S VOLUME ON ABOVE PRODUCT LINE

Total dealer sales for past year on all Philco products should be noted. For the specific product line for which you are requesting assistance, you must also note last year's volume dollars. If dealer is new account, note in both of these areas "*New Account*".

13. ESTIMATED VOLUME (ALL PRODUCTS)—ESTIMATED VOLUME ON ABOVE PRODUCT LINE

Realistic dealer volume estimates for all products and for the product line for which you are requesting assistance must be noted.

14. COMPETITION

This section relates to all matter offered by the competitor.

15. BRAND

Note brand trade name (RCA, Zenith, Whirlpool, etc.) for each competitive model.

16. MODEL

Note model number for each competitive set.

17. PRICE SHEET

¹Note the competitive price sheet cost for each model. Copy of competitive product price schedule should be attached to form to verify starting point of competitive offering.

18. PROGRAM

¹Note the amount of Program funds offered by competitor. Copy of Program details should be attached.

19. DIRECT SHIPMENT

¹Note the amount of the Direct Shipment Allowance offered by competitor. Copy of Direct Shipment Program should be attached to verify offering.

20. VOLUME INCENTIVE

¹Note the amount of the Volume Incentive offered by competitor. Copy of Volume Incentive offering showing volume breaks at specific percentage levels should be attached to form.

21. INBOARD SERVICE

¹Note the amount of the Inboard Service which competitor has in each model. Verification of service factor and coverage should be attached to form.

22. NET PRICE

¹Represents the net price offering made on a model to the dealer by the competitor. If available, an invoice verifying this price offer should be attached to your request.

¹Where these elements relate to your request, it is extremely important to supply the Action Manager in Philadelphia with all available details of each competitive program.

23. COMPETITOR'S ADVERTISING RATE

¹ Reflect percentage of sales offered by competitor for cooperative advertising and check participation percentage block.

24. DELIVERY

¹ Check appropriate block and note any details pertaining to competitor's delivery program.

25. TERMS

¹ Recite terms offered to dealer by competitor and, if possible, attach documentation verifying offer.

26. INCENTIVE AND AWARDS

¹ Note spiff or in-store promotion program offered by competitor to dealer.

27. SERVICE COVERAGE

Note the cost of In-board and Out-board Service related to the competitor's *product line*. Total of Inboard and Outboard Service should equal the price of the full-service contract which should be described under coverage (i.e. 30 day carry-in service).

28. SOURCE

Names of the District and Dealer representatives who provide the competitive data should be noted. Competitor's deal should be related to any unit volume requirement made on the dealer by the competitor and a time period under which the deal is effective.

29. PHILCO-FORD

This section relates to all matters pertaining to Philco proposed offering.

30. MODEL NUMBER

Note Philco model number(s). Each of these model numbers must relate the comparable Philco model back to the competitor's model noted in the Competition section. (Example: Competitor's model listed in Column I should be matched under the Philco-Ford section in Column I with the most comparable Philco model.)

31. PRICE SHEET (STOCKING)

Note the dealer Stocking price from your approved price schedule.

32. DISPLAY ALLOWANCE 3 PERCENT

Note the 3% Display Allowance as a deduction from Stocking Price.

33. DIRECT ALLOWANCE

Note exact net percentage of Direct Allowance and show dollar amount under each applicable model as a deduction from Stocking Price.

34. INBOARD SERVICE

Note the amount of Inboard Service as a deduction from Stocking Price.

35. NET

By subtracting the Display Allowance, Direct Allowance and Inboard Service from the Stocking Price, you will arrive at a Net price.

36. VOLUME INCENTIVE

When requesting a *Volume Incentive* for a dealer to meet a competitor's offer, note the percentage of Volume Incentive requested. Note also the dollar amount of the Volume Incentive for each of the product models which you are using to justify this request (follow instructions in CM-28-69 Letter of January 9). When requesting a *Price Allowance* for a dealer who has already been authorized for a Volume Incentive under the terms of CM-28-69, note the percentage of Volume Incentive authorized and show the amount of such incentive under each model for which a Price Allowance is being requested.

37. COMPETITIVE ADJUSTMENT

Calculate this Adjustment which is the difference between Net Price less Volume Incentive and the Requested Net Price at which the model is proposed to be offered to the dealer.

38. REQUESTED NET

The requested price at which a model is being proposed to be offered to the dealer.

39. PHILCO PUBLISHED ADVERTISING RATE

Recite percentage of cooperative advertising offered to the dealer as published on your price schedule.

40. PHILCO ADVERTISING RATE REQUESTED

Note requested percentage of sales for cooperative advertising and check participation percentage block.

41. DELIVERY

Check appropriate block for requested Delivery program.

42. TERMS

Recite Current Payment Terms under which dealer is being sold or will be sold.

43. INCENTIVE AND AWARDS REQUESTED

Note how these expenses will be funded (i.e. Promotion "Adder" Fund) and total cost and length of program with dealer.

44. SERVICE COVERAGE

Note the Inboard and Outboard Service costs related to the *product line*. Total of Inboard and Outboard Service should equal the price of the full service contract which should be described under coverage.

45. TERMS OF APPROVAL REQUESTED

Time period cannot be any longer than a product sales program period. Within this time period, P & Q, if approved, would become subject to renegotiation if either the competitive product prices or Philco product prices are changed upward or downward, or if any other substantive factors change. Each approved P & Q is subject to quarterly factory audit.

46. ESTIMATED UNIT VOLUME

Note 90 day and annual (remainder of year) unit volume estimates for each product model on which assistance is requested. Use REMARKS section to spell out immediate unit, volume sales if Request is accepted.

47. PRODUCT REPRESENTATIVE'S RECOMMENDATION

(Reverse Side of Form)

District Manager will solicit Product Representative for his recommendations and will so record these comments in the space provided.

48. REGIONAL MANAGER'S RECOMMENDATION

(Reverse Side of Form)

District Manager will solicit the Regional Manager for his recommendations and will so record these comments in the space provided.

49. SALES ENGINEERING SECTION

(Reverse Side of Form—Not to be Completed By District)

The Request will be appropriately marked APPROVED, DISAPPROVED or APPROVED AS AMENDED by the Action Manager—Philadelphia. An explanation of the action taken will be recited for full District understanding.

DISTRIBUTION OF FORM

As noted, the form will be completed in quadruplicate and will be initialed by the District Operations Manager as verification for the accuracy of all reported data. His endorsement will also assure that appropriate funds have been budgeted to support requested Volume Incentives, Promotion, Local Delivery, Advertising, etc. The REMARKS section can be used to elaborate on any conditions pertaining to this authentication. The District Manager will then sign and date all four (4) copies. The green copy should be forwarded to the Action Manager in Philadelphia, the blue copy to the Controller's Office (E. Meline), while the pink copy should be sent to your Regional Manager. The yellow copy should be retained in the District file.

Please follow the instructions provided in Sales Engineering Letter CM-63-69 of March 17, 1969, as to where each type of P & Q should be sent.

RECORDER OF FORMS

You can send your request for additional P & Q forms (FORM PSDD684) to the Controller Office (E. Meline).

CONCLUSION

One of the main by-products of this new form is to appraise Sales Management of the competitiveness of our pricing. Since you have a great responsibility in gathering competitive data, you must make every effort to insure its accuracy. Therefore, we ask that every detail of supporting data available be provided to the Action Manager in Philadelphia or to your Regional Manager with your Requests.

A major goal of our NSDP Zone Pricing Program was to provide you with pricing which is reasonable and competitive with a very large part of your dealer organization. Considering that this goal was recognized and acknowledged by you through your participation in our Philadelphia Sessions, we would anticipate a sharp drop in P & Q activity over 1968 rate.

J. A. O'HARA,
Director, Sales Engineering.

PHILCO-FORD CORPORATION

PRICE AND QUALITY COMPARISON

SAMPLE

REQUEST FOR:
Volume Incentive Authorization

- Coop Participation Exceeding 75/25
- Competitive Price Allowance

☐ 4- Coop in Excess of Published Rate
☐ 5- Approval of Incentive or Awards
☐ 6- Service Allowance

	7. Excess Fill-in Privilege	
	8. { Other: _____	
	Other: _____	

g. Dealer's Name _____		District ⁻¹⁰ _____
Location _____		Product ⁻¹¹ _____
Last Year's Volume (All Products) \$ ⁻¹² _____		Last Year's Volume on Above Product Line \$ ⁻¹² _____
Estimated 19__ Volume (All Products) \$ ⁻¹³ _____		Estimated 19__ Volume on Above Product Line \$ ⁻¹³ _____

14. COMPETITION

[illegible]

2. Competitor's Advertising Rate _____ % of Sales 50/50% ☐ 75/25% ☐ 100% ☐

3. Delivery: Prepaid ☐ FOB Shipping Point ☐ Other: _____

25. Terms _____ Incentive and Awards -26

26. Inboard Service: \$ _____ Outboard Service: \$ _____ Coverage: _____

26. State source of competitive information (attach supporting data) District: _____ Dealer: _____

29. PHILCO-FORD

29. PHILCO-FORD

[illegible]

40-Philco Advertising Rate Requested _____ % of Sales 50/50 ☐ 75/25 ☐ 100% ☐

41-Delivery: Prepaid ☐ FOB Shipping Point ☐ Other: _____
42-Terms: Current Payment Terms: _____

44 Inboard Service: \$ _____ Outboard Service: \$ _____ Coverage: _____

45. Term of Approval Requested: From _____ To _____

Models I / II / III / IV / V / VI / VII

Remarks _____

[illegible]

(Date)

47

PRODUCT REPRESENTATIVE'S RECOMMENDATION:

(Product Representative)

(Date)

१५

REGIONAL MANAGER'S RECOMMENDATION:

(Regional Manager)

(Date)

The Subject P & Q is:

APPROVED

11

DISAPPROVED

11

APPROVED AS AMENDED

11

19 -

Please note the following comments which relate to the action taken above:

(Sales Engineering) (Regional Manager)

PHILCO DISTRIBUTORS, INC.,
Washington, D.C., May 26, 1969.

MR. LARRY GRAY,
Federal Trade Commission,
Washington, D.C.

DEAR MR. GRAY: Confirming our telephone conversation of this afternoon, this is to advise that a comprehensive review of dealer invoices and related documents at PDI's Washington Office will be an unexpectedly complex and time-consuming procedure. I agreed, however, to follow-up this problem and contact you about it in the near future.

You also requested information supplementary to that previously supplied, particularly with respect to PDI's "P & Q" procedures. I will likewise contact you about this subject following my return to Philadelphia.

Sincerely,

DON B. BLENKO.

APPENDIX D

ARENT, FOX, KINTNER, PLOTKIN & KAHN,
Washington, D.C., May 20, 1969.

Re D & H Distributing Company, File No. 681 0114.

LAWRENCE E. GRAY, Esq.,
Federal Trade Commission,
Washington, D.C.

DEAR MR. GRAY: As you have requested, I am enclosing herewith the following materials as a supplement to our submission of April 4, 1969, on behalf of D & H Distributing Company:

- (1) Custom line specification sheets.
- (2) 1967-1968 custom line price sheets (not otherwise included in April 4 submission).
- (3) 1967-1968 D & H price sheets for room air conditioners.
- (4) Cooperative advertising program, 1967-1968.
- (5) Twelve largest accounts of D & H for Washington (1968) and Baltimore (1967-1968) market areas.

D & H Distributing Company, for some months now, has directed considerable effort at modifying its pricing and promotional policies to meet objections raised by Commission investigative personnel. These compliance efforts on the part of D & H, in the context of an intensely competitive industry setting, appear to have a significant financial toll.

By way of specific example, we are advised that the former RCA Victor franchisee for the Washington area, Southern Wholesalers, Inc., grossed 10.9 million dollars in sales during the year 1967. In 1968, the first year that D & H operated the Victor franchise for the Washington area, gross sales dropped 1.8 million dollars to 9.1 million dollars gross. The loss of sales was experienced by D & H during a period when television sales nationally were increasing over the previous year by approximately 11%.

We simply point out these facts as background to the information submitted herewith.

Sincerely,

ARENT, FOX, KINTNER, PLOTKIN & KAHN,
By EARL W. KINTNER.
By LAWRENCE F. HENNEBERGER.

ARENT, FOX, KINTNER, PLOTKIN & KAHN,
Washington, D.C., May 27, 1969.

Re D & H Distributing Company, File No. 681 0114.

LAWRENCE E. GRAY, Esq.,
Federal Trade Commission
Washington, D.C.

DEAR MR. GRAY: This letter will serve to confirm the following points which we discussed during our May 20-21 conference concerning the D & H investigation:

1. D & H does not offer quantity discounts on dealer purchases of refrigerators in the Baltimore market.
2. The "non-franchised dealer" price sheet for Washington dated September 3, 1968 (see Vol. 1 of our April 4, 1968 submission), actually refers to accommodation sales by dealers in the District of Columbia. This sheet concerns itself with

orders which may be placed directly with D & H by any dealer in the Washington trading area, and as to which D & H provides expedited delivery service to the dealer. Because of the special delivery service provided the price to all dealers for these occasional accommodation sales is approximately five per cent higher than the regular dealer price.

3. The notation "Non-displaying dealer must take the L & W" on the color television summary page of the D & H 868 dealer price sheet (Volume 1 of April 4 submission) bears amplification. Non-displaying dealers without a service department, and not using the services of an outside service company, are required by D & H to take the L & W as a protection to consumers, to insure that the latter will have access to a service facility for products purchased from a non-displaying dealer. Displaying dealers, as a general rule, have their own service departments, so that no L & W is needed. However, in those cases where displaying dealers do not have in-house service facilities, all such dealers take the L & W. Were this not the case, D & H would require all displaying dealers without inside or outside service facilities to take the L & W, just as the company does with its non-displaying dealers.

4. The "RCA Month Window Display" promotion (Volume 2 of April 4 submission) refers to allowances for salesmen.

5. Display bonus plans A and B of the Company's 1968 refrigerator "Power Play Program" were rescinded by D & H officials before these programs became effective.

6. The March 4 and March 15, 1968 refrigerator/dishwasher package promotions, "May for Dave" spiff program, 2-year picture tube package promotion, radio/phono/tape exchange service, and September 3, 1968 color television package No. 2. (Volume 2 of April 4 submission) were so structured that the program minimums were reasonably available to and easily reachable by all dealers.

7. The D & H memorandum (undated) to "All RCA dealers" concerning its Franchised Dealer Program for the 1968-1969 model year (Volume 2), was directed at its Washington area dealers. The requirements for "RCA franchise" and "RCA full franchise" are fully set forth in the memorandum. We have been advised by the Company that all Washington area television dealers are "full franchise" dealers, and, in fact, that all but one or two dealers out of approximately one hundred in the Washington market have elected to come under the full franchise program.

8. Hereafter, D & H "meeting competition" memoranda will include information on model numbers and quantities involved in subject competitive situations.

Sincerely,

LAWRENCE F. HENNEBERGER.

NON-AGENDA MATTER

FEBRUARY 23, 1968.

Re Republic Appliance Corporation, et al., File 601 0030.

From: Commissioner Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Program Review Officer.

I move that this be treated as a non-agenda matter.

A cursory examination of the history file suggests that this matter involved a solid violation of the Robinson-Patman Act with clear evidence of discrimination and demonstrable injury. The suggestion is somewhat reinforced by the readiness of the respondent to now execute an affidavit of discontinuance and by the fact that a successful treble damage suit has been prosecuted.

I feel that the practices revealed in this investigation were particularly flagrant and as a watchdog of the public interest the Commission would receive no prices for being alert.

I do not believe that the matter should be disposed of on the basis of an affidavit of discontinuance, and, accordingly, I move that the staff be directed to prepare a complaint.

MEMORANDUM

FEBRUARY 1, 1968.

To: Commission.

From: Ida I. Kloze, Trial Attorney, Division of Discriminatory Practices, Bureau of Restraint of Trade.

Subject: Republic Appliance Corp., changed to Republic Transeon Industries, Inc., now Briggs Manufacturing Company et al., File No. 601 0030.

Recommendation: Closing under Section 2.21: Assurance of voluntary compliance.

Statute: Section 2(a) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act in connection with price discrimination in sale of electric water heaters and unfair competition by the sale of goods at unreasonably low prices.

Commodity: Electric water heaters.

SUPPLEMENTARY CLOSING MEMORANDUM

This matter was closed by the Commission on the recommendation of the Bureau of Restraint of Trade¹ based on the final report of the San Francisco office recommending closing of an investigation concerning *gas* water heaters, while an active investigation requested by the San Francisco office on a complaint concerning *electric* water heaters was in progress at the Seattle office.²

The final report of the Seattle office concerning the complaint of the law firm of Bogle, Bogle & Gates in behalf of National Steel Construction Co.³ alleging that proposed respondent was engaged in discriminatory practices in the sale of electric water heaters recommended complaint charging proposed respondents with violation of Section 2(a) of the Clayton Act for price discrimination and Section 5 of the Federal Trade Commission Act, for unfair competition by sale of goods at unreasonably low prices with intent to destroy competition.⁴

I. Applicants

This investigation was initiated upon the request and direction of Harry A. Babcock, Executive Director, stating that Republic Appliance Corporation was engaged in the manufacture and sale of *gas* water heaters which it was selling below cost and indulging in discriminatory pricing tactics. The memorandum stated the applicant, who supplied the information, for good cause asked to remain anonymous.⁵ The name of this applicant has not been disclosed. Investigation was requested on July 30, 1959 and the report of this investigation made by the San Francisco office was dated June 3, 1960 (PPF, p. 5) recommending complaint for violation of Sec. 2(d). The Bureau of Litigation did not consider this substantial and suggested investigation for possible violation of Sec. 2(a) (PPF, p. 16). By a memo dated Feb. 3, 1961 the San Francisco office stated a complaint was not warranted (PPF, p. 38).

The project attorney in this matter reported another complaint from Bogle, Bogle & Gates in behalf of National Steel Company⁶ of Seattle, Washington, which operates a factory in Seattle for the manufacture of *electric* water heaters with distribution primarily in the Pacific Northwest, concerning Fowler Mfg. Co., a manufacturer of electric water heaters acquired by Republic Appliance Corporation, which applicant claimed was selling electric water heaters in the Pacific Northwest during 1959 and early 1960 to wholesalers at prices which permitted wholesalers to sell electric water heaters at retail for prices equal to or less than prices quoted to wholesale customers by other manufacturers including National. Proposed respondent sold a 52 gallon electric water heater to plumbers in the Portland market at around \$50 each when National's price to wholesale purchasers, who also sold to plumbers was \$54.60. Applicant claimed that proposed respondent had not sold at these prices in any area other than Portland.⁷ Both of these complaints were considered under File No. 601 0030.⁸

¹ Memorandum dated Sept. 29, 1961, from the Bureau of Restraint of Trade, approved by the Secretary, Oct. 24, 1961 (PPF, p. 48).

² Memorandum dated Feb. 3, 1961 from the San Francisco office (PPF, p. 27); memo Aug. 9, 1960 Bureau of Litigation to Bureau of Investigation (PPF, p. 16); memo Aug. 15, 1960 project attorney to chief project attorney (PPF, p. 20).

³ Letter dated May 20, 1960 from Robert W. Graham, Esq. of the law firm of Bogle, Bogle & Gates to Commission.

⁴ Final Report dated Oct. 23, 1961 from Seattle office (PPF, p. 50 to 82).

⁵ Memo July 23, 1959 from Executive Director to Director of Bureau of Investigation (PPF, p. 1).

⁶ Memo dated June 6, 1960 from Project Attorney to Chief Project Attorney (PPF p. 14). Letter May 20, 1960 from Bogle, Bogle & Gates to Commission (PGF).

⁷ Letter May 20, 1960 Bogle, Bogle & Gates (TGF).

⁸ Memo June 9, 1960 Chief Project Attorney to San Francisco office (PPF, p. 14). Memo dated June 30, 1960 from San Francisco office to Seattle office.

II. Proposed respondents

Fowler introduced the glass lined electric water heater to the Northwest and was considered one of the leading manufacturers in the area. The company was completely modernized in October 1958 when it was purchased by Republic Oden Appliance Corporation. It manufactures electric water heaters in various sizes, and sells to wholesalers and retailers in the Seattle and Portland areas. This company was organized in 1946 and its stock was purchased in October 1958 by Republic Oden Appliance Corp. who sold certain of its assets to Republic Appliance Corp. including Fowler in April 1959. In 1959 Republic Appliance and Fowler were acquired by Transcontinental Industries, a corporate shell, and a new company Republic Transcon Industries was formed. Republic Transcon Industries, Inc. filed a certificate of termination with the Michigan Corporation and Securities Commission⁹ transferring its assets to Briggs Mfg. Company in exchange for Briggs stock.

Fowler Mfg. Co. was among the assets acquired by Briggs on October 19, 1965. It was a wholly-owned subsidiary dominated and controlled by Republic Transcon and now by Briggs. Fowler's president,¹⁰ William P. Lennon, employed by Republic Transcon and its predecessors and president of Republic Transcon since 1958,¹¹ was president of Briggs Mfg. Co. in an active full time capacity,¹² and served as a director of Briggs.¹³ Mr. Lennon was a participant and official in each of the proposed respondent companies before, during and after the merger of Republic Transcon and Briggs and therefore aware that Briggs either directly or indirectly continued to discriminate in price between purchasers in the same manner and by the same means as the predecessor companies. He knew and was informed concerning the continuous contacts and activities of representatives of the Commission with predecessor companies, and these contacts therefore, may be considered as communications and contacts with Fowler and with Briggs, the present parent company, and Briggs is considered to have been fully cognizant of the present investigation.¹⁴

There was no indication that the acquiring company, Briggs, was engaged in activities at the time of the merger or prior thereto which would be considered as being in violation of Section 5 of the Federal Trade Commission Act by selling electric water heaters at unreasonably low prices with intent of destroying competition. Investigation revealed that Briggs had continued discriminatory pricing in sales of electric water heaters in the Seattle area in violation of Section 2(a) of the Clayton Act, as amended, thereby perpetuating and continuing to carry on the pricing policies of the acquired company, Republic Transcon and its subsidiary Fowler Mfg. Co. Subsequent to its acquisition by Briggs, Fowler admitted its favored customers were receiving greater discounts than those allowed non-favored competing purchasers of the same water heaters.¹⁵

III Investigation

The investigation shows that in 1960 Fowler drastically reduced its prices to Seattle customers to far below the cost of manufacture of a competitor, Northern Steel Products, and although this competitor reduced its price Fowler's price remained below its cost and the competitor had to discontinue the manufacture of electric water heaters. During 3 years prior to 1961, several such manufacturers¹⁶ were forced out of business. It was stated that at that time, no competitor offered a price as low as Fowler.¹⁷ Tabulations of electric water heater sales by Fowler to all Seattle customers from January 1, 1964 through November 15, 1964 compared to prices at which comparable electric water heaters were sold to favored customers show price differences ranging from 0 to 30 % with the great bulk of price differences ranging from 3% to 8% (SBF 5448 Thru 5461). Pricing to Portland wholesalers for drop shipments to be made outside of Oregon revealed out of state shipments were priced the same as large purchases in Portland by these purchasers and that wholesalers who were not making drop shipments received less favorable prices. Price differences indicated by the invoices ranged from 2.3% to 15.5%. (PPF. 156)

⁹ Dezler Exhibits 1 and 2 (PGF).

¹⁰ Seattle office report May 19, 1966 (PPF, p. 152).

¹¹ D & B Report June 28, 1966 ACD, p. 5 (PGF).

¹² D & B Report Jan. 10, 1966 ACD, p. 2 (PGF).

¹³ D & B Report June 8, 1966 ACD, p. 5 (PGF).

¹⁴ TBF, p. 5576.

¹⁵ TBF, p. 5539.

¹⁶ TBF, p. 291 Pearl Exhibit 10.

¹⁷ TBF, p. 43, p. 291.

Northern's manager said he thought that Fowler, who had 35% to 40% of the market and National who also had 35% to 40% with the remaining 20% to 30% split among the other companies¹⁸ were trying to get all of the electric water heater business and attempting to monopolize the Northwest market.¹⁹

It was reported that in 1957 or 1958, the Chairman of the Board of Republic Transcon boasted he intended to be the largest water heater manufacturer in the world, and it was observed he had apparently achieved his aim.²⁰ In 1960 there were about 150 manufacturers of electric water heaters in the U.S. Presently only about 28 have an impact on the industry and it is expected 10 or 12 more will withdraw from the industry in the next year or two.²¹

Fowler's gross sales in 1960 were \$2,334,182 and were \$4,000,000 for the year ending December 31, 1965.²² Trade areas of Fowler include Oregon, Washington, Idaho, Western Montana and British Columbia.²³ Fowler's parent company, Republic Transcon had total sales of \$34,966,434 for 1962. In addition to its subsidiary Fowler, Republic Transcon had *gas* water heater plants in various parts of the country; its total assets as of December 31, 1962 were \$22,840,882. Fowler has submitted selling at different prices to various customers in the Seattle and Portland areas;²⁴ two price lists were maintained simultaneously, one with lower prices for large distributors.²⁵ Unfavored purchasers felt the effect of discriminations and there was actual and potential injury to non-favored purchasers. Price was considered important and made a considerable difference competitively in 1964; customers discounted bills whenever they could.²⁶ Non-favored purchasers in Portland and Seattle reported competition in the sale of electric hot water heaters was sharp.²⁷

The supplementary investigation by the Seattle office found that effects from discriminatory pricing practices both on the primary and secondary levels of competition resulted from practices and policies pursued by Fowler, under the domination and control of Republic Appliance Corp., Republic Transcon, and since its acquisition in 1965, by Briggs. It was found that Fowler dominated the electric water heater industry in the Pacific Northwest and had obtained a position of dominance because of its pricing practices while under the control of Republic Appliance, Republic Transcon and Briggs.

On March 22, 1962 a representative of the Seattle office proposed recommendation of Assurance of Voluntary Compliance if Fowler would submit such assurance. Concern was shown by Fowler's counsel²⁸ of the effect of such assurance on pending private litigation involving treble damages in which proposed respondent was the defendant.²⁹ Because of Fowler's reluctance to furnish assurances of compliance the Seattle office forwarded its final report recommending complaint for violation of section 2(a).³⁰

IV. *Private litigation v. proposed respondent*

The decision in a treble damage suit by non-favored customers found that proposed respondent Fowler was in violation of 15 U.S.C. § 13, for discriminating in the sale in interstate commerce of products of like grade and quality by selling them at the same time to Keller Supply, Rosen and Mesher and to the plaintiffs at different prices without justification; that these prices discriminations may have been to substantially lessen or injure competition among competitors of defendant as well as competition among plaintiff and Fowler's codefendants and their competitors.³¹ The court found that as a result of the violations plaintiffs have been damaged in the amount of \$8,540.60. This amount was trebled pursuant to 15 U.S.C. § 15 and plaintiffs were awarded \$25,621.80 with costs and attorney's fees.

¹⁸ TBF, p. 293.

¹⁹ TBF, p. 291 and p. 292.

²⁰ TBF, p. 434.

²¹ TBF, p. 4180.

²² TBF, p. 21.

²³ D & B Report June 20, 1966 (PGF).

²⁴ TBF, p. 107.

²⁵ TBF, pp. 133, 146, Exhibits 92 and 93.

²⁶ TBF, pp. 5530, 5536.

²⁷ TBF, pp. 5524, 5537, 5570.

²⁸ TBF, p. 5466. Proposed respondent's attorney was John Sinsheimer, Esq. of the law firm of Koenigsberg, Brown & Sinsheimer, Seattle, Washington.

²⁹ TBF, p. 605.

³⁰ Memo dated Oct. 23, 1966 Seattle office.

³¹ U.S. District Court for the Western District of Washington, Northern Division. H. H. Gorlick and Morris Gorlick, copartners, d/b/a Thrifty Supply Co., et al., Plaintiffs v. Fowler Mfg. Co., et al., defendants Civil Action 6312 (PGF).

V. Submission of voluntary compliance

In the course of the investigation proposed respondents, through legal counsel, submitted a letter of voluntary compliance signed by Carl J. Strutz, President and General Manager of Fowler Mfg. Co. and Sash A. Spencer, President of Briggs Mfg. Co., requesting the Commission to accept these assurances in the disposition of the matter by a letter³² assuring the Commission that proposed respondents do not intend to, nor will they sell at prices differentials, unless such differentials reflect a savings in cost in the manufacture, sale or delivery of the product in question to the said customer, meeting of a competitive price, or sales resulting from changed conditions affecting the market for, or the marketability of the product, such as deterioration or obsolescence. Proposed respondents state they will not grant any differentials which lessen competition in the resale of their products.

VI. Financial status of proposed respondents

The 1965 merger between Briggs and Republic Transcon resulted in a much larger organization in terms of volume, but tangible equity did not increase proportionately and sizeable losses occurred in 1965 and the first nine months of 1966 resulting in a highly extended financial condition.³³ In July 1966 nineteen large trade creditors with claims of over \$4.6 million agreed to a moratorium in which creditors would be paid over the next 3½ years; a large stockholder loaned an additional \$3 million on a long term basis and agreed to a cessation of payments on previously existing loans until moratorium creditors had been paid. A number of management and operational changes have been instituted in an attempt to improve results.³⁴

The President of Briggs in a press release announced that *Briggs had lost substantially more than \$6,358,332 for the fiscal year ended December 31, 1966.* The loss was attributed to the building decline and included significant adjustments in inventory, receivables, equipment and substantial write-downs related to the disposition of idle plants and extraneous businesses sold. He said that operations in the first half of 1967 continued to be unprofitable.³⁵ Subsequently a Dun & Bradstreet notice dated September 21, 1967 stated that *final audited results for the year ended December 31, 1966, indicated a loss of \$10,957,981.*³⁶

Conclusion

Due to the changes in management in Briggs, its financial situation and the decision for treble damages to non-favored customers against Fowler, it is the opinion of this Bureau that the public interest will be fully safeguarded by accepting proposed respondents' assurances of discontinuance. Since Fowler, the subsidiary, which has engaged in the transactions questioned in this investigation, indicated in the assurance of voluntary compliance that it agrees to an examination of its books and records upon request to determine the extent of compliance with the assurance, and the assurance provides merely verbal assurances, it is recommended that a spot check investigation of proposed respondents be conducted within a period of one year from the date of the acceptance of the assurance of compliance if it is accepted by the Commission.

Delay in processing this matter was due to the reassignment, transfer and engagement in the trial and consideration of other matters by attorneys who had been assigned to this case.

Recommendation

It is accordingly recommended that proposed respondents offer of voluntary compliance be accepted on a non-adjudicatory basis pursuant to Rule 2.21 of the Commission's General Procedures and Rules of Practice, without prejudice to the right of the Commission to reopen same at some future date should circumstances so warrant and that this file remain closed. It is further recommended that closing letters be sent to proposed respondents, but in view of the length of time, it is recommended that no closing letter be sent to applicant.

It also is recommended that a spot check be undertaken within one year from the date of acceptance of assurance of compliance to determine whether or not

³² Letter dated June 13, 1967 submitting assurance of voluntary compliance.

³³ D & B Report July 27, 1967 (PGF).

³⁴ D & B Report August 14, 1967 (PGF).

³⁵ D & B Report August 14, 1967 (PGF).

³⁶ D & B Report September 21, 1967 (PGF).

proposed respondent has in fact discontinued engaging in discriminatory practices in the sale of electric hot water heaters.

Respectfully submitted,

IDA I. KLOZE,
Trial Attorney.

Approved January 25, 1968.

FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.

CECIL G. MILES,
Acting Director, Bureau of Restraint of Trade.

KOENIGSBERG, BROWN & SINSHEIMER,
ATTORNEYS AT LAW,
Seattle, Wash., July 19, 1967.

Re File No. 601-0030

FEDERAL TRADE COMMISSION,
Washington, D.C.

Attention: Lewis F. Depro, Trial Attorney, Division of Discriminatory Practices

GENTLEMEN: The undersigned is writing as counsel for Fowler Manufacturing Company, of Portland, Oregon.

We enclose form of voluntary assurance letter on behalf of our client, executed both by Carl J. Strutz, as President of Fowler Manufacturing, an Oregon corporation, and by S. A. Spencer, President of Briggs Manufacturing Company. This dual form of execution is in conformance with the suggestions and requests stated in your correspondence of May 17, 1967.

Thank you for your many courtesies extended to our client by way of definition as to the purpose of your inquiry, and the rationale supporting your request that voluntary assurance be executed by a responsible officer of Briggs Manufacturing.

Yours very truly,

W. JOHN SINSHEIMER.

Enclosure.

FOWLER MANUFACTURING COMPANY,
Portland, Ore. June 13, 1967.

Re Voluntary assurance on behalf of Fowler Manufacturing Company

Mr. LEWIS F. DEPRO

*Trial Attorney, Division of Discriminatory Practices, Federal Trade Commission,
Washington, D.C.*

GENTLEMEN: This is to state that I, Carl J. Strutz, am the President and General Manager of the Fowler Manufacturing Company (referred to hereinafter as "Fowler"), an Oregon corporation and a wholly-owned subsidiary of Briggs Mfg. Co., a Michigan corporation.

Briggs' address is: 6600 East 15 Mile Road, Warren, Michigan: and, Fowler's address is: 2545 S. E. Gladstone Street (P.O. Box 42038), Portland, Oregon.

Briggs acquired all of the stock of the Fowler Manufacturing Company on October 19, 1965, and Republic-Transcon Industries, Inc., a former Michigan corporation and former parent of Fowler, was dissolved on December 31, 1965.

Fowler is and has been for many years a manufacturer of electric water heaters. It sells this product, as well as gas water heaters procured from other divisions of Briggs, principally in the northwestern United States. Fowler's only office, and manufacturing facility, is located in Portland, Oregon.

This letter is submitted, pursuant to Section 1.21 of the Federal Trade Commission's Rules of Practice, as assurance of voluntary compliance. It is understood that the Commission is in no way bound hereby as to its action in this matter.

In the course of its business, Fowler Manufacturing Company has sold, at various times and at different prices, electric water heaters of like grade and quality to wholesaler customers in Seattle, Washington, during the period January 1, 1964 through approximately November 15, 1964. These customers were in competition with each other in the re-sale of electric water heaters, and the Federal Trade Commission personnel has pointed out that such price differentials may be in violation to Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

The purpose of this communication is to assure the Federal Trade Commission that the Fowler Manufacturing Company does not intend to, nor will it, sell at price differentials, unless such differentials reflect a savings in cost in the manufacture, sale or delivery of the product in question to the said customer, meeting of a competitive price, or sales resulting from changed conditions affecting the market for, or the marketability of the product, such as a deterioration or obsolescence.

Further, the Fowler Manufacturing Company will not grant any price differentials which lessen competition in the re-sale of such product.

Fowler agrees to allow an examination of its books and records, upon request, to determine the extent of compliance with the foregoing assurance.

This statement is for settlement purposes only, and does not constitute admission that the questioned acts or practices were unlawful. It is understood that if accepted by the Commission, this assurance may be placed on the public record, and may be given such additional publicity as the Commission considers appropriate.

Briggs Manufacturing Company, as the 100% parent of Fowler, joins in this letter of assurance of voluntary compliance insofar as the sale and distribution of electric water heaters by Fowler is concerned, by agreeing that such products will not be sold at price differentials unless justified as provided by the amended Clayton Act, and that such assurances will extend to any successor company of Fowler, providing Briggs owns controlling stock interest in such successor company, to cover the business now being conducted under the name of Fowler, although it may be subsequently continued under some other name.

Very truly yours,

FOWLER MANUFACTURING COMPANY,
CARL J. STRUTZ,
President and General Manager.
BRIGGS MANUFACTURING COMPANY,
By S. A. SPENCER.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re Republic Appliance Corp., now Briggs Manufacturing Co., File No. 601 0030.

Mr. SASH A. SPENCER,
*President, Briggs Manufacturing Co.,
Warren, Mich.*

DEAR MR. SPENCER: The Commission has conducted an investigation involving your company's alleged violation of Section 2(a) of the amended Clayton Act, and Section 5 of the Federal Trade Commission Act, through alleged unlawful pricing practices in connection with the sales of electric hot water heaters.

On the basis of the assurances in your letter dated June 13, 1967, that the practices which were under investigation have been discontinued, the matter has been closed pursuant to Section 2.21 of the Commission's Procedures and Rules of Practice, dealing with voluntary compliance. The Commission may at any time take such further action as the public interest may require.

Sincerely,

JOSEPH W. SHEA,
Secretary and Congressional Liaison Officer.

AUGUST 22, 1968.

Re New York American Beverage Co., File No. 671 0159.

From : James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director; Bureau of Field Operations.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached memorandum.

MEMORANDUM

AUGUST 22, 1968.

To: Commission.

From: James M. Nicholson.

Subject: New York American Beverage Co., File No. 671 0159.

The respondent here sells its soft drinks solely to retailers located within the State of New York, some of which apparently received promotional and other assistance while others did not. Respondent also sells the extract and certain beverages to Royal Crown, an independent bottler in New Jersey and the extract only to Little Rock Spring Water Co., an independent bottler in Connecticut. Both of these bottlers resell to retailers in their states and the evidence establishes that both are truly independent franchisees and that no indirect customer relationship exists between their retailer customers and respondent. Therefore, the staff concludes that the alleged discriminations between retailers do not come under Sections 2 (a) and (d) of the Clayton Act, as amended.

I concur. Further, while the staff did not inquire into the question of injury to competition due to the jurisdictional aspects, it does not appear that the *Fred Meyer* doctrine would have application to this situation as it is not likely that competition exists between the retailers located in New York and those located in New Jersey and Connecticut. Were it otherwise, a very intriguing application of the *Fred Meyer* principle would be involved to establish jurisdiction where none existed before. I do not, however, think the existence of competition among these retailers in the sale of soft drinks is sufficiently probable to warrant further investigation along those lines.

I therefore move approval of the staff recommendation that this matter be closed and that no closing letters be sent.

MEMORANDUM

JULY 23, 1968.

To: Commission.

From: Austin H. Forkner, Attorney, Division of Discriminatory Practices.
Bureau of Restraint of Trade.

Subject: File No. 671 0159, New York American Beverage Co.

Closing Recommended: Insufficient evidence of Jurisdiction.*Charge:* Sections 2 (a) and (d) of the Clayton Act, as amended.*Commodity:* Soft drink beverages.

Application for complaint in this matter was forwarded to the Commission by Richard A. Dice, Esq., of Cheshire, Connecticut on July 27, 1966 on behalf of his client, Cott Corporation, against whom a Consent Order had been entered by the Commission on March 23, 1966 (Docket No. C-1052) under Section 2(d) of the Clayton Act, as amended. The applicant alleged that the proposed respondent was engaging in discriminatory pricing and allowance practices in the "New York market" (PGF, p. 1).

Since the proposed respondent herein and White Rock Corporation, against whom Cott Corporation was also the applicant in a related matter (File No. 671 0171), were located in New York City, the memorandum of this office of January 19, 1967 directed that the jurisdictional question of interstate commerce be investigated thoroughly at the beginning of the instant investigation before developing facts on primary or secondary injury or reduced sales volume.

The proposed respondent, through its wholly owned subsidiary, SCE Beverage Corporation, acquired the Hoffman Beverage Company on June 3, 1966 after the latter had been adjudicated bankrupt by the United States District Court for the Eastern District of New York. The applicant claimed that the discriminatory practices with respect to Hoffman brand beverages were being continued by the proposed respondent. In addition to Hoffman Beverages, the proposed respondent also bottled and/or sold other soft drink beverages under various franchise agreements (TBF, pp. 8-9).

The attorney in charge of this investigation reports (pp. 3, 4) that there was no indication by any of his informants that the New York American Beverage Co., Inc. and its New Jersey franchisee were anything other than distinct and separate operations (both of the above allegations to the contrary, notwithstanding). The specifics relating to the said franchise arrangements are contained in proposed respondent's prospectus, dated Feb. 2, 1967 (TBF, p. 14) and the Hoffman License and Franchise (New Jersey territory) (TBF, pp. 151-158).

For example, the headquarters buyer, John P. Wallace, of the Great Atlantic & Pacific Tea Co., Inc. explained the procedure on all promotions of Hoffman beverages (TBF 51, 52) which was the same for all suppliers. The supplier was required to obtain approval from him to have the product or promotion authorized throughout the A&P chain. After such approval, the suppliers' salesmen directly contacted the individual A&P store managers in order to solicit orders.

In the case of Hoffman beverages the distribution was divided so that the New York American Beverage Company sold, promoted and delivered Hoffman in New York City and the Royal Crown Beverage Company of Newark, Inc. sold, promoted and delivered Hoffman in New Jersey. According to informant Wallace, both New York American and Royal Crown wrote to him separately with respect to their respective promotional offers. Letters in the file confirm these separate offerings (TBF, 53-67). Each company billed A&P separately. Several other interviews with other buyers conducted by the Attorney-Examiner confirm the same general procedure (TBF, 68-81).

Although the instant investigation did not reach the point of determining the existence of discrimination or injury, proposed respondent's officials admitted that their method of notifying retail customers within the New York market area of the availability of various promotions may have been such that the actual language used and the exact dates of notification were not identical for all.

However, proposed respondent's president and attorney maintained that after the instant matter was brought to their attention, a thorough examination of the procedures for implementing promotions was made and that as a result certain steps were taken, such as the use of a form letter of notification, in order to insure that all retailers would be advised of the availability of proposed respondent's promotions at the same time (TBF, pp. 83-85, 108). Proposed respondent's attorney offered a voluntary letter of assurance to the above effect, submitted by proposed respondent's president (TBF, pp. 159-160).

The investigation shows that the only retailer customers to whom respondent made direct sales of its Hoffman brand beverages were located within the state of New York, and therefore the transactions complained of on the part of proposed respondent were not actually in interstate commerce. Thus, the alleged discriminations between retailers do not come under Sections 2 (a) and (d) of the Clayton Act, as amended. (See *Coca Cola Bottling Co. of New York, Inc.*, Docket 6594, 54 FTC 1092 (1958).)

Furthermore, the files show no evidence of either the exercise of such control by proposed respondent over its New Jersey and/or Connecticut bottlers of a sufficient nexus between the proposed respondent and the bottlers' retail customers to warrant a conclusion that said retail customers were the indirect customers of proposed respondent (See *Kraft-Phenix Cheese Corp.*, Docket 2935 (1937); *Frank G. Shattuck Co.*, Docket 7743 (1964)).

The attorney who investigated this matter concluded that the subject matter of the instant application for complaint was not within the jurisdiction of the Federal Trade Commission because of the lack of the requisite transactions in interstate commerce. This office agrees with that conclusion.

In view of the foregoing, it is recommended that the matter be closed without prejudice to the right of the Commission to reopen if and when warranted by the facts.

Suggested closing letters to the applicant and the proposed respondent are not required under Section 6-051.14E, Subsection (4) of the Administrative Manual because of a lack of jurisdiction. Further, the applicant has not made any further inquiries to the Commission since the original complaint was filed.

Respectfully submitted,

AUSTIN H. FORKNER,
Attorney, Division of Discriminatory Practices.
FRANCIS C. MAYER,
Chief, Division of Discriminatory Practices.
WILMER L. TINLEY,
Assistant Director, Bureau of Restraint of Trade.
CECIL G. MILES,
Director, Bureau of Restraint of Trade.

SEPTEMBER 12, 1968.

Re Gross Auto Electric, Inc. (Advisory Opinion) File No. 693 7024.

From : James N. Nicholson.

To : Commissioner Dixon, Secretary J. Kuzew, General Counsel, Program Review Officer; Bureau of Economics; Bureau of Restraint of Trade; Bureau of Deceptive Practices; Bureau of Industry Guidance; Bureau of Textiles and Furs; Executive Director; Assistant Executive Director.

I move that this be treated as a non-agenda matter, and that the staff recommendation, in which I concur, be approved.

See attached Memorandum.

MEMORANDUM

SEPTEMBER 12, 1968.

To : Commission.

From : James M. Nicholson.

Subject : Gross Auto Electric, Inc., File 693 7024.

Simply stated, the question posed by this advisory opinion request is whether an automotive parts rebuilder can legally himself pick up used cores from the jobber customers of his warehouse distributors when that function is allegedly normally performed by the distributors. The staff concludes that he can, but that this would be the rendering of a service in connection with the processing, handling or sale of a commodity and hence must, under Section 2(d) be made available to all competing distributors on proportionally equal terms. The staff further concludes that because of the factual uncertainties surrounding the exact relationship between the parties, it cannot tell for certain whether the service is in fact performed for the distributor or the jobber and, if the latter, it must be made available to all competing jobbers.

While I have no quarrel with the views and conclusions expressed by the staff, insofar as they go, I am not convinced that this inquiry has yet reached a stage where it is ripe for an opinion. As the staff notes, there are several unresolved questions and the rebuilder requesting the opinion has been unaccountably vague in his responses thereto. Who better than he should know the answers to these questions, the absence of which has led the staff to prepare an opinion which is itself somewhat vague as to how the Commission would view the situation. Further, the rebuilder has not himself submitted a detailed outline of the proposal he intends to adopt beyond the submission of a communication to jobbers from a distributor which contains references to the fact that a competing rebuilder will pick up used cores from the jobbers. All we know at this stage is that the rebuilder will pick up cores if the Commission does not regard the practice as illegal.

I think we will need to know not only the answers to the questions discussed by the staff, but also more about the nature of the rebuilder's present practices with respect to used cores and more about the program he intends to put into effect concerning which he desires an opinion. I move the matter be returned to the staff for further development along these lines.

MEMORANDUM

AUGUST 19, 1968.

To : Commission.

From : Paul A. Jamarik, Attorney-Adviser, Division of Advisory Opinions, Bureau of Industry Guidance.

Subject : File No. 693 7024, Gross Auto Electric, Inc., Pinconning, Mich.

Request for Advisory Opinion re Legality of Manufacturer Picking Up Old Cores from the Jobber, a Function Allegedly Performed by the Warehouse Distributor.

Statute : Section 2(e) of the amended Clayton Act.

Recommendation : Practice be approved if it otherwise meets the requirements of Section 2(e).

The above-named company is a rebuilder of generators, starters and alternators for use in the automotive replacement market. With annual sales approximating \$100,000, its principal marketing area is in the State of Michigan with a very small percentage of sales being made in Indiana and Ohio.

The rebuilding and sales of the three aforementioned automotive replacement parts involves the exchange of the old unit being replaced, which is referred to as the "old core." This enables the rebuilder to reuse various parts, primarily the casing, in the rebuilding process. This means, of course, that the old cores must be transported from the jobber back to the manufacturer and this function, we are advised, is normally performed by the warehouse distributor. It is this transportation of the old cores from the jobber to the manufacturer which prompted this request for an advisory opinion.

According to the requesting party, it is the warehouse distributor's job to transport the old cores from the jobber to the manufacturer. But at least one warehouse distributor (Michigan Parts Warehouse, 402 East Carroll, South Bend, Indiana) is having the manufacturer (Automotive Armature Co., Inc., of Mooresville, Indiana) perform this function. It is the requesting party's position that this function should be performed by the warehouse distributor, and that the rebuilder in this case (Automotive Armature Co., Inc.) is performing this function as a wedge to gain new customers. Without citing the reasons, the requesting party contends that such a practice is illegal and would like to see it stopped. On the other hand, if the practice is legal the requesting party would like to be so advised because it contemplates engaging in the same practice for competitive reasons.

If the problem is as clear as indicated above, i.e., the pick-up service is in fact actually performed by the warehouse distributor and the rebuilder merely acts as a substitute for the warehouse distributor in picking up the old cores from the jobber, there would be little doubt about the answer to the problem. Under these circumstances, the proposed practice would be lawful as long as it is performed in accordance with the requirements of Section 2(e) of the amended Clayton Act. This provision of the law makes it unlawful for a supplier to furnish services connected with the processing, handling, or sale of a commodity to one purchaser upon terms not accorded to all competing purchasers on proportionally equal terms. Although we have not been able to locate any specific precedent on the point, it is our belief that the transportation of such worn and defective automotive parts by the manufacturer would constitute a service connected with the processing, handling and sale of such products, as contemplated within the purview of Section 2(e). The transportation of such products from the jobber to the manufacturer is a service which is normally performed by the warehouse distributor and is an essential factor in the automotive replacement market relating to the sale of rebuilt parts. Therefore, even though the manufacturer elects to transport the defective parts from the jobber to his own factory for rebuilding, it is still a service nonetheless which is connected with the processing and sale of automotive parts and any service performed in this regard by the manufacturer must therefore comply with the requirements of Section 2(e).

While not specifically in point, nevertheless we believe that the consent order in Docket C-226, *Diaperwhite, Inc., et al* (1962), may provide some helpful guidance in connection with this matter. In that case, respondents were charged with violating Section 2(e) because they furnished a sample of a cleaning compound "without charge and with freight pre-paid" to some customers and the offer was not made available on proportionally equal terms to all competing customers. Thus we believe it is clear that the case involved two factors, namely, the furnishing of a free sample and the payment of freight costs incurred in the delivery of the free sample. Based upon the above-quoted language, which is taken from paragraph nine of the complaint, we think it is reasonably clear that the Commission intended to treat the payment of the freight costs of the free samples as a service within the scope of Section 2(e). Under these circumstances, therefore, we conclude that the manufacturer who picks up old cores from jobbers and transports them back to his factory for rebuilding is performing a lawful service for his warehouse distributor, provided he accords the service on proportionally equal terms to all of his competing warehouse distributors.

But neither the problem nor the solution is quite as simple as has been indicated because there are a number of unanswered questions with respect to our understanding of the real relationship which exists between the rebuilder, the warehouse distributor and the jobber. Some of the unanswered questions that we have not been able to resolve in a telephone conversation with the requesting party are: Does the rebuilder or the warehouse distributor grant the credit for the old cores? Does the rebuilder place a limitation on the number of old cores which may be returned? Does the rebuilder require a copy of the jobbers' invoices?

In addition to the unanswered questions, the requesting party submitted the "return" plan of a warehouse distributor (Michiana Parts Warehouse) which can be interpreted as offering its jobber customers the option of:

(1) Allowing the rebuilder to pick up old cores without qualification; and

(2) Permitting the jobbers to return the old cores to the warehouse distributor, subject to various specified conditions.

These provisions of the "return" plan, coupled with the unanswered questions outlined in the preceding paragraph, merely serve to emphasize the point that the exact relationship between the parties has not been clearly delineated.

In the absence of a precise understanding of the factual relationship that exists between the parties, which the requesting party has not been able to clarify for us we believe there is a very real possibility that the rebuilder may in fact be performing the service for the jobber, rather than for the warehouse distributor, within the principle enunciated by the Supreme Court in *FTC v. Fred Meyer, Inc., et al.*, Docket 7492, March 18, 1968. If such is the case, and we believe it is a possibility which must be guarded against in this particular situation, we have added a caveat to the advisory opinion to cover the problem. In short, we have added a phrase which requires the rebuilder to offer the pick-up service to all competing jobber customers of his warehouse distributor on proportionally equal terms, if the rebuilder performs this service for one of his customer jobbers.

RECOMMENDATION

Accordingly, it is recommended that the Commission give its approval to the practice in question, provided it otherwise complies with the requirements of Section 2(e) of the amended Clayton Act. A letter to this effect prepared for the Secretary's signature is attached hereto.

Respectfully submitted,

PAUL A. JAMARIK,
*Attorney-Adviser, Division of Advisory Opinions,
Bureau of Industry Guidance.*

AUGUST 16, 1968.

Approved.

HUGH B. HELM,
*Chief, Division of Advisory Opinions,
Bureau of Industry Guidance.*

AUGUST 16, 1968.

CHALMERS B. YARLEY,
Director, Bureau of Industry Guidance.

AUGUST 16, 1968.

Concurrence.

PETER J. DIAS,
*(For Francis C. Mayer, Chief, Division of Discriminatory Practices, Bureau
of Restraint of Trade.)*

AUGUST 16, 1968.

Digest approved for publication.

WILLIAM F. JIBB,
Director, Office of Information.

ADVISORY OPINION DIGEST No. —

PERFORMING PICK-UP SERVICES FOR WAREHOUSE DISTRIBUTOR

The Commission announced today it had rendered an advisory opinion to a manufacturer of rebuilt automotive replacement parts concerning the legality of certain pick-up services which the manufacturer intends to perform and which are allegedly performed by the warehouse distributor.

Specifically, the question was raised as to the permissibility of the manufacturer picking up and hauling old cores from the jobber customers of the warehouse distributor back to the manufacturer's plant.

In the opinion which was rendered, the Commission ruled that the practice in question would be lawful, provided it is a service which the rebuilder renders for the warehouse distributor and not for the jobber. Stating that the practice in question must comply with the requirements of Section 2(e) of the amended Clayton Act, the Commission said:

"This provision of the law makes it unlawful for a supplier to furnish services connected with the processing, handling, sale or offering for sale of a commodity to one purchaser upon terms not accorded to all competing purchasers on proportionally equal terms. The transportation of such worn and defective parts by the manufacturer would constitute a service connected with the processing, handling and sale of rebuilt automotive products, as contemplated within the purview of Section 2(e). Under these circumstances, therefore, the Commission is of the opinion that the manufacturer who picks up old cores from jobbers and transports them back to his factory for rebuilding is performing a lawful service for his warehouse distributor, as long as he makes the service available on proportionally equal terms to all of his competing warehouse distributors."

On the basis of the facts presented, it was not absolutely clear to the Commission as to whether the service is one which is in fact performed for the warehouse distributor or the jobber. Because of this uncertainty, the opinion contained the following caveat:

"If, because of the relationship which exists between the parties, the service is one which the rebuilder in fact performs for one jobber, then the law requires the rebuilder to offer the service to all competing jobbers on proportionally equal terms."

Note: In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

GROSS AUTO ELECTRIC, INC.,
Pinconning, Mich., July 18, 1968.

FEDERAL TRADE COMMISSION,
Washington, D.C.

DEAR SIR: I would like to have your ruling pertaining to selling to a warehouse distributor and yet the manufacturer do all of the work or part of the work for the warehouse distributor. An example of this is selling to the warehouse distributor and then sending the factory's own truck around to pick up the old cores.

We sell to some warehouse distributors and have been approached on this same program, but we have always contended that it has been against the fair trade practice to do this, and we have never done it.

Enclosed you will find a policy of the program set up by Automotive Armature Company, Incorporated of Mooresville, Indiana who is doing this. If it is illegal, I would like to see it stopped immediately. If it is not illegal, please write me and let me know.

Yours very truly,

CARLTON A. GROSS, *President.*

Enclosure.

MICHIANA PARTS WAREHOUSE

SOUTH BEND, IND.

To: All Jobbers.

Subject: Stock Adjustments, Defectives and Core Returns.

We want to process your returns, both new stock and cores, as quickly as possible. To do this we need your assistance. By following the requirements outlined below you will enable us to process your returns quickly and accurately.

NEW STOCK

A jobber who buys from us and follows our inventory suggestions will never lose money on slow moving or obsolete merchandise. To insure this, a designated month has been established for the return of each line, as shown on the enclosed schedule. During this month, we will accept for full credit, merchandise our customers wish to return—provided the return is written up on our invoice, prior authorization is given and an offsetting order is received at the time of the return. If a jobber is buying from several sources, we will accept a return of up to 3% of his past year's purchases on a no-handling charge basis. All other stock returns will be subject to a handling charge. (This policy does not apply to "changeover" merchandise. Changeover policies will be covered in writing, on an individual basis at the time the changeover is made.)

DEFECTIVES

Defectives may be returned to the warehouse at any time. No prior authorization is required, but we must be furnished a copy of the jobbers invoice listing the defective items, and all defectives must be tagged or boxed so as to be easily identified by part number. In the case of batteries, they must be tagged with the jobber's name and accompanied by the manufacturers warranty form. Merchandise which is to be repaired and returned, such as equipment, must be tagged with the jobber's name.

CORES

We will accept cores for credit by line up to the amount purchased from us during the prior twelve-month period. No credit will be given for excess cores returned to us. Please keep in mind that stock adjustments directly affect the amount of cores eligible for return.

In general, all core returns must be accompanied by a copy of the jobbers invoice listing the core by part number of value. Specific core return requirements are shown on the attached page. We will attempt to process all core returns made by the 20th of the month so that they appear on the month's statement—core returns received after the 20th of the month will appear on the next month's statement.

Automotive armature

Cores will be picked up at least once a month by the factory and should not be returned to the warehouse. It isn't necessary to identify them in any way. (When defectives are returned to the factory, they should be plainly marked.)

Accurate

Customers handling Automotive Armature should return their Accurate cores to the factory as designated above. If Accurate cores are returned to the warehouse, they must be tagged or boxed and listed by value.

Airtec

It isn't necessary for these cores to be identified by the jobber.

Detroit

Cores must be tagged or boxed so they are easily identified by part number.

Delco carburetor

Cores must be tagged or boxed so they are easily identified by part number.

Ennis

Cores must be tagged or boxed so they are easily identified by part number.

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C.

Re File No. 693 7024.

Mr. CARLTON A. GROSS,
President, Gross Auto Electric, Inc.,
Pinconning, Mich.

DEAR MR. GROSS: This reply is in response to your letter of July 18, 1968, requesting an advisory opinion as to whether it would be permissible for a manufacturer of rebuilt automotive replacement parts to pick up and haul old cores from the jobber back to the manufacturer's plant. It is alleged that this service is normally performed by the manufacturer's warehouse distributor.

The Commission has given careful consideration to your request and it has concluded that the proposed practice in question is lawful, provided it is a service which the rebuilder renders for the warehouse distributor and not for the jobber. Basically, the practice in question must comply with the requirements of Section 2(e) of the amended Clayton Act. This provision of the law makes it unlawful for a supplier to furnish services connected with the processing, handling, sale or offering for sale of a commodity to one purchaser upon terms not accorded to all competing purchasers on proportionally equal terms. The transportation of such worn and defective automotive parts by the manufacturer

would constitute a service connected with the processing, handling and sale of rebuilt automotive products, as contemplated within the purview of Section 2(e). Under these circumstances, therefore, the Commission is of the opinion that the manufacturer who picks up old cores from jobbers and transports them back to his factory for rebuilding is performing a lawful service for his warehouse distributor, as long as he makes the service available on proportionally equal terms to all of his competing warehouse distributors.

It is not absolutely clear to the Commission as to whether the service is one which is in fact performed for the warehouse distributor or the jobber. If, because of the relationship which exists between the parties, the service is one which the rebuilder in fact performs for one jobber, then the law requires the rebuilder to offer the service to all competing jobbers on proportionally equal terms.

By direction of the Commission.

JOSEPH W. SHEA, *Secretary*.

SEPTEMBER 8, 1969.

Re An Evaluation of the Effects of the Orders Issued Under the Robinson-Patman Act.

FOR INFORMATION ONLY

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs; Executive Director; Assistant Executive Director; Division of Compliance.

Since I first joined the Commission I have been interested in the efforts of younger staff people to shake Commission complacency and some of our more parochial attitudes. Accordingly, when my office recently learned that two attorneys in the Compliance Division have been preparing an evaluation of the effects of Commission orders issued under the Robinson-Patman Act, my office requested and was given a copy. This report by Robert Field and Henry Banta is extremely stimulating and provocative. These attorneys should be commended for their imaginative and scholarly work which contains much food for thought. A copy is attached.

MEMORANDUM

To: Director, Bureau of Restraint of Trade.

From: H. Robert Field, Henry M. Banta, Attorneys, Compliance Division, Bureau of Restraint of Trade.

Subject: An Evaluation of the Effects of the Orders Issued Under the Robinson-Patman Act.

INTRODUCTION AND SUMMARY OF CONCLUSIONS

It is our purpose here to make some beginning toward an effort to evaluate the effect of some one thousand Robinson-Patman Act orders issued by the Commission over the past thirty-three (33) years. At the outset however we feel it important to affirm our commitment to the basic purpose of this as of our other antitrust statutes. We believe monopoly to be an unmitigated social, political and economic evil and consider its prevention and elimination to be required by any decent concept of a just society. But commitment to the principles is not necessarily commitment to all that is done in its name; great principles, honored with lip service and supported with ineffective measures, breed a singularly destructive cynicism. It is not the justness of the fight we are about to consider, but the choice of weapons.

We conclude: (1) That there is no satisfactory evidence that price discrimination is significantly related to the general phenomena of concentration in American industries; (2) that there is no persuasive evidence that the Commission's enforcement of the Robinson-Patman Price Discrimination Act has had any significant affect on either the structure, conduct or performance of any important American industry; (3) that, given the severe budget limitations faced by the Commission and the very high yields associated with enforce-

ment in such other areas as mergers, price fixing, and deconcentration proceedings, it would probably be unproductive to attempt a rational defense of the Commission's present commitment of perhaps as much as 50% of its total antitrust resources to price discrimination work (including that done in the Division of General Trade Restraints); and (4) that price discrimination, being a creature of monopoly power, should be treated as such and subjected, in the appropriate case, to the traditional remedy of dissolution and divestiture.

SCOPE OF STUDY

In the first part of this paper we attempt to set out a reasonably comprehensive theory of price discrimination, none of which of course purports to be original. It is, rather, nothing more than a restatement of conventional price theory and the findings of established scholars in the field.¹ Its undertaking was necessary, however, because we were unable to find any single work which treated the problem of price discrimination in all of its several aspects. The conclusion of this section attempts to draw from this theoretical framework principles which, when checked against all of the empirical data available, will provide a fairly sound basis for evaluating the Act's enforcement.²

The second part of this paper examines the actual pattern of the Act's enforcement: how each subsection has been used, and in which industries enforcement resources have been concentrated.

Part three discusses some of the legal and administrative problems arising in the post-order phase of enforcement.

In our final section we set out our conclusions.

Through this paper we shall deal only with the effect of orders actually issued by the Commission. We do not have, nor do we believe anyone else has, the information necessary to measure how business conduct has been affected by the mere *existence* of the statute.³ Nor can we assess the impact of the various decisions, orders, and investigations on those who were not actually placed under order.

Additionally we have made no attempt to evaluate the case selection process. We have not considered whether the cases resulting in orders having represented an optimum allocation of enforcement resources.

¹ In case it should be thought that this has prejudiced our conclusions, we have consistently relied on economists who have established reputations as antitrusters in the classic sense and have scrupulously avoided reliance on those whose hostility to the competitive ideal might render their work suspect. In short, we believe what is reflected here is the judgment of the friends of antitrust, not its enemies.

² If there is any doubt that such a technical analysis is necessary, we suggest that certain observations of Professor Jay W. Forrester of The Massachusetts Institute of Technology are highly pertinent here. Professor Forrester notes that the problems of all "complex systems" (and certainly the price system is complex by any definition), are quite beyond solutions suggested by simply "common sense." His language is unfortunately that of the mathematician and systems analyst, but his point is quite clear:

"From all normal personal experience one learns that cause and effect are closely related in time and space. A difficulty or failure of the simple system is observed at once. This cause is obvious and immediately precedes the consequence. But in complex systems (e.g., economic processes) all of these facts become fallacies. Cause and effect are not closely related either in time or in space. Causes of a symptom may actually lie in some far distant sector of a social system. Furthermore, symptoms may appear long after the primary causes.

"But the complex system is far more devious and diabolical than merely being different from the simple systems with which we have experience. Although it is truly different, it appears to be the same. The complex system presents an apparent cause that is close in time and space to the observed symptoms. But the relationship is usually not one of cause and effect. Instead both are coincident systems arising from the dynamics of the system structure. Almost all variables in a complex system are highly correlated, but time correlation means little in distinguishing cause from effect. Much statistical and correlation analysis is futilely pursuing this will-o'-the-wisp.

"In a situation where coincident symptoms appear to be causes, a person acts to dispel the symptoms. But the underlying causes remain. The treatment is either ineffective or actually detrimental. *With a high degree of confidence we can say that the intuitive solutions to the problems of complex social systems will be wrong most of the time.* Here lies much of the explanation for the problems of faltering companies, disappointments in developing nations, foreign-exchange crises, and troubles of urban areas." *Urban Dynamics* (1969), pp. 107, 1109-1110 (emphasis added).

³ Packer, *State of Research in Antitrust Law* (1963), pp. 118-119.

Before we begin we wish to make quite clear that our basic approach is wholly "structural" in orientation. We are not concerned with the ethics or morality of price discrimination. And even less are we concerned with the goodness or badness of the businessmen who engage in it. We are interested solely in the structural causes of discriminatory conduct and the structural effects. Robert L. Heilbroner has rather succinctly summed up this point:

"Monopoly (and nowadays oligopoly) are bad words to most people, just as competition is a good word. But with the one as with the other, not everyone can specify exactly what is bad about them. Often we get the impression that the aims of the monopolist are evil and grasping, while those of the competitor are wholesome and altruistic, and therefore the essential difference between a world of pure competition and one of very impure competition is one of motives and drives—of well-meaning competitors and ill-intentioned monopolists.

"The truth is that *exactly the same motives drive the monopoly and the competitive firm*. Both seek to maximize their profits. Indeed, the competitive firm, placed in a situation in which it must keep careful track of costs and revenues in order to survive is apt to be, if anything, *more* penny-pinching and more intensely profit-oriented than the monopolist who (as we shall see) can afford to take a less hungry attitude toward profits. The lesson to be learned—and it is an important one—is that motives have nothing to do with the problem of less-than-pure competition. *The difference between a monopoly, and oligopoly, and a situation of pure competition is entirely one of market structure*—that is, of the number of firms, ease of entry or exit, and the degree of differentiation among their goods."⁴ (Emphasis in original.)

PART I

CRITERIA FOR EVALUATION

The basic question, one that must of course precede any evaluation of Robinson-Patman Act enforcement, is what kind of price discrimination injures competition. For purposes of this discussion, we define injury to competition to mean *any effect which makes the structure of the market less competitive in character*, i.e., that either (1) raises the concentration ratio, (2) raises the barriers to entry, or (3) increase the degree of product differentiation.⁵ Needless to say, in this section we will only be referring to economic price discrimination.⁶

A. TYPES OF PRICE DISCRIMINATION

All price discrimination can be classified into one of three types: profit maximizing, promotional, and collusive.

Profit maximizing price discrimination is used by a seller to maximize his profit within the framework of the existing demand for his product. Essentially, the seller divides his market into two or more submarkets, each with different demand curves.⁷ The revenue resulting from charging different profit maximiz-

⁴ Heilbroner, *Understanding Microeconomics* (1968), p. 107.

⁵ Bain, *Industrial Organization* (1959), pp. 7-9.

⁶ "[Economic] price discrimination occurs whenever goods are sold at prices which differ from each other by more than long-run average costs." (Kaysen and Turner, *Antitrust Policy* (1959), p. 179). We do not consider the kind of economic discrimination that results when the seller has lower costs in supplying one customer than another, yet charges both the same price.

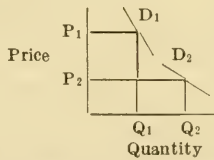
⁷ Those who are familiar with Pigou's classification of price discrimination will recognize that our profit maximizing discrimination closely approximates his "third degree" discrimination. A. C. Pigou, *The Economics of Welfare* (1920) Chap. XVII. The difference is that third degree discrimination requires the seller to have a monopoly. (We have not discussed first or second degree discrimination primarily because there seems some question as to whether they exist in reality. See Whittaker *Price Discrimination Theory: A Correction Antitrust Law & Economics Rev.* 145 (1968). And it is extremely unlikely that any such thing could come within the range of the Robinson-Patman Act.)

ing prices in each of two submarkets is greater than the revenue that would have been realized from charging a single profit maximizing price in both of them.⁸

The requirements for this kind of price discrimination are fairly obvious. The seller must have some monopoly power, otherwise the *higher* price would be bid down by competing sellers.⁹ Secondly, the seller must be able to *separate* his total market into the relevant submarkets, i.e., to "segregate" buyers that have different elasticities of demand, to prevent his low-price buyers from reselling to his high-price customers in competition with him and thus beating down his price. This is of course not always possible; a "Good Humor" man, for example, might well be surrounded by kids willing to pay rather widely varying prices for pop-sicles but he would "discriminate" in this situation at his peril.

On the other hand, certain professionals—such as doctors and lawyers—regularly discriminate by charging one fee to wealthy people and another to the less affluent, quite apart from any consideration of "charity." In the case of medical services, for example, a poor man can hardly "resell" a doctor's treatment to a wealthy man. Nor do rich men become poor in order to obtain cheaper medical service. Should the "Good Humor" man attempt to discriminate, on the other hand, there would be nothing to prevent an enterprising kid from buying at the low price and competing with him for the "high price market," eventually (if not immediately) driving the price down to the lower level. To put it another way, this kind of discrimination requires something that keeps customers from moving from the high priced market to the low priced market, and something that keeps the goods bought in the low priced market from being resold in the high priced market in competition with those being sold by the discriminating seller.

⁸This can be illustrated graphically:



Here our supplier has divided his customers into two submarkets, each having a different demand curve (represented as D1 and D2). Each curve has a different "elasticity," i.e., the percentage reduction in volume of sales that would be induced by a 1-percent increase in price. It is generally expressed as:

$$e = \frac{\text{percentage change in quantity demanded}}{\text{percentage change in price}}$$

or

$$e = \frac{\frac{\Delta Q}{Q}}{\frac{-\Delta P}{P}}$$

(See Bain, *Price Theory* (1952), p. 40 ff.)

In our example, a price increase in submarket D1 would result in a much smaller reduction in quantity demanded than an equivalent reduction in submarket D2. Demand in submarket D1 is, therefore, relatively inelastic, and demand in D2 is relatively elastic. It is important to understand why this can be so. If we assume that all of our seller's customers are businesses which in turn resell goods, their demand is determined primarily by two factors, the availability of substitutes for the commodity and the proportion of the firm's income that is spent on the commodity. (Davisson and Ranlett, *An Introduction to Micro-economic Theory* (1956), pp. 58-59.) Since our submarkets D1 and D2 are all part of one overall market, we will assume that they both spend the same proportion of their income on our seller's product. Therefore the differences in their demand elasticities indicates that firms in D2 (presumably larger customers) have alternative sources of supply available to them that are not available to firms in submarket D1 (presumably smaller customers). These alternate sources of supply can include the larger firm's potential for backward integration, or their access to suppliers in other geographic areas.

This difference in the elasticities of demand enable the seller to increase his revenue by discriminating between the two submarkets at the price P1, a price that will maximize his price in that submarket and which results in quantity Q1 being sold. In the second submarket, the seller chooses price P2, one that results in his profit being maximized in that market.

The proof of why this discrimination will result in a higher profit than can be obtained by any single price is not difficult, nor is the description of how the seller goes about selecting his profit maximizing price in each submarket. They are, however, rather lengthy and since they are readily available in Bain (*Price Theory*, pp. 403-413), we shall not repeat them here.

⁹See Robinson, *Economics of Imperfect Competition* (1934) pp. 179-180, for a discussion of the kind of monopoly power required.

It is reasonable to expect profit maximizing discrimination to be a rather stable and long lasting phenomenon. The market characteristics which induce it and make it possible are not likely to change rapidly.

Perhaps the most significant examples of this kind of discrimination for public policy are volume or "quantity discounts." Either of these may represent efforts to maximize profits by discriminating between large customers with highly elastic demand and smaller customer whose demand is generally much less elastic.¹⁰

Promotional price discrimination is a marketing tactic designed to either expand or defend the seller's market share, as such. It serves the same purpose as other promotional devices such as advertising, special programs, price cutting, etc.¹¹ And it can of course include "predatory" price discrimination. The extent to which it can be employed would seem to be directly related to the monopoly power of the firm.

In general, we would expect promotional discrimination to be a relatively unstable and short term device. Unless some element of profit maximizing is present, the seller should either fairly quickly accomplish his promotional goal or find it unprofitable to continue.¹²

Various kinds of anticompetitive collusion can *incidentally* result in price discrimination. Basing point and delivery price systems are the usual examples. Since the collusion itself is the proper target for public policy here, it seems pointless to discuss the discriminatory side effects as if they had any separate significance.

B. EFFECTS OF PROFIT MAXIMIZING PRICE DISCRIMINATION

The possible injurious effects of profit maximizing price discrimination fall into three general categories: (1) reduction of the general welfare, (2) misallocation of resources, and (3) injury to competition.¹³ The first, reduction of the general welfare results from the fact that the discriminating seller may arrive at a total output which is less than he would have produced if he had sold at a single price and is compounded by the further fact that, because of his discrimination, the total cost to the public may be higher for this reduced quantity of goods. The *general* public welfare is therefore injured to the extent that the discrimination in question results in (a) restricted output and (b) higher average prices.¹⁴

Secondly, as between the favored and unfavored submarkets, price discrimination results in a "misallocation of resources." Too much output will tend to be allocated to the submarket with the more "elastic" demand (the low price or competitive market) and too little will tend to be allocated to the submarket with less elastic demand (the high price or noncompetitive market).¹⁵

Competition may be injured by profit maximizing price discrimination in three ways: (1) the discrimination may have a direct effect on a competitor's ability to survive in the submarket where the seller is charging the lower price

¹⁰ Certain quantity discounts have displayed incredible vitality. In spite of repeated Commission attack, the National Biscuit Company has maintained a quantity discount for over twenty five years, albeit with substantial modifications. *National Biscuit Company*, Docket No. 5013, 38 F.T.C. 213 (1949) ; 50 F.T.C. 932 (1954).

¹¹ Dean, *Managerial Economics* (1951) p. 515-516.

¹² Predatory tactics can of course be quite expensive. See McGee, *Predatory Price Cutting: the Standard Oil (N.J.) Case* 1 J. of Law & Economics 137, at p. 168 (1958).

An apparent problem comes immediately to mind here: the situation where the seller is forced to give a discriminatory discount to a large customer in order to defend his market share. This can in fact result in stable long term discrimination. However, this does no violence to our classifications. The ability of the large customer to make a credible threat means that his demand curve, as regards this seller, has shifted, i.e., has realistic alternatives not available to other customers (perhaps the ability to integrate backwards). As a result, the seller is forced to segment his market in order to maximize his profits and hold his market share. This is a significant point and we shall have more to say about it below.

¹³ The "welfare" effects of restricting output and misallocating resources are somewhat beyond our present scope. In certain real situations, they may well be impossible to measure. They are very important, however, in that they have been the focus of almost all economic studies of price discrimination. What little price discrimination theory we can apply to R-P enforcement is more or less the product of these studies.

¹⁴ Whether or not this happens depends upon the shapes of the demand curves in the submarkets. Bain, *Price Theory*, p. 413. See also Robinson, *Economics of Imperfect Competition* (1938), pp. 190-195.

¹⁵ Bain, *Price Theory*, p. 414. "Rational allocation of resources," a rather difficult and technical concept, is at the center of price theory; it is nothing less than the logically developed explanation for the efficiency of the free market or capitalist system. See Robert Dorfman, *Prices and Markets* (1967), for a brief introduction to the notion involved.

(in legal terms, "primary line" injury); (2) customers in the unfavored submarket may have their ability to compete jeopardized by the discrimination ("secondary line" injury); (3) the discrimination may result in a restructuring of the market at either the primary or secondary levels, e.g., increased concentration or higher barriers to entry in the market of the discriminating seller.¹⁶

The possible secondary line injury may have a somewhat lesser significance than one is generally inclined to give it. The fact that a seller can separate out a specific customer class and subject it to unfavored treatment indicates that the class is already in a disadvantageous position, and therefore that the price discrimination is more likely a symptom and a measure of the disadvantage rather than a cause. It should be remembered, of course, that here we are discussing what is, by definition, a stable long term situation. A seller who is discriminating in order to maximize his profits should not be expected to *deliberately* inflict serious injury on his unfavored submarket. He is certainly exploiting an existing disadvantage but he defeats his own purpose if he actually caused the *demise* of firms in the unfavored submarket, those from whom he is extracting his most profitable prices.

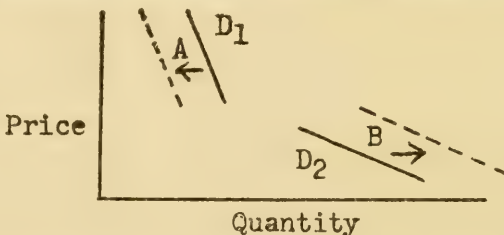
Assume, for example, that a seller in order to discriminate has divided his customers into two classes. If he then proceeds to cause competitive injury to one of them—i.e., to lessen its market share—that will of course result in a proportionate decrease in demand for the seller's own product in that particular market. And the converse is also true; if either submarket is able to exploit a competitive advantage, it will thereby increase its demand for the seller's product. Now assume further that any reduction of demand in the unfavored submarket would result in equal increase in demand in the favored submarket.¹⁷ The seller would obviously suffer a loss of net revenue from any transfer of demand from the high price (inelastic) market to the low priced (elastic) market. It is therefore reasonable to assume the seller will not use discrimination to inflict competitive injury on the high priced submarket *if he can avoid it*. In fact the seller has every incentive to attempt to transfer demand to the high priced market, not the other way around.

By now the basic problem with this hypothetical should be readily apparent. In real life, the seller rarely has any incentive to be concerned about the lot of his unfavored customers. This is not because the matter is of no interest to him, but rather because there is nothing *he* can do about it. A typical situation is illustrated by the seller who provides only one type of product to retail grocers. His decision to discriminate to any extent against smaller retailers will not *by itself* have any impact on their viability. He does not, nor does any other supplier, provide a significant enough percentage of that retailer's total requirements. His individual decision to reduce or eliminate his discriminatory price will be of no consequence to any single retailer.

All of this is not to say that discrimination by all suppliers will not injure the smaller retailers. Of course it can. Our point is merely that the discrimination is not the beginning of the disfavored submarkets troubles, and in any case secondary line injury is never the result *intended* by the discriminating seller.

¹⁶ Kahn, *Discriminatory Pricing As a Barrier to Entry: The Spark Plug Litigation*, 8 J. of Industrial Economics 1 (1959); Brooks, *Volume Discounts as Barriers to Entry and Access*, 69 J. Pol. Econ. 63 (1961).

¹⁷ This would be the best possible result from the seller's viewpoint of any competitive injury in the high priced submarket. (In any real situation, the seller could not expect to recoup one hundred percent of what he loses in one submarket by a gain in another, particularly where the demand is lost in the submarket where the seller has more monopoly power than in the submarket where demand is gained.) Graphically, the matter might be illustrated thus:



D1 represents the original demand curve of the unfavored, submarket; D2, that of the favored submarket. (The dotted lines represent the curves after transfer of demand from D1 to D2. Distances A and B are equal.

Primary line injury should not result solely from the fact that the competitors of the discriminating seller are faced with the lower price in part or all of their market.¹⁸ That "low" price itself could still be one that exceeds the competitive level and that is thus more than sufficient to assure the long run survival of all of its competitors that are reasonably efficient. Only if the price is driven *below* this level—below the point where it is covering all production and distribution costs, plus a normal or competitive return on the capital employed—can any reasonably efficient (and thus competitively significant) firm be eliminated by it.¹⁹

Perhaps the most serious consequence of profit maximizing price discrimination is the barrier it raises to entry into the seller's market.²⁰ Consider, for example, the situation in which a new food producer decides to sell his product to a retail grocery firm that is presently buying this product from another producer, one that is giving him a large "quantity discount." If the retailer were to turn now and purchase any significant amount from the *new* producer, he would, in effect, raise the price of all his purchases from the other producer. Naturally the retailer will be most reluctant to give serious consideration to the new producer under these circumstances. And of course it is the large retailers who are already earning large quantity discounts that are most important to the new producer trying to expand his production in order to realize all possible economies of scale. (This effect is multiplied if the established firms have a highly differentiated product which, because of the demand generated by advertising, the retailers believe they *must* stock in large quantity.)

Profit maximizing discrimination can induce anticompetitive restructuring of the buying market. Long term volume discounts, for example, which give an advantage to the larger purchasers tend to force the firms in the purchasing market to combine, either by merger, or by the formation of buying groups, until they reach a size sufficient to support purchases in the lowest price category. This may result in a buying market much more concentrated than would be dictated by the needs of any "real" economies of scale in the absence of the volume discounts.

It is worth pausing briefly to consider the possible beneficial effects of profit maximizing discrimination, if for no other reason than to dispel the notion that price discrimination is inherently evil, surrounded as it were by an odor of immorality. In fact it is *per se* neutral, and must be judged by its consequences. Where there are decreasing average and marginal costs, profit maximizing discrimination can result in greater output at lower prices *even for the disfavored submarkets*. It may even result in some submarkets being served which could not be otherwise served at all under a one price system.²¹

Additionally, where the seller is part of a tight oligopoly, a lower price granted to a large buyer may have beneficial effects, if the large buyer must sell in a competitive market and pass the price reduction on to the consumers.

C. EFFECTS OF PROMOTIONAL PRICE DISCRIMINATION

We will now consider the effects of promotional price discrimination, which we have defined as any discrimination which has as its purpose expanding or defending market share. We identify at least six possible injurious effects that may result from promotional discrimination. The first two are the same welfare effects that we discussed with regard to profit maximizing discrimination, namely, reductions of total output and misallocation of resources. Since we have already explored them sufficiently for present purposes and particularly because they have only very limited significance for short term promotional discrimination, we will not consider them further here.

The third possible bad effect of promotional discrimination is that it may injure competition at the primary level. The classic example of course is that of the giant multimarket concern using monopoly profits from one market to finance predatory pricing in another. The extent to which this kind of tactic

¹⁸ A seller practicing profit maximizing discrimination will not lower his price in the favored submarket below his marginal costs in any case.

¹⁹ We cannot see how competition is injured if the lower price is not below long run average costs. There is the notion that the competitors of the discriminating seller could use super competitive profits to enable them to expand into the discriminating seller's protected market. But this is a very weak argument. There is no reason to believe that high profits in one market have any relation to entry into another. If entry into the protected market of the discriminating seller really appeared to be a profitable opportunity, competitors would find the capital.

²⁰ See note 16 *supra*.

²¹ Bain, *Price Theory*, pp. 413–414.

can be used is obviously dependent upon the seller's market power. But it also depends upon the condition of entry into the seller's own industry. Ease of entry represents a serious limit on the extent to which firms can profitably use predatory pricing. The only reason for driving a competitor under is to be able to realize a greater return on sales after his elimination. But low entry barriers can render this a futile endeavor. Any attempt on the part of the seller to reap the benefits of his new monopoly power will simply induce prices. Clearly, then, predatory pricing requires significant entry barriers.²²

This brings us to the fourth possible harmful effect of promotional discrimination, the possibility that the ability of a dominant firm to engage in predatory pricing can *itself* be a barrier to entry. The theory here is that the firm which has successfully used such tactics will "scare off" potential competitors.²³

The fifth possible anticompetitive effect of promotional discrimination is that it may injure competition at the secondary level. Presumably the practice is based on the seller's belief that a dollar price reduction to one group of customers is worth more to him than the same reduction to another group. Again, the seller has no reason to cause secondary line injury, if he can avoid it. This purpose is to expand his sales. To the extent that the promotional effort merely causes a *redistribution of market share among the seller's customers*, it is a failure. However, the seller will rationally engage in promotional discrimination in spite of secondary line injury as long as he believes that what is lost by injuring the unfavored customers is more than made up by an expansion of his sales to and profits from the favored customers.

Finally, promotional price discrimination can be used to perpetuate anti-competitive patterns of conduct in an industry. For example, a dominant firm can use discriminatory pricing to discipline a firm which breaks ranks and engages in price cutting.²⁴

Promotional price discrimination has two possible procompetitive uses. In an oligopolistic situation, price discrimination can be the chief source of price competition.²⁵ Oligopolists, aware of the fact that retaliation by competitors can generally be expected to make price cutting unprofitable for all, typically refuse to reduce prices *across the board*. However, they are constantly tempted to selectively shade prices to capture or keep certain particularly large accounts and this can trigger an outbreak of general, overall price competition. While it is easy to question the significance of this kind of competition, the fact remains that it is all we can expect to get in these oligopolistic markets; they simply do not compete in any but this discriminatory fashion, and we are thus faced with a take-it-or-leave-it situation, i.e., we get prices reduced "selectively" (discriminatorily) or we don't get them reduced *at all* (assuming an unwillingness to reduce the concentration levels themselves). As an illustration of what is involved here, Dr. John M. Kuhlman of the University of Missouri and a former consultant to the Commission—a specialist in the area of price fixing—has advised us that, following the "break-up" of a price fixing conspiracy, the ensuing price decline (generally a decline of about 25%) *invariably occurs in a discriminatory fashion*.

Since price fixing occurs most frequently in industries that are at least somewhat concentrated (e.g., at least "loose oligopolies," with the eight largest holding say, 30% or more of the market), and since, as noted, oligopolists find it unprofitable to compete on price openly, the break-up of the conspiracy is characterized, in the beginning, by a few secret discriminatory price concessions to one or more of the very largest customer accounts. Loss of one of these accounts ultimately tips the other former conspirators off to the fact that price cutting is going on, and they retaliate by making concessions to one or more *other* large accounts, thus deepening and "spreading" the price decline. Gradually, then, in this reverse-ratchet manner, the price to at least the bulk of the larger customers works its way down from the inflated conspiratorial price to the normal competitive one. During that price decline, discrimination has of course been rampant, with price varying almost from customer to customer as the former conspirators offer whatever price they happen to think will be necessary to get a particular account, without too much regard for the niceties of statutory

²² Bain, *Barriers to New Competition* (1956) p. 34.

²³ Brooks, *op. cit. supra*, note 16, at 46.

²⁴ *Ibid.*

²⁵ Dirlam and Kahn, *Fair Competition: The Law and Economics* (1954), pp. 233-234. Also Fixler, *Price Discrimination in Homogeneous Oligopoly* 1 *Antitrust Law & Economics* Rev. 117 (1967).

requirements. To prevent this kind of discrimination would be, unfortunately, to prevent the restoration of the competitive price itself.²⁸

Promotional price discrimination, a device of considerable importance to small firms, can have pro-competitive effects when used by firms entering new markets. Special promotional discounts are particularly vital to small business in competition with large dominant firms. The small business simply does not have the arsenal of promotional weapons that is available to the large concern, a fact that was dramatically illustrated during the NRA experience when small business raised a strong protest against the codes which limited their use of price competition.²⁷

D. "INDUCING" AND ADVERTISING ALLOWANCES

Two matters deserve some preliminary comment here. The first is the question of "inducement" of a lower price by a "power buyer." The second is the question of advertising allowances.

As to the matter of "inducement," notwithstanding the outrageous volume of literature to the contrary, we simply do not find the concept particularly useful. It adds nothing, in our view, to a meaningful analysis. It requires only a small amount of economic sophistication to recognize that *all* prices are "induced." Even when the buyers have no *individual* market power, their collective willingness to buy or not at any given price constitutes "inducement," i.e., the total "demand" for the product in question. As the market power of the buyer increases, the issue here tends to become charged with a rather large amount of emotion. Moral indignation may of course be highly appropriate but it should not be allowed to interfere with a careful examination of precisely what happens in such a situation. From the seller's point of view, as we have noted before, the "inducement" simply means he faces a "flatter" demand curve in at least a portion of his market. The buyer, on the other hand, is able to "induce" the lower price *only because he has alternative sources where he can obtain the same product for an equally low price.*²⁸ This point bears repetition. *Nothing* else enables the large buyer to "induce" his lower price *except* the ability to obtain the same item at a similar price from an alternate source. "Market power" on the side of buyer—no matter how great—is by itself insufficient. Thus from the buyer's point of view, the product is "worth" no more than the "induced" lower price, because he can get it someplace else just as cheap. The concept of inducement, therefore, contributes nothing except rhetoric to an analysis of the conduct of the small seller and the so-called "power buyer."

The second matter deserving special comment concerns promotional allowances. As is recognized by the Act itself, this practice can be used to conceal what are in effect price discriminations. But there are other, less widely recognized implications for public policy in this practice. There is a substantial amount of evidence that *product differentiation created by mass advertising is the prime cause* of increased concentration in the consumer goods industry,²⁹ a fact that cannot rationally be ignored in developing a public policy towards promotional

²⁸ Professor Khulman also notes, with considerable amusement, that if the Division of Discriminatory Practices was sufficiently alert, it would completely undo all efforts of the Division of General Trade Restraints to stop price fixing. As soon as General Trade Restraints had obtained an order, the prices would fall but in a discriminatory fashion. Discriminatory Practices would then file a complaint and "restore the fix."

²⁷ "A study of the codes as a whole could only conclude that most of the price clauses were directed against price cutting by 'little fellows.' In numerous industries the advantage of large firms lay not so much in the area of price as it did in non-price fields, in such matters as advertising, access to credit, ability to conduct research, control of patents, and attraction of the best managerial talent. Small firms often existed only because they offered lower prices to offset consumer preference for advertised brands, prices sometimes made possible by lower wage rates, sometimes by more favorable location, sometimes by other advantages arising out of specialization or recapitalization. It was in the interest of large firms, therefore, to eliminate price and wage differentials and wipe out the special advantages that made them possible." Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (1966) p. 83. In short, price competition is of most value to small business itself, not to its larger competitors.

²⁸ This of course indicates a serious defect in the "countervailing power" theory of J. K. Galbraith (*American Capitalism* (1952) Chaps. 9 and 10). Where there are no alternate sources of supply available the "power buyer," he cannot induce a lower price no matter how large or powerful he might be.

²⁹ *Studies by the Staff of the Cabinet Committee on Price Stability* (1969), pp. 68-69.

allowances. Cooperative advertising programs may account for as much as 20 percent of national expenditures for advertising.³⁰

Two questions, then seem highly relevant here. First, does cooperative advertising affect the total volume of advertising? And, second, does such advertising tend to be of an "informational" nature (i.e., is it pro-competitive) or does it tend to contribute to product differentiation (i.e., is it anti-competitive)?

It would seem that an advertising allowance is an attempt by the seller to impose his business judgment on his customers: he is trying to compel the customer to promote his product in one particular way, i.e., by advertising, rather than letting him use some other device, e.g., price reductions. We do not know of course the extent, if any, to which this practice affects total national volume of advertising, but we believe the answers would have considerable significance for public policy. And equally significant is the question of the nature of cooperative advertising. Since most of it appears in newspapers, the initial inference is that much of it is probably informational and this pro-competitive; it is hard to run a newspaper ad without telling what, where, and how much. But again, we have no firm data.

E. POLICY IMPLICATIONS

There are a number of key questions that are basic to a national evaluation of enforcement policy in the price discrimination area, i.e., there are several things that have to be known before one can rationally say that a certain type of price discrimination injures competition.

We will consider first the problems of discrimination at the primary level. Where the discrimination here is of the profit maximizing variety, the most significant injury done to the sellers' competitors is the limit it places on their ability to expand their sales in the favored market.³¹ This particular type of discrimination is generally easier to detect and identify than most of the other types of discrimination and is usually quite stable and long lasting, even "traditional" in the affected industries. It is probably impossible to conceal from competitors, who are bound to find out in the long run and either complain rather loudly or try to imitate it.³² Like all discrimination of this type, it requires some market power. The seller's industry must have a concentration ratio placing it at least in the category of a "loose oligopoly," e.g., an eight-firm ratio of at least 30% or more. And some entry barriers must exist to protect the seller's monopoly profits in the high priced market. The really key structural feature in this situation, however, appears to be product differentiation. Not only does extensive product differentiation contribute to high concentration and high entry barriers, but it multiplies the barrier effect of the discrimination within the favored submarket.

Unfortunately, very little empirical study has been done on this particular effect. And while entry barriers can be measured with considerable accuracy, we know of no attempt to measure the precise contribution that price discrimination has made to the entry barriers in any particular industry.³³ Nor do we have any study estimating the aggregate effect of the practice.

Some particular complex problems are encountered in trying to assess the competitive effects of primary line promotional or predatory discrimination. First of all, there are two varieties of primary line discrimination that have the almost universal blessing of the economic authorities. Promotional price discrimination *by members of a tightly structured oligopoly* is generally considered beneficial on the theory that *any* kind of price competition is better than none at all. Also, there is general agreement that price discrimination *by a new entrant* to break into a new market is pro-competitive, at least where the market is being entered is less than workably competitive. On the other hand, there is almost universal condemnation of the practice where it

³⁰ John Robert Davidson, *A Study of the Effect of the Robinson-Patman Act Upon Cooperative Advertising Policies and Practices* (Ohio State University, 1959. Vol. 20 Dissertation Abstract, p. 4300).

Elsewhere it has been estimated that cooperative advertising in 1959 amounted to nine hundred million dollars or 25% of all newspaper advertising.

Recent estimates state that 30% of all department store advertising (approximately 133/4 to 2 billion dollars) is paid for by supplies under cooperative programs.

³¹ See note 16 *supra*.

³² *National Biscuit Company*, Dk. 5013; *Sunshine Biscuit*, Dk. 6191; *United Biscuit Company*, Dk. 7817.

³³ For an excellent example of the measurement of entry barriers see Moore and Walsh, *Market Structure of the Agriculture Industries* (1966), pp. 390-391.

is a large multi-market firm that is using its monopoly power in one market to finance predatory pricing in another.³⁴

Unfortunately, these general statements raise as many questions as they answer. Should we approve of a large national conglomerate's use of geographic price discrimination to challenge a local monopoly? Or a large oligopolist's use of prices that are below his competitor's costs? Is this kind of price competition really better than none at all?

Facile generalities are clearly out of place here. Perhaps the best we can do is to set out the *minimum data that ought to be known* before a judgment is made about such matters in the particular case. Obviously a great deal ought to be known concerning the discriminating seller: Its absolute size, its relative market share in each of its markets, whether it is a new entrant, whether it sell a differentiated product and, perhaps most important of all, whether its discriminatory price is below long run marginal costs.³⁵ Equally essential is at least some similar data on the market where the discrimination occurs: Is it concentrated? What are the entry barriers? Is there product differentiation? Are prices above the competitive level? Is there price collusion?

We are by no means prepared to suggest that all of this information will guarantee the ability to make even reasonably accurate decisions in every conceivable case. But we feel quite certain that, *without* this data, no rational judgment can be made at all.

It is appropriate to note here our conviction that predatory price discrimination has drawn far greater attention than it appears to merit. We do not think it would be much of an exaggeration to say that the antitrust profession appears to harbor something of an obsession with the subject, one quite out of proportion to its real importance.³⁶ In the first instance, the number of actually documented cases is quite small.³⁷ And we have been unable to discover any authorities who consider price discrimination to have significantly contributed to the rise of monopoly in any major American industry. Certainly it does not deserve to be in the same class, with for example, mergers, heavy advertising, exclusive dealing agreements, and patent abuse.

This curious lack of perspective can have some rather serious consequences. In a case of real predatory pricing, it seems perversely myopic to focus on the price discrimination aspect of the problem. A prohibition against *future* predatory pricing is most unlikely to be an effective remedy, since the predator has almost always completed his monopolization of the market in question before a case can be developed and tried.³⁸ In addition, a firm with sufficient size or market power to engage in this kind of practice usually has available a whole range of options which can be equally as effective as predatory pricing. How does the public benefit if a predatory firm diverts its resources away from geographic price discrimination and concentrates instead on extremely heavy advertising in selected local areas?

PART II

STATISTICAL ANALYSIS OF ENFORCEMENT POLICY

We have made no effort to repeat or match the extensive statistical analysis done by Professor Corwin Edwards in 1957. We have, however, compiled the following tables believing that if there is a discernable enforcement pattern, it should have appeared here by now.

³⁴ E.g. Edwards, *Maintaining Competition* (1949), pp. 169-170.

³⁵ See note 19 supra.

³⁶ This phenomena seems to have deep roots. To the extent anyone can tell, it seems to have started during the Depression. To the economically naive businessman (a description that includes not a few lawyers) the Depression had a simple explanation: prices were too low. His were low because his competitor across the street had cut his. And somewhere there was guy who started it all. "Ruinous price wars," "excess competition," "price chiselling" were the result. See Hawley, *The New Deal and the Problem of Monopoly* (1966), pp. 38-41, 54, 248-249.

³⁷ These certainly include: *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1 (1911); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *E. B. Muller & Co. v. FTC*, 142 F. 2d 511 (6th Cir., 1944); *Maryland Baking Co. v. FTC*, 243 F. 2d 716 (4th Cir., 1957); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir., 1959), cert. denied 363 U.S. 843 (1959); *Forster Mfg. Co., Inc.*, 62 FTC 852 (1963).

³⁸ E.g., *Forster Mfg. Co., Inc.*, 62 F.T.C. 852 at 899-890 (1963).

TABLE 1.—NUMBER OF ORDERS ISSUED UNDER EACH SECTION, 1936-69

Section of act	Total number of orders	Percent of total
2(a).....	180	17.7
2(c).....	259	25.5
2(d).....	491	48.2
2(e).....	6	.6
2(f).....	22	2.1
More than 1 section.....	60	5.9
Total.....	1,018	100.0

TABLE 2.—NUMBER OF ORDERS ISSUED UNDER EACH STATUTORY SECTION, 1957-69

Section of act	Total number of orders	Percent of total
2(a).....	79	11.1
2(c).....	114	16.2
2(d).....	464	65.7
2(e).....	1	.1
2(f).....	15	2.1
More than 1 section.....	34	4.8
Total.....	707	100.0

TABLE 3.—ENFORCEMENT BY SECTION IN SELECTED INDUSTRIES, 1936-57

Industries	2(a)	2(c)	2(d)	2(e)	2(f)	Comb.	Total	Percent-ages
Food.....	28	125	12	0	3	11	179	52.5
Fruit and vegetable.....	1	27				1	(29)	
Seafood.....	2	28					(28)	
Bakery products.....		1	2				(5)	
Dairy products.....	3		1				(4)	
Candy.....	3	1	2	0	1	5	(12)	
Apparel.....	2	13	2			1	18	5.8
Auto parts.....	14					1	15	4.8
Cosmetics.....	1		3	3		3	10	3.2
Publishing.....	6			1			7	2.3
Corn products.....	8					1	9	2.9
Others.....	41	7	10	1	4	9	73	23.5
Total.....	101	145	27	5	7	26	311	100.0

TABLE 4.—ENFORCEMENT BY SECTION IN SELECTED INDUSTRIES, 1957-69

Industries	2(a)	2(c)	2(d)	2(e)	2(f)	Multi-count	Total	Percentage
Food.....	24	109	17	1		15	166	23.5
Citrus fruit.....		87					(87)	
Seafood.....		28					(28)	
Bakery products.....	6		1			2	(9)	
Milk.....	5					3	(3)	
Macaroni.....		3				5	(8)	
Candy.....	3	1					(4)	
Apparel.....	1		307				308	43.7
Publishing.....			58				58	8.2
Auto parts.....	21				14	2	37	5.2
Rugs and carpets.....	11					1	12	1.7
Toys.....	2		26		1		28	4.0
Cosmetics and toiletries.....	1		7				8	1.1
Others.....	20	5	48	0	0	16	89	12.6
Total.....	79	114	464	1	15	34	707	100.0

Perhaps the most striking thing about all of these tables is the lack of any really significant pattern. We have no reason to believe that price discrimination had any special significance in these industries, as compared with any others. We do not know, for example, that discriminatory conduct was unusually prevalent in any of them. Nor do we even know that structural factors made it particularly harmful there. But most important, we do not know how the challenged discrimination was likely to affect the structure of these industries.

There are, of course, some exceptions to this general lack of data. The 1966 *Staff Report to the Federal Trade Commission on the Structure and Competitive Behavior of Food Retailing* presented some highly relevant information concerning discrimination in the milk and bread industries.³⁹ But these account for only a small percentage of cases.

Some critics have focused on the fact that large numbers of *cases* have been brought in certain industries—from this have drawn some generally unfavorable inferences. This strikes us as not just unfair, but as quite irrelevant. Numbers of cases alone do not give a valid indication of the enforcement policies. Most of the large groups of cases listed here involved consent orders which were procured on an almost "mass" basis, presumably with significant savings in resources. For example, it is very hard to draw an inference, favorable or unfavorable, from the existence of twenty-six (26) cases in the toy industry.

We are, again, simply unable to detect a significant pattern in the enforcement statistics.

PART III

LEGAL AND ADMINISTRATIVE PROBLEMS

The legal and administrative problems surrounding the enforcement of the Robinson-Patman Act have been widely recognized. But what has not been recognized is that many serious problems do not appear until after an order has been issued.

Almost inevitably the factual issues which arise in the compliance phase of a case are more complex than those involved in the litigation. Typically a case involves a firm with a large, complex distribution system (the firm need not be large, however; small firms often have very complex distribution systems). A broad order is issued, predicted on a limited number of proven violations. Immediately a whole range of practices comes within the Commission's purview, many of which were never contemplated in the complaint.

The legal proposition that the Commission does not have to prove injury to competition in a suit for violation of a price discrimination order creates more complications than it avoids. If injury is irrelevant, every price discrimination, regardless of its significance, is an order violation and may result in a penalty suit. Obviously it is very difficult for the staff, on its own initiative, to consider the violation of an order *de minimis*.

There is a further related problem. While it may be proper for the trial staff to anticipate some real economies from attacking the "inducement" of discriminatory prices and allowances (by, say, a large grocery chain), rather than proceeding against virtually hundreds of suppliers, there is no comparable savings to the Compliance Division in such a procedure. Eventually someone will have to examine the relationship between the respondent buyer and *each* of his hundreds of suppliers. And since the orders issued under the Robinson-Patman Act usually run in perpetuity, a half dozen such orders can tie down a number of attorneys for substantial periods of time.

The worst of these problems stem from the various cost justifications included in reports of compliance. A staggering combination of skills is required to properly review such a report, not to mention the vast number of man hours. But what is most significant here is the fact that there is no satisfactory process outside of an adversary proceeding (and even here one can harbor reservations) for checking the validity of the representation made in such a cost study. These studies depend upon a host of factual assertions that are completely beyond the power of the staff to either verify or refute. We are thus left with the Hobson's choice of either having to accept the respondent's word for it or challenge the report via a full *de novo* investigation.

³⁹ Pp. 186-193.

Obtaining compliance with orders issued under Section 2(d) is beset with similar problems. It is simply impossible to police every promotional program issued by every seller under such an order. A great deal of compliance work consists of making respondents make "offers" to customers who will not under any circumstances accept them. (A large number of retailers simply have no use at all for the "alternative" programs that the orders say must be made "available" to them. Nonetheless, a great deal of effort is continually expended in compelling the respondents to make these ritualistic recitations of these meaningless offers.)

Another post-order problem is the fact that Robinson-Patman orders are remarkably easy to evade *legally*. In fact, we suspect that the real effect of an order is in inverse proportion to the intelligence and imagination enjoyed by the respondent; the gifted remain substantially unscarred. There are, of course, the obvious evasions: "inducing" orders can be evaded by backward integration or by purchasing the whole output of a supplier. Orders prohibiting discriminatory pricing by suppliers can be evaded by a special product of a slightly different "grade and quality" for the favored customer. And of course predatory advertising in local areas can generally substitute quite well for geographic price discrimination. But what we have in mind here are the really cunning evasions. Consider, for example, the case where a manufacturer is placed under an order which attempts to prohibit it from favoring certain large retail customers. To comply with the order, the manufacturer sells only to wholesalers. But on merchandise resold to the formerly favored retailers, he grants significant price reductions. The manufacturer is, of course, not discriminating between the wholesalers, because each is free to compete for the patronage of the favored retailers. And the lower price charged by the wholesaler is of course "cost justified." (This is not a "rainy day hypothetical." See the compliance report filed in *Armstrong Cork Co.*, Docket C-1010.)

The Commission's Rules place a premium on "trying out" various schemes of marginal legality by not permitting the filing of a civil penalty suit until the respondent has been informed of the deficiencies in his compliance report.⁴⁰ If one clever scheme fails to get approval, there is every reason to try another. A sort of immunity thus prevails as long as a report is kept pending disclosing his current activities.

There are of course those who either out of a perverse sporting instinct or because of perhaps somewhat sociopathic inclinations simply prefer to violate their orders outright and then use their imagination and intelligence to avoid detection. Of these, the dull and careless provide the material for our civil penalty suits.

There is a growing body of literature which holds that cease and desist orders aimed at preventing anti-competitive conduct are usually ineffective, at least when compared with "instructional" remedies.⁴¹ Businessmen are most unlikely to view with any enthusiasm these efforts to interfere with what they consider their most profitable courses of action; the natural reaction is to yield to the temptation to carry on as before in one guise or another, being deterred only if the penalties are so high and so certain as to rather clearly outweigh the probable gain. Our experience with the Robinson-Patman Act hardly casts any strong doubts on this thesis. Directing a businessman to operate in a particular way than that mode of operation does not in fact conform to his idea of what is "good business" is thus likely to be wasted effort unless the penalties are so stiff, detection so easy, and evasion so difficult that it is simply easier to comply than to evade. The Robinson-Patman Act hardly fits any of these requirements.

PART IV

CONCLUSIONS

There are a distressingly small number of things that can be said in the price discrimination area with any real degree of assurance, and most of those things are, unfortunately, rather negative in character. First, it seems fairly clear to us that the Commission's orders in Robinson-Patman matters have not in general had any really substantial effect upon the pricing policies of the companies against whom they are directed. Even where these orders have had

⁴⁰ Rule 3.61.

⁴¹ E.g., Bain, *Industrial Organization* (1959) pp. 489, 495, 496, 518-520. Elzinga, *Mergers: Their Causes and Cures* 2 *Antitrust Law & Economics Rev.* 53 (1968); Mueller, *The New Antitrust: A Structural Approach* 12 *Vill. L. Rev.* 764 (1967).

the effect of forcing some companies to change their pricing schemes, the "anti-competitive" results alleged by the Commission were in fact probably continued by alternative methods. Second, there presently are no available empirical data, nor is there even a theoretical framework, that would enable us to clearly judge the effectiveness of the Commission's Robinson-Patman activities. Third, in each case where there in fact exists serious price discrimination problems which appear to have clearly anti-competitive effects, the most effective, in fact the *only* effective remedy, would probably be a direct attack upon the structural characteristics producing not the "low" but the *high* price. Fourth, at the present time we do not possess either the empirical or theoretical data necessary to enable us to determine whether a particular price discrimination is in fact likely to be pro-competitive, anti-competitive, or neutral in its effects.

Furthermore, we are not at all certain that the resources necessary to *develop* this kind of information could not be better used in other areas, e.g., against mergers and collective monopolization, where we can be a great deal more certain of our ultimate results. It seems fairly clear, however, that it would be exceedingly difficult to justify the present utilization of almost 50% of the Commission's total antitrust resources in this area (one large Division plus a substantial part of the work of another one) until such information is developed.

Fifth, the criteria for evaluating the impact of price discriminations should be the same as those used to judge other conduct with a similar impact. Thus, if a price discrimination in fact results in the elimination of a competitor or competitors and the shifting of their market shares to the leading firms in the industry, the economic result is essentially the same as if a *merger* had taken place between the "acquiring" firms and those whose market shares they have obtained. Considered in such a light, the relevant factors to be considered include the usual structure/performance data, e.g., concentration, barriers to entry, and product differentiation characteristics. If a merger of that size and character would not be worth challenging, then it would presumably be an unwise use of resources to attack a price discrimination that causes the same competitive result. (This is not to say that the *private* plaintiff should not have his relief in such a case, but only that a *public* agency such as the Commission could not rationally undertake to secure it for him.)

Other practices provide similar guidelines. It is not clear, for example, as to why a volume discount which has the effect of foreclosing outlets to competitors should be treated more rigorously than an exclusive dealing arrangement which accomplishes the same end; the latter leaves no room for maneuver while the former, the elimination of a firm by predatory pricing, at least implies that it will be the least efficient of the smaller firms which are likely to suffer first and thus that their market shares will be up for grabs by *all* of the other members of the industry, rather than simply being transferred directly to the large firm. A volume discount may at least leave open the possibility of a rival firm substituting itself for the former supplier by quoting a lower price on the entire volume.

Perhaps most importantly of all, however, serious price discrimination is almost inevitably accompanied by numerous other anticompetitive structural conditions and practices, particularly high entry barriers, high degrees of product differentiation, excessive advertising, exclusive dealing systems, and so forth. To attack *one* of these indications of an anticompetitive structure without attacking the root cause of the problem may in fact be worse than taking no action at all. We have numerous examples of industries whose bad structures are due to exclusive dealing (e.g., automobiles), mergers (e.g., steel) and product differentiation (e.g., breakfast cereals) but there is no major highly concentrated industry today which we can safely say was produced primarily by price discrimination. In short, we simply do not know the long range effects of either price discrimination or of a policy of attempting to stop it. If there was any clear cut indication that price discrimination was in fact producing serious long range problems in major American industries, the single most productive step would be to begin the necessary research to identify those structural characteristics, and those types of discrimination, that in combination determine whether the effect of the practice is either anticompetitive, neutral, or procompetitive and, more important, to enable the Commission to evaluate the *degree* of anticompetitiveness involved, if any, and thus to rationally allocate resources between this and other Restraint of Trade areas.

Price discrimination differs in this respect from a number of the other matters antitrust is concerned with. A substantial amount of solid, empirical data is readily available on the effects of mergers, price fixing, exclusive dealing, high concentration, high entry barriers, high degrees of product differentiation, excessive advertising, and other types of vertical and horizontal restraints. When the researcher turns to price discrimination, however, there is virtually no data available. The unmistakable inference, unfortunately, is that this dearth of research on price discrimination reflects a substantial consensus in the scholarly community that any such effort would be unproductive, i.e., that the potential gains to be realized from even the most rationally-conceived antidiscrimination program would be more than offset by the cost of devising and administering it. The largest of these costs, of course, is what the economist calls the "opportunity cost": a thousand man-hours spent on an Robinson-Patman Act cases necessarily means, given a fixed budget, a thousand man-hours withdrawn from an enticingly high-yield case in one of the three areas known to be most productive, namely, merger, price fixing, and deconcentration cases. None would care to defend a Commission policy of spending perhaps as much as 50% of its entire antitrust resources on a practice that has yet to be established as a productive means of promoting noncompetitive market structures and thus noncompetitive prices to the consuming public.

We believe that much of the emphasis on Robinson-Patman enforcement at the Commission is due in large measure to the high "visibility" of the entrepreneurs that are the natural constituents of the statute, as compared with the almost complete invisibility of the rather anonymous members of the consuming public that are the potential beneficiaries of competitive prices. Thus, no one has suggested the creation at the Federal Trade Commission of a "Division of Patent Abuse," even though one scholar has estimated that patent monopolies cost the American public something on the order of \$50 billion in lost output annually, some 90% of which (or about \$45 billion) is due to patent abuses that are already illegal under existing law. It goes without saying that even the most sanguine of Robinson-Patman enthusiasts would hardly claim any such potential benefits for an anti-price discrimination program of even the most heroic dimensions.

From our brief research here, we conclude that it would be impossible to justify on rational priority grounds the Commission's present commitment to price discrimination matters, given the severe budget limitations it faces and the exceedingly high yields available to it in the three kinds of cases mentioned above. Price discrimination in its genuinely anticompetitive forms is a creature of monopoly power and should be treated as such, namely, as an integral part of a *monopoly case*. And, when attacked in a monopoly case, the remedy should be not an antidiscrimination order but the traditional monopoly solution, dissolution and divestiture.

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RESPONSE TO QUESTION 8

Tabulations of Law Clerks and Attorneys with Less than Five Years of Service, By Bureau, 1966-1969, dated September 30, 1969.

FEDERAL TRADE COMMISSION

SEPARATIONS OF LAW CLERKS AND ATTORNEYS WITH LESS THAN 5 YEARS OF SERVICE, BY BUREAU, 1966-69

Bureau or office	Calendar year			
	1966	1967	1968	1969
Commissioners' Offices.....	3	4	2	4
Office of General Counsel.....	1	0	0	0
Bureau of Restraint of Trade.....	15	4	12	8
Bureau of Deceptive Practices.....	3	7	17	8
Bureau of Textiles and Furs.....	1	1	2	1
Bureau of Field Operations.....	24	15	22	12
Bureau of Industry Guidance.....	0	2	2	1
Total.....	47	33	57	34

(1645)

RESPONSE TO QUESTION 9

Commission Minutes in the Matter of Associated Merchandising Corporation,
Docket No. 8651, dated :

April 9, 1964	February 27, 1968
September 28, 1964	March 5, 1968
October 6, 1964	June 18, 1968
November 19, 1964	June 20, 1968
April 27, 1965	June 25, 1968
May 13, 1965	June 27, 1968
May 21, 1965	July 9, 1968
May 26, 1965	August 8, 1968
June 7, 1965	September 3, 1968
June 8, 1965	September 4, 1968
June 9, 1965	October 8, 1968
September 7, 1966	October 29, 1968
September 15, 1966	December 11, 1968
October 11, 1966	December 12, 1968
February 19, 1968	

Circulations by :

Commissioner Mason dated January 20, 1956
Commissioner Reilly dated March 31, 1964
Commissioner Elman dated April 1, 1964
Commissioner MacIntyre dated May 20, 1964
Commissioner Reilly dated September 15, 1964
Commissioner Reilly dated October 5, 1964
Commissioner Elman dated April 26, 1965
Commissioner Elman dated May 11, 1965
Commissioner MacIntyre dated January 3, 1966
Commissioner MacIntyre dated March 14, 1966
Commissioner MacIntyre dated March 18, 1966
Commissioner MacIntyre dated October 6, 1966
Commissioner Reilly dated January 4, 1967
Commissioner MacIntyre dated November 1, 1967
Commissioner MacIntyre dated November 6, 1967
Commissioner Elman dated February 14, 1968
Commissioner MacIntyre dated June 10, 1968
Commissioner Nicholson dated July 23, 1968
Commissioner MacIntyre dated August 7, 1968
Commissioner MacIntyre dated August 8, 1968
Commissioner Nicholson dated August 20, 1968
Commissioner Jones dated August 29, 1968
Commissioner Jones dated August 29, 1968
Commissioner Elman dated September 4, 1968
Commissioner Nicholson dated October 28, 1968
Commissioner Dixon dated December 6, 1968
Commissioner Elman dated December 11, 1968

APRIL 9, 1964

AGENDA MATTER

File 601 0059—Associated Merchandising Corporation, et al.

Mr. Reilly presented memorandum of March 31, 1964, in which he reviewed the facts in this matter and concurred in the recommendation of the Bureau of Restraint of Trade in memorandum of February 28, 1964, that the submitted draft of complaint be issued.

For the reasons recited in his memorandum of April 1, 1964, Mr. Elman recommended that this matter be returned to the staff to be held until after the Commission's order in Docket 7813—Joseph A. Kaplan & Sons, Inc. is ruled upon by the courts.

After consideration, on motion of Mr. Reilly, this Commission having reason to believe that Associated Merchandising Corporation, a corporation, and the other respondents named in draft of complaint submitted by the Bureau of Restraint of Trade with memorandum of February 28, 1964, have violated and are now violating the provisions of Section 2(f) of the Clayton Act, as amended, it was determined that the complaint submitted by the Bureau should issue.

For the reasons recited in his memorandum of April 1, 1964, Mr. Elman voted in the negative as to the determination, at this time, that complaint should issue.

SEPTEMBER 28, 1964

File 601 0059—Associated Merchandising Corporation, et al.

Pursuant to arrangement, the Commission considered this matter (in which the Commission, under its action of April 9, 1964, determined that complaint should issue) in view of:

(a) Joint memorandum of August 28, 1964, from the Bureau of Restraint of Trade and Office of Consent Orders (1) transmitting offer of settlement by the respondents, which was accompanied by letter of August 11, 1964, from their counsel, and (2) recommending, for the reasons recited, that the Commission reject the respondents' proposal for settlement; direct issuance of the submitted revised draft of complaint; that the respondents and their attorneys be advised of the rejection by the submitted draft of letter; and that copies of the letter be included in the mailing of the complaint and the usual service letter; and,

(b) Memorandum of September 15, 1964, by Mr. Reilly reporting his further consideration of this matter and recommending, for the reasons recited, that pursuant to their request, the respondents' counsel be permitted to present their position to the Commission at a Commission meeting.

The Commission, in the presence of interested staff members, including Commission counsel, heard the following counsel for the respondents in connection with the settlement offer: Paul Warnke, Norman Diamond, Ira Millstein and Abe Fortas.

After being heard, counsel for the respondents were excused.

The interested staff members were then heard, and thereafter excused.

After discussion, Mr. MacIntyre suggested that the Commission give consideration to directing the staff to revise the complaint herein to include a Section 5, Federal Trade Commission Act, charge, as in Docket 5794—Atlas Supply Company, et al., in addition to the charges under the Robinson-Patman Act, in separate counts.

After further discussion, it was agreed that this matter would be considered at a later meeting of the Commission.

OCTOBER 6, 1964

(4) File 601 0059—Associated Merchandising Corporation, et al.

Mr. Reilly presented memorandum of October 5, 1964, in which he reported his further consideration of this matter (in which the Commission, under its action of April 9, 1964, directed that complaint be served under the consent order procedure) in the light of the Commission's consideration at the meeting of September 28, 1964, of the respondents' offer of settlement.

For the reasons recited, Mr. Reilly (1) recommended (a) that the staff be directed to communicate a rejection of the respondents' offer of settlement, and give the respondents 10 days within which to agree to the proposed order as presently drafted, and, failing which, (b) stated, with regard to Mr. MacIntyre's suggestion that any violation of Section 5 of the Federal Trade Commission Act be alleged in the complaint, that he would prefer to hear from the staff prior to making a recommendation.

The Director and the Assistant Director of the Bureau of Restraint of Trade, and the Chief of the Division of General Trade Restraints, and Attorneys Basil J. Mezines and Lewis F. Parker of that Bureau, and Wayne Threlkeld of the Office of Consent Orders, were called in and heard regarding the inclusion of a Section 5 charge in the complaint, and thereafter were excused.

After discussion, on motion of Mr. Reilly, the respondents' offer of settlement was rejected, and the respondents were granted 10 days after receipt of notice of the rejection within which to accept the proposed order; with the direction that the staff prepare an appropriate letter of notification.

As to the foregoing action, Messrs. Dixon, MacIntyre and Reilly voted in the affirmative, and Mr. Elman voted in the negative and requested that his position, as follows, be shown on the letter of notification to the respondents:

"Commissioner Elman does not concur. He thinks that the Commission is making a great mistake in rejecting the consent order proposed by respondents, and that it is most unlikely that litigation will eventually result in a better or more drastic order."

Mr. MacIntyre moved that the complaint be redrafted to include a Section 5, Federal Trade Commission Act, charge, as in Docket 5794—Atlas Supply Company, et al. The motion was lost for a want of a second.

The above staff members were recalled, advised of the foregoing action, and thereafter were excused.

NOVEMBER 19, 1964

(2) *File 601 0059—Associated Merchandising Corporation, et al.*

Circulated by Mr. Reilly.

November 19, 1964—Directed that complaint which the Commission, under its action of April 9, 1964, determined should be served under the consent order procedure, and as subsequently amended, be now issued and served forthwith.

Mr. Elman voted in the negative as to the foregoing action.

APRIL 27, 1965

(3) *Docket 8651—Associated Merchandising Corporation*

Mr. Elman presented memorandum of April 26, 1965, in which he referred to the offer of consent settlement of this matter insofar as it concerns respondent Federated Department Stores, Inc. The offer was made in a document, addressed to the Commission, filed by said respondent's counsel on April 22, 1965, and the document was treated as a motion and referred to the hearing examiner for handling by the Office of the Secretary.

For the reasons recited, Mr. Elman expressed the opinion (1) that when a settlement offer is addressed directly to the Commission, the Commission should consider it directly without reference to the hearing examiner; and (2) that Federated's proposal should be accepted.

After consideration, on motion of Mr. Elman, this matter was referred to the General Counsel with instruction to submit to the Commission for consideration at the next regular meeting a legal memorandum dealing with the question of law, and the actual practices of other government agencies, concerning offers of settlement under the Administrative Procedure Act.

MAY 13, 1965

(6) *Docket 8651—Associated Merchandising Corporation, et al.*

Mr. Elman presented memorandum of May 11, 1965, in which he reported his consideration of memorandum of April 30, 1965, from the General Counsel reporting, pursuant to the action of April 27, 1965, on the practices of other government agencies concerning offers of settlement under the Administrative Procedure Act, and questions of law arising under the Act in connection with such offers.

The General Counsel included an expression of opinion (a) that adherence to the Commission rules now in effect governing such offers would seem to afford a more orderly and consistent procedure than a confusing policy of circumvention, even though such adherence under some circumstances may appear to be more of ritual than realistic; and (b) that to negotiate settlement with one party, (regardless of prohibited staff consultation) on *ex parte* basis after the assumption of adjudicative jurisdiction under the Administrative Procedure Act, could be violative of due process and Section 5(c) of that Act.

For the reasons recited, Mr. Elman disagreed with a number of points raised by the General Counsel, and recommended (1) that the Secretary be directed to inform the examiner and the parties that the Commission has decided to consider and pass on the offer of settlement of respondent Federated Department Stores, Inc. directly, and without referring it to the hearing examiner; and

(2) that the Bureau of Restraint of Trade be directed to submit a report and recommendations to the Commission on Federated's settlement offer.

After consideration, Mr. Elman moved that action in accordance with the recommendation in his above memorandum be taken in this matter.

Miss Jones moved, as a substitute, that the Secretary be directed to return the offer of settlement to the Commission without the hearing examiner's making recommendation thereon. Miss Jones' motion was seconded by Mr. Elman.

As to Miss Jones' motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, MacIntyre and Reilly voted in the negative. The motion was lost.

As to Mr. Elman's motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, MacIntyre and Reilly voted in the negative, for the reason that they desire that the offer of settlement be certified to the Commission according to its Rules of Practice. The motion was lost.

Miss Jones referred to that part of Section 3.6 of the Rules providing that the hearing examiner shall certify to the Commission, with his recommendation, any motion upon which he has no authority to rule, and moved that the hearing examiner be instructed to certify Federated's offer of settlement to the Commission, without recommendation. The motion was seconded by Mr. Elman.

As to Miss Jones' above motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, Elman and MacIntyre voted in the negative. The motion was lost.

MAY 21, 1965

(4) *Docket 8651—Associated Merchandising Corporation, et al.*

Mr. MacIntyre presented memorandum of May 20, 1965, in which he reported his consideration of this matter in view of certification by the hearing examiner, filed May 18, 1965, to the Commission of the motion by counsel for respondent Federated Department Stores, Inc., requesting the Commission to waive the provisions of § 2.4(d) of the Rules of Practice and proposing a consent order for the consideration of the Commission. In an answer to said motion, filed May 14, 1965, complaint counsel concluded that the motion should be certified to the Commission for consideration.

Mr. MacIntyre recommended that the Commission adopt and issue the submitted draft of order providing for the filing of briefs on the question certified by the hearing examiner.

After discussion, Mr. Reilly suggested that the order submitted by Mr. MacIntyre be amended as stated.

Mr. MacIntyre moved that the order submitted by him, amended as suggested by Mr. Reilly, be adopted. The motion was seconded by Mr. Reilly.

Mr. Elman moved, as a substitute for Mr. MacIntyre's motion, that the Director of the Bureau of Restraint of Trade be instructed to submit to the Commission a memorandum setting forth his views and recommendations respecting disposition of the offer of settlement. The motion was seconded by Miss Jones.

As to Mr. Elman's motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, MacIntyre and Reilly voted in the negative, Mr. Dixon so voting for the reason that he is of the opinion that it is unnecessary to obtain the Director's views. The motion was lost.

As to Mr. MacIntyre's motion, Messrs. MacIntyre and Reilly voted in the affirmative, and Messrs. Dixon and Elman and Miss Jones voted in the negative. The motion was lost.

On motion of Mr. Dixon, the Commission denied the request of respondent Federated Department Stores, Inc., that § 2.4(d) of the Rules of Practice be waived and that its proposed consent settlement be accepted; and directed that Federated's counsel be so informed.

As to the foregoing action, Messrs. Dixon, Reilly and MacIntyre voted in the affirmative; Mr. Elman voted in the negative, and stated that he would file a dissenting statement to accompany the letter of advice; and Miss Jones voted in the negative for the reason that she is not sufficiently informed on this matter, and did not receive the benefit of the discussion had with the parties on September 28, 1964, prior to her appointment to the Commission.

Mr. MacIntyre stated that he would also file a statement to accompany the Commission's letter of advice.

It was agreed that Mr. MacIntyre would prepare the letter of advice to counsel for respondent Federated.

MAY 26, 1965

(6) Docket 8651—Associated Merchandising Corporation, et al.

Mr. Dixon presented this matter for reconsideration pursuant to the action of May 21, 1965, at which time (a) the Commission denied the request of respondent Federated Department Stores, Inc., that § 2.4(d) of the Rules of Practice be waived and that its proposed consent settlement be accepted, directed that Federated's counsel be so informed, agreed that Mr. MacIntyre would prepare a letter of advice to Federated's counsel; and (b) the individual Commissioners' positions in this matter were entered in the minute record, including the fact that Mr. Elman would file a dissenting statement to accompany the letter of advice and Mr. MacIntyre would also file a statement.

(On May 24, 1965, Mr. Elman circulated to the other Commissioners his dissenting statement for attachment to the letter to counsel for Federated.)

After consideration, Mr. Elman moved that the Bureau of Restraint of Trade be instructed to submit to the Commission for consideration a memorandum setting forth the Bureau's recommendation regarding Federated's offer of settlement. The motion was seconded by Miss Jones.

As to Mr. Elman's motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, MacIntyre and Reilly voted in the negative. The motion was lost.

Mr. Dixon moved that the Commission waive the provisions of § 2.4(d) to the extent that consideration be given to the offer of settlement of Federated Department Stores, Inc.

Without objection, the motion was adopted, and it was so ordered.

Mr. Dixon moved that Federated's offer of settlement be rejected. The motion was seconded by Mr. Reilly.

As to the above motion, Messrs. Dixon, MacIntyre and Reilly voted in the affirmative; Mr. Elman voted in the negative and stated that he would file a dissenting statement; and Miss Jones did not participate for the reason that she is not sufficiently informed on this matter, and did not receive the benefit of the discussion had with the parties on September 28, 1964, prior to her appointment to the Commission.

The motion was carried, and it was so ordered.

It was agreed that Mr. MacIntyre would prepare an appropriate order ruling in accordance with the motions which were carried in this matter.

JUNE 7, 1965

(2) Docket 8651—Associated Merchandising Corporation, et al.

Pursuant to the action of May 26, 1965, with respect to the offer of consent settlement of respondent Federated Department Stores, Inc., and upon consideration of reports in connection with this matter by Mr. Dixon and Miss Jones, the Commission (1) waived, as to all respondents, the provision of Section 2.4(d) of the Rules of Practice that the consent order procedure should not be available after issuance of complaint; (2) granted counsel for all respondents and counsel supporting the complaint an opportunity to be heard with respect to Federated's offer of settlement; (3) directed that the counsel be so informed by the Director of the Bureau of Restraint of Trade (the Director was so instructed by telephone from the meeting); and (4) established 2:00 p.m., June 8, 1965, Room 242, this building, as the time and place for a conference for the above purpose between the Commission and counsel for Federated Department Stores, Inc., and complaint counsel, and all other counsel if they choose to attend.

JUNE 8, 1965

Docket 8651—Associated Merchandising Corporation, et al.

Pursuant to the action herein of June 7, 1965, the Commission conferred with counsel for the respondents and interested Commission staff members, as follows, respecting the offer of consent settlement of respondent Federated Department Stores, Inc.:

Counsel for the respondents attending were: Abe Fortas and Normand Diamond, for respondent Federated Department Stores, Inc.; Paul Warnke, Thomas H. Austern and Harvey Applebaum, for the 13 store respondents, other than Federated Department Stores, Inc.; and, Ira Milstein, for respondents Associated Merchandising Corporation and Aimcee Wholesale Corporation.

Staff members in attendance were: The Director of the Bureau of Restraint of Trade and the Chief of the Division of Discriminatory Practices of that Bureau, and Attorneys Basil J. Mezines and Lewis F. Parker, counsel supporting the complaint, also members of that Bureau; and the Assistant General Counsel for Consent Orders.

Counsel for all the respondents were advised of the Commission's waiver in this matter of the provision of § 2.4(d) of the Rules of Practice that the consent order procedure shall not be available after issuance of complaint.

Messrs. Fortas and Diamond were heard on behalf of the offer of settlement of respondent Federated Department Stores, Inc.

At the conclusion of the presentation by Federated's counsel, in response to inquiry by Mr. Dixon, counsel for all respondents advised the Commission that they had no objection to the Commission's consulting *ex parte* with its staff members, including complaint counsel, regarding this matter.

Counsel for the respondents were excused.

Counsel supporting the complaint and other staff members were consulted, and thereafter were excused.

After discussion, Mr. Dixon moved that Federated's offer of settlement be rejected and that the case be remanded to the hearing examiner for hearings in regular course. The motion was seconded by Mr. Reilly.

As a substitute, Mr. Elman moved that the Commission, having waived § 2.4(d), and the matter now being before the Commission for consideration of the offer of settlement submitted by respondent Federated Department Stores, Inc., (1) instruct the hearing examiner (a) that the Commission is allowing all parties thirty days for the purpose of discussing the terms of an appropriate consent order disposing of the case in its entirety, and (b) that, if a consent order is not submitted by all the parties prior to the expiration of thirty days, or, if a consent order is submitted and rejected by the Commission, the matter will be remanded to the hearing examiner; and (2) instruct the Bureau of Restraint of Trade (a) to proceed forthwith to engage in discussion with all the respondents for the purpose of entering into a consent order adequately disposing of the issues of this case, and (b) to be guided in this connection by the discussion had at the table, and in particular, by Miss Jones' suggestion for including in the consent order a provision applicable to central or joint buying by all divisions of Federated Department Stores, Inc. The motion was seconded by Miss Jones.

As to Mr. Elman's motion, Mr. Elman and Miss Jones voted in the affirmative, and Messrs. Dixon, Reilly, and MacIntyre voted in the negative. The motion was lost.

As to Mr. Dixon's motion, Messrs. Dixon, Reilly, and MacIntyre voted in the affirmative, and Mr. Elman and Miss Jones voted in the negative.

The motion was carried, and it was so ordered.

Whereupon, the proposed consent settlement of respondent Federated Department Stores, Inc., was rejected; this matter was remanded to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice; and it was agreed that Mr. MacIntyre would prepare an order to that effect and present the same to the Commission for consideration.

It was directed that Mr. Elman be shown on the order as dissenting, and that his dissenting statement accompany the order.

JUNE 9, 1965

(2) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to the action of June 8, 1965, Mr. MacIntyre presented memorandum of June 8, 1965, with which he submitted an appropriate draft of order.

After consideration, the Commission approved an order rejecting the proposed consent settlement of respondent Federated Department Stores, Inc., and remanding the matter to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice:

As to the foregoing action, Mr. Elman and Miss Jones dissented, and it was directed that their position, as follows, be shown on the order:

Commissioners Elman and Jones dissident. In their view, Federated's offer provides a reasonable basis for working out a settlement without protracted litigation on terms that would effectively prevent continuation or recurrence of the practices charged against Federated in the complaint.

It was further directed that the off-the-record material relating to Federated's offer of settlement, and the instant order, be placed in the public record.

Mr. Reilly was recorded as in favor of the foregoing action.

SEPTEMBER 7, 1966

(186) *United States v. Associated Merchandising Corp., et al. U.S.D.C., S.D., N.Y., 66 Civ. 456 (Docket 8651—Associated Merchandising Corporation, et al.)*

Memorandum of August 18, 1966, from J. B. Truly, Acting General Counsel, (a) advising that this matter is set for hearing on September 9, 1966, in the United States District Court for the Southern District of New York on the application for enforcement of the hearing examiner's order for production of documents; and (b) requesting that the Commission, prior to September 1, 1966, authorize the Office of the General Counsel to present at the court hearing on September 9, 1966, the transcript of the prehearing conference held before the hearing examiner in the pending administrative proceeding.

In his special-matter circulation of August 23, 1966, Mr. Reilly recommended approval of the General Counsel's request.

On August 23, 1966, the five Commissioners authorized the General Counsel to present at the court hearing on September 9, 1966, the transcript of the prehearing conference held before the hearing examiner in the pending administrative proceeding in Docket 8651.

SEPTEMBER 15, 1966

(3) *United States v. Associated Merchandising Corp., et al. 66 Civ. 1156 (SDNY) (Docket 8651—Associated Merchandising Corporation, et al.)*

Pursuant to the action of September 12, 1966, the Commission considered this matter in view of memorandum of September 15, 1966, from Charles C. Moore, Jr., Acting Assistant General Counsel, Division of Appeals, approved by the General Counsel, and memorandum of September 15, 1966, by Mr. MacIntyre.

Mr. Moore, included advice that subpoenas duces tecum were served on Messrs. Dixon and Elman, the Executive Director, the Secretary, the General Counsel, and Attorney Basil J. Mezines, who, with Attorney Lewis F. Parker, is counsel supporting the complaint in this matter, and that the Assistant United States Attorney is confident that all except the subpoena directed to Mr. Mezines will be quashed, and suggestions that, if the Mezines subpoena duces tecum is not quashed that he be directed to comply with a portion of the specifications and to decline to produce certain material, as indicated, and that, should a question arise wherein the Commission's attorneys cannot determine whether or not disclosure would be proper that they be authorized to request a recess for the purpose of obtaining further advice from the Commission.

The General Counsel included, with his approval, a request that Attorney Harold D. Rhynedance, Jr., of the Office of the General Counsel, be authorized to represent the Commission, Mr. Mezines and the General Counsel.

Mr. MacIntyre advised that this matter is of extreme urgency and transmitted a proposed draft of Commission minute action instructing Trial Counsel with respect to their response to subpoenas and the scope of their testimony in this matter.

Mr. Moore was called in and consulted regarding this matter.

After consideration, on motion of Mr. MacIntyre, the staff was instructed as follows:

(a) That the Commission has determined that in view of the fact that Attorneys Basil Mezines and Lewis Parker may be required to appear in the United States District Court for the Southern District of New York, they should be given instructions as to the information they may disclose in the event they testify in that Court in the course of hearings pertaining to the Commission's suit to compel the production of certain data by respondents;

(b) That, if Mr. Mezines is required to produce documents under the subpoenas served on him by respondents' attorneys on September 9, 1966, he may furnish materials describing documents in respondents' files made previously available to the Commission's attorneys, and that, in connection with requests for documents bearing on the institution of the investigation and issuance of complaint, he should not produce documents reflecting the internal decision-making process of the Commission or the documents which are the work product of its attorneys;

(c) That, in connection with requests for documents not filed with the Commission or in the public record, reflecting suggestions, proposals or

recommendations with respect to complaint counsel's Motion for Production of Documents or Motion in the Alternative for an Order Requiring Access filed on July 26, 1965, Mr. Mezines is to refuse those documents constituting the work product of the Commission attorneys;

(d) That, in case there is a dispute as to whether a document is privileged, Mr. Mezines may turn the document over to the presiding judge for his examination, and that, if the judge, after such examination, nevertheless orders disclosure, the government attorneys representing the Commission should request the judge to dismiss the suit rather than compel production, and that, in that eventuality, the government attorneys should request the judge to keep such documents in a confidential status so that they may be presented to the Court of Appeals without disclosure to respondents;

(e) That, if certain documents requested by respondents do not exist, Mr. Mezines may reveal that fact;

(f) That, Attorneys Mezines and Parker are authorized to answer questions on the duration of the investigation, the persons and corporations investigated, questions on the relevancy and reasonableness of the order requiring production, as well as questions pertaining to information which has already been disclosed pursuant to their normal authority to try Commission proceedings;

(g) That Government counsel representing the Commission are given discretion as to whether or not Messrs. Mezines and Parker should answer questions relating to information to be released in the future course of this administrative proceeding; and,

(h) That counsel representing the Commission are authorized to request a recess for the purpose of obtaining further advice from the Commission in those cases where they cannot independently determine whether or not disclosure in response to certain questions would be proper.

Mr. Moore was excused.

OCTOBER 11, 1966

SPECIAL MATTERS

(1) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to the action of June 7, 1966, this matter was considered further by the Commission.

With his special-matter circulation of October 7, 1966, Mr. MacIntyre presented memorandum of October 6, 1966, in which he recommended that the Commission return this matter to the hearing examiner with directions to order the respondents to commence their pretrial procedures, and that the submitted drafts of order and opinion of the Commission denying oral argument and directing commencement of pretrial procedure be approved.

After consideration, the Commission directed that the examiner, making such provisions as he deems necessary to assure the respondents the opportunity for discovery on subsequent submittals by complaint counsel, if any, resulting from delayed discovery, direct the respondents to commence, as soon as possible, their pretrial submissions and procedures as ordered in Prehearing Order No. 1; and denied the respondents' request for oral argument on the interlocutory appeal of complaint counsel.

Order and opinion of the Commission to the above effect were approved.

As to the foregoing action, Mr. Elman, seeing no reason for the Commission to interfere with the hearing examiner's intelligent and responsible handling of prehearing discovery procedures, dissented; and was so recorded, with the direction that his position be shown on the above order.

Mr. Reilly voted in the negative as to the foregoing action.

(2) *Emile M. Lapeyre, et al. v. Federal Trade Commission 5th Cir., No. 21,787 (Docket 7887—Grand Caillon Packing Company, Inc., et al.)*

Memorandum of October 7, 1966, from J. B. Truly, Assistant General Counsel, Division of Appeals, approved by the General Counsel, recommending, for the reasons recited, that the Commission not seek certiorari of the opinion of September 13, 1966, of the Court of Appeals for the Fifth Circuit affirming in part and setting aside in part the Commission's order in Docket 7887.

In his special-matter circulation of October 11, 1966, Mr. MacIntyre stated that he would prefer to seek certiorari in this case, but was deferring to Mr. Truly's view that it is not practical to seek Supreme Court review.

After consideration, on motion of Mr. MacIntyre, it was directed that certiorari of this matter be sought.

As to the foregoing action, Messrs. Dixon and MacIntyre and Miss Jones voted in the affirmative; Mr. Reilly voted in the negative; and Mr. Elman was recorded as not concurring, and it was directed that his non-concurrence be shown on the letter to the Solicitor General requesting certiorari.

(3) *Docket 6837—Warehouse Distributors, Inc., et al. In re: Drop-Shipping in the Automotive Replacement Parts Industry*

Memorandum of October 3, 1966, from the Bureau of Restraint of Trade reporting pursuant to the actions of August 31 and September 1, 1966, and expressing the opinion that the August 5, 1966, supplementary statement of counsel for Warehouse Distributors, Inc., contains very little that can be of use in assisting the Commission in reaching a decision.

FEBRUARY 19, 1968

(5) *Docket 8651—Associated Merchandising Corporation, et al. In re: Associated Merchandising Corporation v. William K. Jackson, Civil No. 18,993 (D. Md.)*

Memorandum of February 13, 1968, from Assistant General Counsel Truly, approved by the General Counsel, forwarding for the Commission's consideration (1) a letter dated February 8, 1968, and addressed to Mr. Harold D. Rhynedance, Jr., of Mr. Truly's office, from counsel for plaintiffs in the above-captioned collateral lawsuit in the District Court; (2) a proposed "Agreement Containing Consent Order to Cease and Desist" in Docket 8651; and (3) a "Request For Certification Of Motion To Withdraw Proceeding From Adjudicative Status" for possible filing with Hearing Examiner Jackson. Mr. Truly recommended that the present matter be withdrawn from adjudication for the purpose of negotiating a consent settlement of both the collateral lawsuit in the District Court and of the underlying administrative proceeding, pursuant to Section 2.34(d) of the Commission's Rules.

Special, walk-around circulation of February 14, 1968, by Mr. Elman submitting memorandum of the same date in which he reported his consideration of this matter and to which he attached a draft of order referred this matter to the hearing examiner with directions.

Special, walk-around circulation of February 15, 1968, by Mr. Elman withdrawing the above proposed order, and instead, submitting for approval draft of order which spells out precisely, for the guidance of counsel both in this case and generally, how requests under Section 2.34(d) should be handled.

On February 15, 1968, the five Commissioners referred this matter to the hearing examiner with directions (1) to have complaint counsel respond to respondents' request and (2) to then certify the matter back to the Commission with his recommendation as to whether it should be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and approved and referred to the Secretary for issuance and service upon the parties, order to the foregoing effect.

FEBRUARY 27, 1968

(2) *Docket 8651—Associated Merchandising Corporation, et al.*

Certification filed February 21, 1968, by the hearing examiner of respondents' motion to withdraw proceedings from adjudicative status. The hearing examiner recommended that the motion be granted and that the matter be withdrawn from adjudication for a period not to exceed thirty days.

Special matter circulation of February 26, 1968, by Mr. MacIntyre in which he concurred in the recommendation of the hearing examiner.

After consideration, on motion of Mr. MacIntyre, the Commission granted respondents' motion, and pursuant to Section 2.34(d) of its Rules of Practice, made its determination to withdraw this proceeding from an adjudicative status for a period not to exceed 30 days; and the General Counsel was instructed to prepare an appropriate order and submit the same to the Secretary to obtain Commission approval thereof.

As to the foregoing action, Mr. Dixon was recorded as in favor.

MARCH 5, 1968

SECRETARY'S MATTERS

(1) Docket 8651—Associated Merchandising Corporation, et al.

Memorandum of February 28, 1968, from Acting General Counsel truly submitting pursuant to the direction of February 27, 1968, draft of order withdrawing the proceeding from the adjudicative status.

On February 29, 1968, the five Commissioners withdrew the administrative proceedings in this matter from adjudicative status for a period of thirty days following the date of issuance of the order, for the purpose of negotiating a settlement by the entry of a consent order; and order to the foregoing effect was approved and referred to the Secretary for issuance and service upon the parties.

JUNE 18, 1968

SPECIAL MATTERS

(1) Docket 8651—Associated Merchandising Corporation, et al.

Letter of June 14, 1968, from counsel for the respondents requesting an opportunity to appear before the Commission at the earliest time convenient for the purpose of presenting the respondents' view in support of the proposed consent agreement prior to its final disposition of the Commission.

Mr. MacIntyre submitted said counsel's letter with his special-matter circulation of June 17, 1968.

After consideration, it was agreed that the Commission would confer with respondents' counsel regarding this matter on Thursday, June 20, 1968, at 10:00 a.m., in Room 242, this building; and the staff was instructed to so notify said counsel.

JUNE 20, 1968

ADJUDICATIVE MATTER

Docket 8651—Associated Merchandising Corporation, et al.

Pursuant to arrangement, the Commission, in company with interested staff members from the Bureau of Restraint of Trade and the Division of Consent Orders, and the following counsel for the respondents, considered the respondents' offer of settlement of this matter:

Attorneys Ira M. Millstein and Irving Scher, of the law firm of Weil, Gotshal & Manges;

Attorney Burray Bring, of the law firm of Arnold & Porter;

Attorneys J. Randolph Wilson, Harvey M. Applebaum, and H. T. Austern, of the law firm of Covington & Burling.

At the hour of 11:55 a.m., counsel for respondents and the staff members were excused.

During the consideration of this matter, Messrs. Elman and Nicholson stated that they were in favor of accepting the consent settlement, and Messrs. Dixon and MacIntyre and Miss Jones stated that they were in favor of its rejection.

After consideration, the time within which this proceeding is to be withdrawn from adjudicative status for the purpose of consent negotiations was extended to and including July 10, 1968; and it was agreed that Attorney Charles A. Tobin would prepare an order to that effect and refer the same to the Secretary for issuance and service upon the parties.

JUNE 25, 1968

SPECIAL MATTERS

(1) Docket 8651—Associated Merchandising Corporation, et al.

Pursuant to the action of June 20, 1968, the Commission considered further the respondents' offer of settlement at today's meeting.

Miss Jones circulated at the table copies of letter of June 24, 1968, addressed to her, from counsel for respondents, discussing questions raised at the meeting on June 20, 1968.

During consideration of this matter, Mr. MacIntyre moved that the complaint be withdrawn, and that separate expeditious investigations of each of the asso-

ciation's members on allegedly knowing and inducing price discriminations, allowances and services in violation of law be conducted on the assumption that the consent settlement is rejected.

Mr. MacIntyre's above motion was lost for want of a second.

After further consideration of Mr. Elman's substitute motion as amended and seconded by Miss Jones, the Commission rejecting respondents' offer of settlement was rescinded and the staff was directed to submit to the Commission no later than July 8, 1968, for inclusion on the meeting agenda for July 9, 1968, a memorandum regarding the feasibility of conducting a relatively short investigation, not to exceed one year, looking toward issuance of Section 5 complaints against the leading members of the department store industry who have allegedly used their buying power to exact from suppliers through individual purchasing arrangements, unlawful price discriminations or price concessions, or discriminatory promotional or advertising allowances.

The staff was instructed, in preparing the memorandum, to examine what has already been investigated by the Commission in the wearing apparel matters, this particular case, and any other reasonably current investigation which has been made by the Commission.

The staff was further instructed to reopen or continue negotiations with the respondents in Docket 8651 with a view to expanding the prohibitions of the order to include direct buying of specific product categories or lines, based upon purchases which individual respondents have made for which there is evidence in the Commission's files.

Attorney Charles A. Tobin was instructed to prepare and submit to the Commission for the meeting on Thursday, June 27, 1968, a draft of letter to counsel for respondents, as discussed at the table, which does not imply that the Commission has rejected respondents' offer of settlement.

Messrs. Dixon and MacIntyre voted in the negative as to the foregoing action.

JUNE 27, 1968

SPECIAL MATTERS

(1) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to the action of June 25, 1968, the Commission considered the letters to respondents submitted by Attorney Charles A. Tobin.

After consideration, it was directed that no letters be forwarded to counsel for the respondents in this matter.

Instead, the staff was instructed to (1) contact the respondents' attorneys and explore with them the extent to which the individual department store members of Associated Merchandising Corporation are prepared to accept an order directed against their individual purchases covering a substantial portion of the products which they purchase through their buying corporation; and (2) to make it plain to the respondents' attorneys that such contact is being made in advance of the Commission's action in this matter.

JULY 9, 1968

(4) *Docket 8651—Associated Merchandising Corporation, et al.*

Memorandum of July 9, 1968, from the Bureau of Restraint of Trade reporting pursuant to the actions of June 25 and 27, 1968, and concluding that a relatively short investigation, not to exceed one year, into the individual inducement and receipt of price and promotional concessions by department stores is not feasible since such an investigation would require the full time attention of more attorneys and accountants than the Bureau can spare at this time or in the foreseeable future.

After consideration, the consent agreements submitted by the respondents were rejected by the Commission, with the direction that they be so notified.

The staff was instructed to prepare appropriate letters of notification to respondents' counsel, for the signature of the Secretary closing with "By direction of the Commission".

Messrs. Elman and Nicholson dissented from the foregoing action, and it was directed that their dissenting statements accompany the letters to respondents' counsel, and that their position be indicated on the letters.

AUGUST 8, 1968

(9) *Docket 8651—Associated Merchandising Corporation, et al.*

Special matter circulation of August 7, 1968, by Mr. MacIntyre submitting memorandum of the same date in which he reported his consideration of this matter: set forth an alternative solution to respondents' offer of settlement; and set forth requests concerning the matter in the event his proposed solution is not acted on.

Chairman Dixon withdraw his support for going forward with the complaint in its present form and stated that he supports Mr. MacIntyre's motion as contained in his memorandum.

Mr. MacIntyre withdrew his vote on the rejection of the proposed settlement and stated that he likewise votes against acceptance of the settlement. After discussion, it was agreed that Mr. MacIntyre would prepare and circulate to the Commission for consideration a draft of order withdrawing the complaint herein.

SEPTEMBER 3, 1968

(4) *Docket 8651—Associated Merchandising Corporation, et al.*

Special matter circulation of August 9, 1968, by Mr. MacIntyre with which he submitted, pursuant to agreement at the meeting on August 8, 1968, memorandum of August 8, 1968, supplementing his circulation of August 7, 1968, and transmitting a resolution authorizing a 6(b) investigation of respondents, and an order simultaneously withdrawing the complaint. Mr. MacIntyre in his memorandum recommended adoption of the resolution and order and further recommended, in the event the Commission withdraws the complaint, that the staff be directed to prepare appropriate 6(b) orders to carry the resolution into effect.

Agenda matter of August 21, 1968, by Mr. Nicholson submitting memorandum of August 20, 1968, in which he reported his consideration of the matter and set forth his suggestions in disposition of the matter as well as recommendations concerning other buying groups in the department store industry.

Agenda matter circulation of August 29, 1968, by Miss Jones submitting memorandum of the same date in which she reported her consideration of the matter and for the reasons recited, stated that she is still convinced that a limited order is far more preferable than withdrawal of the complaint.

After discussion, Mr. MacIntyre moved the recommendations contained in his circulations of August 7 and 9, 1968, for withdrawal of the complaint, approval and adoption of the resolution authorizing a 6(b) investigation of respondents, and direction to the staff to prepare appropriate 6(b) orders to carry the resolution into effect.

As a substitute motion, Miss Jones moved that in the event the consent order is accepted, the Commission direct the staff to submit to the Commission a recommendation as to the kind of investigation they feel can be mounted to determine whether the individual respondents are engaged in inducing discriminatory prices or allowances or promotions in advertising, and to submit to the Commission a recommendation as to the kind of investigation and action which is necessary to proceed against any other group buying practices which are in this industry.

The substitute motion by Miss Jones was seconded by Mr. Nicholson with Miss Jones and Mr. Nicholson voting in the affirmative and Messrs. Dixon, Elman and MacIntyre voted in the negative. The motion was lost for want of a majority.

As to Mr. MacIntyre's motion, the motion was seconded by Mr. Dixon, with Commissioners Dixon, MacIntyre and Jones voting in the affirmative and Commissioner Elman and Nicholson voting in the negative. The motion was carried and it was so ordered.

Messrs. Elman and Nicholson stated that they may file a statement in this matter.

SEPTEMBER 4, 1968

(2) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to the action of September 3, 1968, Mr. Elman presented special matter circulation of September 4, 1968, with which he submitted the statement of his position to be appended to the order withdrawing the complaint which was approved at yesterday's meeting.

Miss Jones stated that she withdraws her vote on yesterday's action in this matter.

It was agreed that this matter would be further considered at a later meeting.

OCTOBER 8, 1968

AGENDA MATTERS

(1) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to agreement at the meeting of September 4, 1968, this matter was further considered by the Commission.

After discussion, Miss Jones moved that the case be restored to adjudicative status. The motion was lost for want of a second.

Mr. MacIntyre moved adoption of the recommendations contained in his circulation of August 7 and 9, 1968, for withdrawal of the complaint, approval and adoption of the resolution authorizing of 6(b) investigation of respondents, and direction to the staff to prepare appropriate 6(b) orders to carry the resolution into effect.

After discussion, as a substitute for Mr. MacIntyre's motion, Mr. Nicholson moved that the consent agreement be accepted. The motion was seconded by Miss Jones, with Commissioners Elman, Jones and Nicholson voting in the affirmative and Commissioners Dixon and MacIntyre voting in the negative. The motion was carried and it was so ordered.

Miss Jones moved adoption of Mr. MacIntyre's recommendation for approval and adoption of the resolution authorizing a 6(b) investigation of respondents and direction to the staff to prepare appropriate 6(b) orders to carry the resolution into effect. As to Miss Jones motion, Commissioners MacIntyre, Jones and Nicholson voted in the affirmative, and Commissioners Dixon and Elman voted in the negative. The motion was carried and it was so ordered.

Mr. MacIntyre reserved the right to file a statement respecting the Commission's action accepting the consent agreement.

Mr. Dixon stated that he voted in the negative for the reason that he thinks the Commission should withdraw the present complaint, draw upon the material developed in the wearing apparel cases and investigation and any other evidence that expeditiously might be able to be developed so that a new and proper complaint can be submitted to the Commission for consideration, a broad Section 5 complaint.

Mr. MacIntyre stated that he joins in the views expressed by the Chairman and additional reasons that will be explained in a statement that will be attached to the order herein.

OCTOBER 29, 1968

(3) *Docket 8651—Associated Merchandising Corporation, et al.*

Special matter circulation of October 28, 1968, by Mr. Nicholson submitting memorandum of the same date in which he recommended in connection with the revision of the minutes of October 8, 1968, in this matter to accord with discussions at the table on problems within the proposed consent agreement, that the Commission again discuss this matter at the table with the Chief of the Division of Discriminatory Practices and Attorney Basil Mezines.

After consideration, Mr. Nicholson moved that the minutes of October 8, 1968, be amended in the following respects: (1) insert "subject to the resolution of an interpretation of the phrase 'which are unlawfully discriminatory' in Paragraph 11 in accordance with the discussion between respondents' counsel and the Commission at the table," after the word "accepted" appearing in the second line of the fourth paragraph; and (2) insert the following sentence immediately preceding the paragraph containing Mr. MacIntyre's reservation on filing a statement: "The staff was instructed to inform the respondents of the Commission's intention to conduct the investigation authorized in the immediately preceding paragraph."

As amended, Mr. Nicholson moved approval of the minute.

As a substitute motion, Miss Jones moved (1) that the staff communicate to the respondents that there are three members of the Commission who are agreeable to entering of the consent order, one of those three is willing to accept the consent order as is, and the other two are willing to accept the consent order if the phrase "which are unlawfully discriminatory" is changed to reflect the discussion that the Commission and respondents' counsel had at the table, and (2) that the respondents also be informed that the Commission simultaneously approved and adopted a resolution directing an investigation of and collection of reports from certain corporations

engaged in the department and specialty store business and related corporations, and directed the staff to carry into effect such resolution covering alleged violations of Section 2 of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

As to Miss Jones' motion, Commissioners Elman, Jones and Nicholson voted in the affirmative, Commissioner Dixon voted in the negative, and Commissioner MacIntyre did not concur in that part of the action regarding the acceptance of the consent settlement for the reasons stated in his circulations of August 7 and 9; he prefers instead what he proposed in his circulations of August 7 and 9 with respect to the resolution for the investigation and even the notice to the respondents of the Commission's intention to undertake such investigation. Commissioner MacIntyre does vote for that as he proposed on August 9 and again in his vote of October 8.

The motion was carried and it was so ordered.

DECEMBER 11, 1968

AGENDA MATTERS

(1) *Docket 8651—Associated Merchandising Corporation, et al.*

Memorandum of December 4, 1968, from Assistant General Counsel truly transmitting of November 27, 1968, from counsel for the respondents withdrawing the offer of settlement of the adjudicative proceeding; recommending, for the recited reasons, that the Commission promptly dispose of the adjudicative proceeding on the basis of a consent settlement along the lines seemingly suggested by the aforementioned letter from counsel for the respondents; and urging the Commission to promptly dispose of this matter.

Memorandum of December 6, 1968, from the Bureau of Restraint of Trade reporting on negotiations with respondents in this matter, and for the recited reasons, recommending that respondents be informed that the Commission will accept, if respondents submit, the order contemplated by the Commission's minute of October 29, 1968; that if such order is submitted and accepted, a determination as to whether or not further investigation of the AMC individual member stores should be made, will be deferred until the Commission has had an opportunity to consider the compliance status of this matter and other information available at the end of the 12 months allowed for compliance with the order; and that this will not operate to delay any investigation which the Commission may consider appropriate with respect to other corporations engaged in the department and specialty store business and related corporations.

Agenda circulation of December 6, 1968, by Mr. Dixon submitting memorandum of the same date in which he reported his consideration of this matter; recommended that the procedure proposed by Mr. MacIntyre in his memorandum of August 7, 1968, be adopted, and moved (1) that the outstanding complaint be withdrawn; (2) that the Commission simultaneously adopt a resolution directing an investigation to determine whether during the past two years the pricing and purchasing practices of the individual store members of AMC may constitute violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act; (3) that if the investigation discloses that the stores have not during the two-year period violated either of these laws, the investigation be closed and the case dropped; and (4) that if the investigation discloses violations by all or any of such stores individually, a new complaint be prepared covering all such activities, including the alleged group buying violations covered by the withdrawn complaint.

Mr. MacIntyre seconded Mr. Dixon's motion in his memorandum of December 6, 1968. As to Mr. Dixon's motion, Mr. Dixon was recorded as in favor and Mr. MacIntyre voted in the affirmative, Messrs. Elman and Nicholson voted in the negative, and Miss Jones abstained. The motion was lost for want of a majority.

After discussion, Mr. Elman moved the recommendation of Assistant General Counsel Truly in his memorandum of December 4, 1968, that the Commission promptly dispose of the adjudicative proceeding on the basis of a consent settlement along the lines seemingly suggested by letter of November 27, 1968, from counsel for the respondents. The motion was seconded by Mr. Nicholson, with Messrs. Elman and Nicholson voting in the affirmative, Mr. Dixon recorded as voting in the negative, Mr. MacIntyre voting in the negative for the reason that he thinks that would be a disposition that would be far less in the public interest than the one that was proposed in the Chairman's motion that was voted down, and Miss Jones abstained. The motion was lost for want of a majority.

After brief discussion, no Commissioner moved the recommendation of the Bureau of Restraint of Trade in memorandum of December 6, 1968.

Mr. Nicholson moved that the Bureau of Restraint of Trade, Division of Discriminatory Practices, be authorized to enter into further negotiations with respondents looking towards the acceptance of their proposed settlement with the phrase "unlawfully discriminatory" changed to reflect the discussion had with respondents and complaint counsel at the table, and that the respondents be informed that the Commission has no intention to investigate individual violations at this time but it reserves the right to conduct any such investigation should it receive any further information indicating that there are individual violations in the future.

The motion by Mr. Nicholson was lost for want of a second.

Mr. Elman moved (1) that the complaint in Docket 8651—Associated Merchandising Corporation, et al., should be dismissed or withdrawn and the General Counsel draft an order for submission to the Commission, the exact phraseology of the order to be considered when the Commission has a draft of order before it (reason for the motion is that the Commission is apparently unable to work out a consent settlement with respondents and the one alternative of proceeding with litigation, in view of all the complications that have arisen with respect to discovery and other problems detailed in Mr. Truly's memorandum of December 4, 1968, as well as the other staff memoranda in the file, appears to be most unsatisfactory and not in the public interest); and (2) with respect to violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act in the department store industry, that the Bureau of Restraint of Trade in conjunction with the Bureau of Economics and the Program Review Officer be instructed to submit to the Commission within 90 days, their considered recommendation as to what actions the Commission should take with respect to existence of alleged violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act in the department store industry in the light of the knowledge of the staff as to what is in the Commission's files and any other evidence they may have as to the existence of such violations, and to take into account the Commission's available resources to deal with this matter and all other considerations bearing upon the Commission's responsibilities to enforce the law and the public interest.

No action was taken on Mr. Elman's motion, and the matter was laid over for further consideration at a later meeting.

DECEMBER 12, 1968

(3) *Docket 8651—Associated Merchandising Corporation, et al.*

Pursuant to the meeting on December 11, 1968, Mr. Elman presented his special matter circulation of December 11, 1968, submitting memorandum of the same date and draft of order withdrawing the complaint without prejudice. In his memorandum Mr. Elman repeated his motions made at the meeting of December 11, 1968, and stated as follows: that the motions were made only after all the other proposed alternatives had failed to muster a majority; that the present impasse cannot continue indefinitely, and must somehow be resolved; that the two motions were offered in the hope that they would provide a basis for action upon which the Commissioners could all agree; that if it should transpire that there would be dissent from the submitted order, he would want to reconsider his position in the matter; that since withdrawal of the complaint is a course of action which he does not favor, and which indeed seems to him far less in the public interest than unqualified acceptance of the consent order would have been, he would not want to be put in the position of having to defend withdrawal of the complaint if there were to be a dissent.

Assistant General Counsel Truly and Attorneys Harold Rhynedance and Charles Moore, Jr., were called in, consulted, and thereafter excused.

After consideration, on motion of Mr. Elman, the complaint herein was withdrawn without prejudice, and order to that effect was approved and referred to the Secretary for issuance and service upon the parties.

As to the foregoing action, for the minute record only, Commissioner Jones voted in the negative, and Commissioner MacIntyre did not participate in the vote on the motion for the reason that he would have preferred his motion to withdraw the complaint on the conditions stated in his motion as set forth in his memoranda of August 7 and 8, 1968.

In re: Alleged Violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act in the Department Store Industry

On motion of Mr. Elman, the Bureau of Restraint of Trade in conjunction with the Bureau of Economics, was instructed to advise the Commission within 60 days of its reappraisal of all the information in the Commission's files and otherwise available to the staff, and its recommendations with respect thereto.

OFFICE MEMORANDUM

JANUARY 20, 1956.

To: The Commissioner.

From: Lowell Mason, Commissioner.

Subject: Associated Merchandise Corporation, et al. Docket 5027.

In the attached memo the Assistant General Counsel has presented an engaging problem arising as a result of supplemental investigation into compliance with the Commission's order in the docketed matter.

This compliance investigation which had its beginning in 1950 was undertaken by reason of a 1949 complaint from an anonymous party who alleged in effect that Associated Merchandise Corporation, among others, was soliciting and obtaining from manufacturers preferential quantity discounts, rebates and the like. It so happened that respondent AMC and its member stores were under a 1945 order supposedly proscribing activities in violation of Section 2(f) of the amended Clayton Act—complaint therein having issued in 1943. Said order was entered after admission answers were filed and findings made.

In line with thinking of the times, the matter followed the same theory of the Automatic Canteen case and, from dates related above, it can be seen that all the Commission's actions (including initiation of the supplemental investigation) occurred before the Supreme Court rendered its decision in Automatic Canteen (1953). That decision, as will be recalled, decidedly upset the theory of previous 2(f) cases insofar as the element of scienter necessary to violation is concerned.

The whole matter before us now boils down to this. The compliance investigation disclosed that respondents were still soliciting and getting price concessions, etc., which would no doubt constitute violation of the 1945 order as it was written. And the interesting question is whether we should undertake to get affirmance and enforcement of that order.

To this question the Assistant General Counsel and the General Counsel answer no. After setting out provisions of the order, relevant findings and argument pro and con, they have listed four prime reasons for answering in the negative.

"1. Failure to include findings as to the *knowing receipts of illegal price concession*."

"2. Breach of good faith on the part of the Commission if it attempted to secure an order of affirmance and enforcement on a theory different from that on which the case was originally brought." (Especially where, as here, admission answers were filed.)

"3. Belief that when the Commission proceeds on another 2(f) matter, it should be a case that is not clouded with other issues as there should be no opportunity for a further weakening of the meaning of Section 2(f) of the statute."

"4. The order in D-5027 is not directed at inducing or receiving *illegal* discriminations. It forbids inducing or receiving any discriminations. The Supreme Court's decision in the Automatic Canteen case invalidates this order."

It would be well to mention about here, perhaps, that a somewhat novel step was taken earlier in attempt to get this matter pinned down. This quote from a memorandum of Attorney-Examiner Seidman will suffice: "Anticipating the probability of an attack upon the validity of the Order, the undersigned (Seidman), with consent and authorization of the then Assistant General Counsel for Compliance and the then Director of the Bureau of Antimonopoly, attempted to negotiate a stipulation permitting the amendment of the findings to incorporate those indicated as being essential by the decision in the Automatic Canteen case. This effort proved abortive." Speaking plainly, it was "no go."

The possibility of trying to stretch the complaint and findings by implication is frowned upon by the General Counsel's office and I think with just cause. It would be like stretching a rotten rubber band. It breaks—snaps back—and you wind up with fingers smarting, as it were, and as it will be here, so I believe, if we undertake further action on this order. Again, we can't lose sight of the fact that the order itself, in terms, prohibits knowing inducement or receipt of discriminations, in effect, across the board and without regard to the factor of knowledge of the illegality of such discriminations.

When legal and policy grounds are lumped, it seems quite clear to me that thoughts of suit for affirmance and enforcement in this matter must go out the window. Being of such opinion, I agree that proper recourse here is to refer the investigative results to the Bureau of Investigation for study and report as to whether there is basis for preparation of a new 2 (f) complaint. I so move.

LOWELL MASON, *Commissioner*.

MEMORANDUM

MARCH 31, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation, et al., File No. 601 0059.

This is a proposed 2(f) complaint against Associated Merchandising Corporation (AMC) and its wholly-owned subsidiary, Aimee Wholesale Corporation (AWC).

Largely as a result of the *Automatic Canteen* decision and consequent infirmities found to characterize the Commission's 1945 order against AMC, the staff has reinvestigated AMC, AWC and the department store-stockholders of AMC. AWC was created after issuance of the Commission's original order ostensibly as an independent wholesaler from the buying-front image of AMC.

The violation alleged in the proposed complaint is corollary to that in Joseph A. Kaplan & Son, Inc., Docket No. 7813, a shower curtain manufacturer, supplier to AMC stores, whose preferential prices to these stores was the basis of violation in that case.

The complaint herein presents certain difficulties among which are the following:

(1) AMC, because of its size, warehousing and other functions, is in a position to argue that it is an independent wholesaler and is not the sort of buying-front or bookkeeping device that the Commission has taken exception to in the automotive parts cases.

(2) AWC was recently more completely divorced from AMC for the apparent purpose of lending weight to the argument that it is a wholesaler independent of the member stores purchasing from it.

(3) The prevalence of group buying organizations patterned after AMC raises a question whether the price preferences employed in such arrangements are not so universally available as to eliminate the likelihood of competitive injury.

The staff is of the opinion that these are not substantial impediments and that the likelihood of violation is great enough to warrant issuance of complaint. I agree and so move.

JOHN R. REILLY, *Commissioner*.

AGENDA MATTER—STAFF

APRIL 1, 1964.

Re Associated Merchandising Corporation, et al. File No. 601 0059.

(Circulated as an agenda matter by Commissioner Reilly, March 31, 1964)

From: Commissioner Elman.

To: Comm. Dixon; Comm. MacIntyre; Comm. Reilly; Comm. Rm. 340; Secretary (J. Kuzwa); General Counsel; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

APRIL 1, 1964.

To: The Commission.

From: Philip Elman.

Subject: Associated Merchandising Corporation, et al. File No. 601 0059.

I am not convinced that this complaint should issue at any time, but I am quite sure that it should not issue now.

The staff itself indicates some uncertainty about the strength of its case; it raises, but does not answer, the serious questions outlined in Commissioner Reilly's memorandum. Moreover, the staff does not even mention what must be a grave problem here: the burden, under *Automatic Canteen*, of coming forward with evidence of AMC's knowledge that the preferential prices which it received were not justifiable. At the least, this matter should be returned to the staff for further consideration.

Most important, I believe that no purpose would be served by our issuing this complaint now. Our recent decision in *Joseph A. Kaplan*, Docket 7813, has put AMC's suppliers on notice that preferential prices to AMC are illegal. This alone should, as a practical matter, stop the practices challenged by this complaint. The Supreme Court has endorsed such preventive use of 2(f): "for § 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73 (1953).

I move that this matter be returned to the staff to be held until after our order in *Kaplan*, if sustained, becomes final. If our order in *Kaplan* is not sustained, the staff should re-submit this case to us. However, if our order in *Kaplan* is upheld and becomes final, then three months thereafter the staff should investigate and report to the Commission whether AMC is buying at preferential prices from the six suppliers listed on pages 6 to 7 of the staff memorandum or otherwise violating 2(f).

MEMORANDUM

MAY 20, 1964.

To: The Commission.

From: Commissioner MacIntyre.

Subject: Certification by the Hearing Examiner in *Associated Merchandising Corporation, et al.*, D. 8651, of Respondent Federated Department Stores, Inc.'s Request that § 2.4(d) of the Rules of Practice Be Waived and a Proposed Consent Settlement Accepted.

Federated Department Stores, Inc., represented by the law firm of Arnold, Fortas & Porter, requests § 2.4(d) of the Rules of Practice be waived and offers a consent order in this case arising under Section 2(f) of the Clayton Act, as amended. The proposed order is, in general, limited to Federated's transactions with Aimcee Wholesale Corporation and respondent Associated Merchandising Corporation, but also prohibits it from maintaining other organizations as a means of inducing prices which respondent knows or should know are discriminatory. The examiner has certified the motion to the Commission without recommendation.

To date, apparently, the case is still in the pretrial stage. Respondent offers no compelling reason why the Commission should waive § 2.4(d) at this time. The other respondents, according to respondent's motion, are not willing to join in Federated's proposal. Respondent Federated advises that the proposed order can be made effective as to Federated alone and urges that this would simplify the trial of the case, since the various store divisions of this respondent account for 38.7 percent of the sales of respondent Aimcee Wholesale Corporation.

On that showing alone, I believe that the motion should be denied and I am not convinced at this time that the limited order proposed by Federated adequately disposes of the allegations of the complaint. However, since this is a complex case which will necessarily result in extended and expensive litigation, respondent should be given an opportunity to state its reasons why the rule should be waived and the proposed consent order accepted.¹

¹ An earlier proposal of a consent settlement applicable to all respondents had been rejected by the Commission in August 1964.

Accordingly, I am submitting for your consideration a draft of a proposed order granting respondent Federated permission to file a brief, giving its reasons why § 2.4(d) should be waived and the proposed consent order accepted and providing for a reply brief by complaint counsel. I move that the Commission adopt and issue the draft of the attached order.

EVERETTE MACINTYRE, *Commissioner*.

MEMORANDUM

SEPTEMBER 15, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation, et al., File 601 0059.

This matter is back before us as a result of a breakdown in the consent order negotiations between the staff and respondents' counsel.

Notwithstanding the fact that any inducing and receiving of allowances by the stores who are stockholders of AMC, which in turn owns Aimcee Wholesale Corporation (AWC), has been done through the instrumentality of AWC, nevertheless, the staff in its proposed complaint and order takes the position that the order should run not only against inducing and receiving through the instrumentality of AWC but also inducing and receiving by the individual stores in their separate capacities. Essentially this is the point of impasse between the staff and respondents' counsel. The latter feel that the order should run only against AWC and the individual stores to the extent that they employ AWC or any other instrumentality in inducing and receiving allowances.

Respondents have submitted a "Settlement of Proposed Complaint" dated August 11 which has previously been circulated among the Commissioners. In that proposal they urge that they be permitted to consent to an order running only against inducing and receiving through an instrumentality and they indicate a readiness to bring about a divestiture of AWC by AMC to facilitate achieving this objective.

In their proposal respondents' counsel also request an opportunity to present their position to the Commission at a Commission meeting.

The staff opposes respondents' position and insists upon the broader form of order. The arguments pro and con are fully set forth in the respondents' proposal and in the staff's memorandum.

I feel that because of the importance of the matter and the possibility that protracted litigation may be obviated it may be useful for the Commission to permit respondents' counsel to make its presentation. I so move.

JOHN R. REILLY, *Commissioner*.

MEMORANDUM

OCTOBER 5, 1964.

To: The Commission.

From: Commissioner Reilly.

Subject: Associated Merchandising Corporation, et al., File 601 0059.

After considering proposed respondents' settlement terms, I am convinced that decision as to the breadth of the order in this case should await trial of the issues and that the form of order attached to the staff's proposed complaint should stand. I am convinced that a broad order running against the stores in their individual capacities should follow any finding that the circumstances surrounding any 2(f) violation indicate a proclivity on the part of the individual stores to violate 2(f) in their separate capacities.

If, as the staff says, AWC is not a legitimate independent wholesaling operation but was established for the principal purpose of securing preferment from suppliers, it seems to me an inference may be drawn that having chosen to participate in a 2(f) violation through an instrumentality the stores are equally capable of pursuing it alone.

In short, it may be that in choosing an instrumentality for accomplishing a Section 2(f) violation the stores simply chose the most efficient method for accomplishing the desired results. It does not follow from this however that they would not in their individual capacities violate 2(f).

The breadth of the order in this context is simply a question of the adequacy of the remedy and I have no doubt the Commission may close the "individual" avenue to violation as well as the "collective" if complaint counsel can show that the stores are likely to resort to solicitation of preferential prices in their separate capacities.

I see no justification for antecedently disabling the Commission from securing an adequate remedy by acceptance of proposed respondents' terms of settlement. I think it is too much to bargain away in order to get the collective proscription.

Accordingly, I move that the staff be directed to communicate a rejection of respondents' offer of settlement and to give proposed respondents 10 days within which to agree to the proposed order as presently drafted, failing which I move that the Commission should proceed with issuance of complaint.

In regard to Commissioner MacIntyre's suggestion that any violation of Section 5 be alleged in the complaint, I feel that the present case is sufficiently comparable to the Atlas Supply case, Docket 5794, to warrant consideration of his suggestion. I would however prefer to hear from the staff prior to making a recommendation.

I am attaching a copy of staff memorandum prepared at the request of Commissioner MacIntyre which may be of interest.

JOHN R. REILLY, *Commissioner*.

MEMORANDUM

APRIL 26, 1965.

To : The Commission.

From : Philip Elman.

Subject : Associated Merchandising Corp., et al., Docket No. 8651.

Counsel for Federated Department Stores, Inc., one of the respondents in this proceeding, has submitted to the Commission an offer of settlement. The letter states that the offer is being submitted at the suggestion of the staff, with whom the offer had been discussed and who said they were unwilling to recommend that the Commission accept the offer.

The Secretary's office informs me that Federated's offer, while addressed to the Commission and sent to each member of the Commission, has been treated as a motion and referred to the hearing examiner for disposition. It seems to me that the Secretary has erred in referring respondent's settlement offer to the examiner. An offer of settlement is not a motion, and it is something on which the hearing examiner has no authority to act. If made to the examiner, the examiner would have no option but to certify it to the Commission. When a settlement offer is addressed directly to the Commission, the Commission should consider it directly and not go through the meaningless ritual of referring it to the hearing examiner so that it can be certified back to the Commission.

Moreover, an offer of settlement is an *extra-judicative* submission; in acting on such an offer, the Commission goes outside its adjudicative role and may, with complete propriety, solicit the views of the staff on the proposal *ex parte*. It is highly inappropriate for the staff to answer an offer of settlement in a public on-the-record statement filed with the examiner.

On the merits, I think we should give serious consideration to this new proposal. When the respondents first proposed a consent order in this proceeding, there was considerable question as to whether they would really discontinue the group-buying activities on which the complaint is based. There was some indication that the respondents might be able to maintain indirect control over AMC-AWC's wholesaling operation. Now, however, Federated proposes an order that would completely sever its relationship with AMC and AWC and would prevent its obtaining discounts through any buying organization. Without question, the consent order now proposed would end the kind of group buying which gave rise to the complaint. Reading back over the staff memos in this matter, I am struck by the fact that the staff has consistently regarded the problem of unlawful inducement of discounts by companies like Federated as a problem of group buying, as in the auto parts industry. Department stores have banded together in buying groups like AMC-AWC in order to build up their buying power vis-à-vis the powerful integrated chains. Presumably, they have banded together precisely because they doubted their individual ability to obtain price treatment

comparable to that accorded the integrated chains. It is mere speculation to suppose that, deprived of group-buying power, these respondents would be able or would attempt individually to obtain preferential price treatment from suppliers. If we can deal a death blow to group buying in this industry, and I think acceptance of Federated's present proposal would do just that, and if we can do this without extended litigation and judicial review, we will have accomplished our remedial objective in this industry.

I request that this matter be placed on the Commission's meeting agenda.

MEMORANDUM

MAY 11, 1965.

To: The Commission.

From: Philip Elman.

Subject: Associated Merchandising Corp., et al., Docket No. 8651.

Pursuant to our direction, the General Counsel has submitted a memorandum on the question of how the Commission should handle offers of settlement in matters pending before a hearing examiner. The General Counsel makes a number of points with which I cannot agree. First, he argues that, in all cases pending before an examiner, an offer of settlement, in whatever form made and whether it is addressed to the Commission or to the hearing examiner, must, under the Commission's Rules, be treated as a motion to the hearing examiner. While Section 3.6(a) of the Rules provides that all motions in a proceeding shall be addressed to the hearing examiner during the time the proceeding is before him, that provision is applicable only if a settlement offer addressed directly to the Commission be deemed a motion. Whether it is to be so deemed seems to me a matter within the Commission's discretion. Since the examiner has no authority to approve or reject a settlement, and consequently must certify all offers of settlement to the Commission, I do not see why the Commission should, automatically and inflexibly, remit to the examiner all such offers addressed to the Commission. We should do so only when we desire the recommendations of the hearing examiner. In the present case, with the proceeding before the examiner still in its earliest stages, I think it would be appropriate for the Commission to consider this settlement proposal directly, without first referring it to the examiner.

Second, the General Counsel notes that Section 2.4(d) of the Rules provides that the consent order procedure will not be available after issuance of the complaint, and he suggests that the Commission may lack authority to waive its procedural rules. There are, to be sure, circumstances where an agency is not permitted to waive its own rules because to do so would prejudice a party. But there certainly is no general rule that an agency cannot waive procedural provisions it has established. And, as a matter of fact, the very provision cited by the General Counsel has been waived repeatedly by the Commission. In a number of instances we have permitted cases to be settled by consent even though the complaint had been issued. Recent examples that come to mind are *Lone Star*, *Permanente*, and several wearing-apparel cases.

Third, the General Counsel suggests that in considering a settlement offer made after the complaint has been issued, the Commission cannot seek the *ex parte* views of its staff. Once again, actual Commission practice has been to the contrary, a good example of this being the *Borden* merger case. It would be impossible for the Commission to deal intelligently with offers of settlement if it were forbidden to consult *ex parte* with its trial staff. One of the principal factors bearing on whether a settlement should be accepted in lieu of prosecuting a case to a final order is the strength of complaint counsel's case and the likelihood of an eventual decision upholding the complaint and granting all of the relief sought. Obviously, complaint counsel cannot apprise the Commission with respect to this crucial factor if he is confined to on-the-record comments on any settlement offer made during trial.

If we are to consider settlement offers in the trial stage at all—and I do not see how a government agency can properly adopt a blanket rule of refusing to consider settlement offers during the trial—then it would be, in my opinion, most unwise to cripple our ability to dispose of such offers intelligently by extending the separation-of-functions requirements of the Administrative Procedure Act to embrace settlement offers. Such an extension of the law would be not only unwise and impractical, but also unsound. The separation-of-functions provision of the Administrative Procedure Act applies to adjudication, and a settlement is by its nature extra-adjudicative.

Fourth, the General Counsel argues that for the staff to comment *ex parte* on the present settlement offer might prejudice the rights of other respondents in this proceeding. However, he does not elaborate this argument and I fail to see wherein such prejudice might lie.

I move that the Secretary, who without Commission authorization referred this offer of settlement to the hearing examiner to be treated as a motion addressed to him, be directed to inform the examiner and the parties that the Commission has decided to consider and pass on Federated's offer of settlement directly and without referring it to the hearing examiner. I further move that the Bureau of Restraint of Trade be directed to submit a report and recommendations to the Commission on Federated's settlement offer.

MEMORANDUM

JANUARY 3, 1966.

To: Commission.

From: Commissioner MacIntyre.

Subject: Certification of the Hearing Examiner of Respondents' Refusal To Comply With Order To Produce. Associated Merchandising Corp., Docket No. 8651.

Complaint counsel, pursuant to § 3.12 of the Rules of Practice, requested the examiner to certify to the Commission the circumstances surrounding the refusal of respondents Associated Merchandising Corporation, Aimcee Wholesale Corporation, and Federated Department Stores, Inc., to comply with the hearing examiner's order of August 12, 1965, granting complaint counsel's motion for production of documents. The question is now before the Commission on the certification of the examiner.

As you may remember, on October 29, 1965, respondents filed a complaint in the District Court for the District of Columbia, seeking a temporary restraining order, preliminary injunction, and a declaratory judgment upon the examiner's order of August 12, 1965. On the same date, the district court issued a temporary restraining order and at the same time plaintiffs' motion for preliminary injunction was set down for hearing. Before the hearing was held, by stipulation dated November 18, the parties agreed to dismissal of the action without prejudice. An order to that effect was issued on the same date by Judge Corcoran.

Section 3 of the stipulation leading up to the dismissal is crucial to the Commission's disposition of the question certified. By that stipulation the parties agreed that the plaintiffs would not be subject to any sanctions, criminal or civil, or any administrative action, including but not limited to action under Rule 3.12 by reason of non-production of documents specified in the order of August 12. The stipulation provides further that it is without prejudice to the institution of a separate civil enforcement proceeding pursuant to Section 9 of the FTC Act in a district court for production of the documents specified in the order.

As a result of the stipulation, both the hearing examiner and the Commission are precluded from themselves taking further action to enforce production of the documents specified. The only avenue left open is an enforcement proceeding under Section 9 in the district court. Accordingly, I move that the Commission issue the attached order directing the General Counsel to initiate enforcement proceedings under Section 9 of the Federal Trade Commission Act in conformity with the stipulation of the parties and the order of the United States District Court for the District of Columbia of November 18.

EVERETTE MACINTYRE, *Commissioner*.

SPECIAL MATTER

MARCH 14, 1966.

Re Associated Merchandising Corp., et al., Docket 8651.

From: Commissioner MacIntyre.

Pursuant to the directions of the Commission in its order of January 19, 1966, in the above-captioned matter, the General Counsel is submitting for the approval of the Commission and the signature of the Chairman, a proposed letter to the Attorney General accompanied with a proposed application, exhibits and verification, requesting the institution of a civil action in the United States District Court for the Southern District of New York to enforce an order to produce documentary evidence issued by the hearing examiner pursuant to Section 3.11 of the Commission's Rules of Practice.

From: Everette MacIntyre, Commissioner.

To: Comm. Dixon; Comm. Elman; Comm. Reilly; Comm. Jones; Secretary J. Kuzew; General Counsel; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles and Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

I am submitting the matter to the Commission for consideration and action.

MEMORANDUM

MARCH 18, 1966.

To: Commission.

From: Commissioner MacIntyre.

Subject: Associated Merchandising Corp., et al., Docket No. 8651.

This comes to the Commission on a request by complaint counsel for permission to file an interlocutory appeal from the examiner's order denying their motion to expedite proceedings. In the background is the Commission's recent action taken in this matter to request the institution of a civil suit in district court to enforce the order to produce records issued by the examiner against the respondents pursuant to § 3.11 of the Commission's Rules.

Complaint Counsel's Position: Complaint counsel argued to the examiner in their motion of February 2, 1966, the denial of which is the subject of the request for appeal, that the examiner should amend his Prehearing Order No. 1 in order to expedite the proceeding by requiring respondent to commence their part of the pretrial procedure somewhat out of order. Prehearing Order No. 1, dated January 25, 1965 (more than a year ago), required complaint counsel, within 45 days of the date of that order, to file with the examiner and to serve on the other parties the substance of the case which they were to present, which would include a list setting forth each illegal price discrimination intended to be established at the hearings, a list of the documents and exhibits and a list of witnesses to be called, requests for admissions, proposed stipulations, requests for production of documents and other items. The prehearing order further required respondents, within 30 days after the completion by complaint counsel of their part of the order, to file with the examiner and serve on complaint counsel their pretrial submission, which includes a list of documents and exhibits they intend to introduce, a list of witnesses, and requests for admissions and for the production of documents.

Complaint counsel pointed out to the examiner, and they have made the same argument in this request, that they have completed their portion of the pretrial as set forth in the examiner's order, with the exception of receiving the documents required by the examiner's order, which documents are in the respondents' possession, and that there is no reason why respondents' counsel should not be directed to commence their pretrial submissions at this time. Complaint counsel submit that requiring respondents to proceed with the pretrial will in no way prejudice their position, since the only documents that have not been listed by complaint counsel are in respondents' possession and control. Complaint counsel, in their motion, continue as follows:

"Although these documents are necessary for complaint counsel's case, it is believed that respondents' refusal to comply with the examiner's order for the production of such documents should not affect the initiation of hearings in this matter. With the exception of the material requested in the order for production of documents, complaint counsel have all the information necessary to begin hearings. While this matter cannot be concluded until respondents comply with the order for the production of documents, complaint counsel do not feel that the institution of hearings should be delayed until that time. The examiner may wish to certify to the Commission the question of whether hearings can commence after respondents complete their submission."

In other words, it appears that complaint counsel are ready to go to trial at this time though with the reservation that the trial *cannot be completed* until they have obtained the requested documents from the respondents.

Respondents' Position: Respondents, on February 17, 1966, answered the motion of complaint counsel for the expedition of the proceedings. They opposed the motion, stating among other things that complaint counsel must bear the responsibility for the delay, having chosen, in their words, "to continue the investigation", that complaint counsel have not completed their submission as re-

quired under Prehearing Order No. 1, that the pending court litigation may be crucial since counsel has indicated the evidence is necessary to their case and therefore to continue the proceeding before the Commission would be unreasonable and oppressive and that for respondents to commence their pretrial submissions would be a "fairly disorganized and ineffective discovery procedure." On this last point they claim renewal and duplication of prior inquiries plus recall of witnesses would be unavoidable should complaint counsel's position be sustained.

Respondents, in their answer to the motion, have given a glimpse of their proposed request for discovery, particularly if they are required to commence their pretrial at this point.

They assert that, among other things, they would have to conduct prehearing discovery as to the 200 resources which allegedly are involved in the request for production.

The Hearing Examiner's Position: The examiner, on March 7, 1966, denied complaint counsel's motion and gave his reasons in a six-page order and opinion. In the examiner's view the scheduling of the pretrial submissions is tied in with his ruling on respondents' motion for a more definite statement. He denied that motion but in so doing stated that he would order complete disclosures by complaint counsel of all of the specific acts and practices relied upon prior to the commencement of the hearings in this matter, with sufficient time granted respondents to prepare their defense. He now feels that to require respondents to make their submissions while complaint counsel have made only partial disclosure would not only violate the basic doctrine of fair play underlying the entire prehearing procedure but would result in a piecemeal and endless submission and countersubmission. He also states that he has serious doubts about whether the change in Prehearing Order No. 1 requested "would meet the standards of a fair hearing and due process required in administrative proceedings".

Discussion of the Issue: The examiner's rulings as to pretrial procedure in the normal course of things should be final. Pretrial procedures is very important under the Commission's present rules, demanding a high degree of skill and finesse on the part of the examiner to obtain effective results. In the circumstances, I believe the examiner should ordinarily have a largely free hand in the conduct of this stage of the proceeding.

Nevertheless, I am extremely reluctant to endorse a course of action here (which a failure to act might seem to be) whereby this whole proceeding must come to a standstill pending the outcome of an action to obtain compliance from the respondents with the examiner's order of production. Are the Commission's Rule of Practice now so inflexible that a mere failure to comply with an apparently proper demand by the party sued must necessarily stymie a case indefinitely? I find this difficult to believe.

It does not seem to me that respondents would be at all prejudiced by an order requiring them to begin their pretrial submission at this time and before the completion of the court litigation. They would not be hurt since, upon subsequent submissions by complaint counsel, if any, they would be allowed further discovery. In fact, respondents, in their answer to the motion, do not seem to claim any such prejudice. Their main assertion is that the action would be disruptive of an orderly and economical proceeding. True, the end result would be a somewhat piecemeal approach and there would perhaps be some duplication, but this alternative does not seem to be nearly as repugnant to me as would be the great delay inherent in waiting on court action.

The examiner has estimated that, conservatively, the court proceedings, together with the time needed by respondents to make available the documents and the time needed by complaint counsel to analyze, put in proper form and submit, would require at least two years from the date when the suit is filed. At this point we do not know when, or even if, an action will be filed since this is a matter which must be taken to the court through the United States Attorney General. I have been informally advised that upon a decision to file there could be many months delay before the suit even reaches the district court. Delay, I believe, would clearly work in the respondents' favor in this proceeding and it is not inconceivable that it might cause a result favorable to the respondents on a basis other than the merits. The Commission having put most of its eggs in one basket, so to speak, in prosecuting the buyer's case rather than numerous cases against different sellers, can scarcely afford to see this matter become a victim of a strict or faulty interpretation of its Rules.

The examiner, in his solicitation for the rights of respondents, while laudable enough, overlooks the equally important rights of the public in early resolution of the case on its merits. For one thing, if there are in this industry the unlawful price discriminations charged, then the injury to competitors will be continuing for all the years of the trial, including periods of undue delay.

To take no action here, I believe, would tend to encourage procrastination and delay throughout the entire proceeding. It is well to bear in mind that the examiner who, it seems clear, has bent over backwards to be fair to the respondents, agreed with complaint counsel that their request for production was entirely proper and in the public interest. In fact, his position was that not to permit a party to make a request for vital documents at the pretrial stage would, as he stated it, defeat the very purpose of Rule 3.11 to aid in pretrial and permit orderly, continuous hearings. In spite of the apparent appropriateness of the order, respondents, as it now stands, can successfully block the proceeding merely by refusing to comply. Under such a policy they can tie this case in knots for long periods. It does not seem an unfair question to ask why respondents should, in effect, be permitted to benefit from their own intransigent action.

The seriousness of the issue, in my opinion, is such that the Commission should grant permission to file an appeal so that both parties will have an opportunity to present their views. Of course, in the event the Commission decides to take action contrary to that of the examiner, it is unnecessary, under the Rules, that such procedure be followed so that respondents will have an opportunity to be heard. Upon an appeal, even if the Commission decides not to overrule the examiner, it could at least use such an occasion to emphasize the need to explore all possible means to avoid a long period of delay and to order the examiner to reconsider the matter in the light of such views.

I therefore recommend and move that the Commission here grant the request for permission to file an appeal. I have attached an appropriate order.

EVERETT MACINTYRE, *Commissioner*.

MEMORANDUM

OCTOBER 6, 1966.

To: Commission.

From: Commissioner MacIntyre.

Subject: Docket No. 8651; In the Matter of Associated Merchandising Corp., et al.

The Commission, on March 23, 1966, granted permission to complaint counsel to file an interlocutory appeal from the hearing examiner's order of March 7, 1966, denying their motion to implement Prehearing Order No. 1 by requiring respondents to commence their part of the pretrial to expedite proceedings. The briefs have all been filed (as well as a request of the respondents, on April 11, 1966, for oral argument on the appeal) and the matter is now pending before the Commission for decision.

As I advised the Commission in my agenda circulation of June 2, 1966, abeyance of a decision on the appeal then seemed to be indicated because of pending action in the United States District Court for the Southern District of New York. Thus, the matter was kept in suspense awaiting the outcome of the court case. I believe, however, that as a result of the hearings held before Judge McLean in September the Commission should take a new look at the appeal before it.¹

The following is a brief review of the circumstances which have led us to the present status of the matter: In July 1965 complaint counsel moved the examiner to order the production of certain documents in the respondents' possession. In response to the request respondents argued, *inter alia*, that the motion was investigatory in nature and therefore not permitted after the trial had begun. The examiner rejected this argument and ordered production under § 3.11 of the Commission's Rules of Practice. The Commission, on September 23, 1965, denied respondents permission to file an interlocutory appeal from the order of the examiner. This was a unanimous action by the Commission. Respondents thereupon appealed to the United States Court for the District of Columbia in Civil Action No. 2701-65. This action was dismissed on November 18, 1965, on the

¹ For the Commission's convenience, I have attached hereto copy of my memorandum of March 18, 1966, recommending that permission to appeal be granted.

basis of a stipulation wherein the parties agreed, *inter alia*, that future enforcement of the examiner's order, if necessary, would proceed solely by means of civil enforcement proceedings under Section 9 of the Federal Trade Commission Act.

The subsequent failure of the respondents to comply with the examiner's order of August 12, 1965, ordering production of documents in their possession, was certified by the examiner to the Commission for appropriate action. The Commission thereupon, by order of January 19, 1966, directed the General Counsel to prepare papers requesting the Attorney General to initiate civil enforcement proceedings. The United States Attorney subsequently brought an action, seeking an order directing respondents to comply, in the United States District Court for the Southern District of New York. Judge McLean, in an opinion dated July 13, 1966, overruled the jurisdictional argument and held that Congress had expressly authorized the court to proceed summarily to enforce orders of the FTC for the production of documents. He set the Government's application down for hearing in open court September 9, 1966 (later adjourned to September 19, 1966). Such hearing was had (see report of the Assistant General Counsel for Appeals, dated September 26, 1966) and the outcome was that the Judge took the matter under advisement.

It is impossible to predict when a decision in the court case will be forthcoming. It could be at any time. However, I have been informally advised that Judge McLean is in the middle of another large trial and that a decision is not likely, at best, before the first of next year. Moreover, it is my understanding that the Judge did not appear to be particularly sympathetic with the Commission's cause. The Judge was concerned in part with whether the documents requested "constitute or contain evidence relevant to the subject matter involved" (as required under the Commission's Rule 3.11), a characteristic difficult to show until the documents are in hand. It is altogether likely, if he grants the Government's petition at all, that he will be selective in the documents to be produced. If this happens and the Commission is not satisfied with the production ordered, an appeal could be made, although probably in such circumstances the case would not present an attractive subject for appeal.

I do not believe that at this stage the Commission action on the interlocutory appeal before it could seriously jeopardize the court case. The arguments there have all been made. Moreover, the delays which have already developed and the possibilities against obtaining a favorable decision now appear such that a good argument can be made for continuing the Commission's proceeding whatever the court may do.

Some action on the appeal, it seems to me, should now be taken. The Commission has a certain responsibility to the parties, and particularly the complaint counsel, in resolving the issue presented on the appeal. The appeal should not be left dangling for an indefinite period.

The Alternatives: The Commission, of course, if it is resolved to indefinitely delay this matter until final action in the courts, can deny the appeal. The effect of that would be to affirm the examiner's decision to suspend hearings indefinitely. Such an alternative is not attractive to me. There is no certainty at all how long it would take to get a final and clear-cut decision in the courts. An equivocal court decision resulting in possible appeal could keep the case dragging along for many months. In the meantime, the proceeding begins to mildew with age. Additionally, even if it develops that the court enforces compliance with the Commission's order to produce, it is clear that thereafter an extended period will be involved in accumulating and analyzing the documents. For such reasons I favor some course which will get this case moving.

I realize there is always the possibility of abandoning the effort to have the documents produced and to proceed on the basis of whatever evidence complaint counsel now have in their possession. This also is a highly unattractive alternative. In the first place, the authority and credibility of the Commission is, in a sense, on trial; the Commission believed, when it denied respondents permission to file an interlocutory appeal on September 23, 1965, that complaint counsel had justified their request for the documentation and so upheld the examiner's order for production. Nothing has changed so far as the showing of a need for these documents is concerned. If the Commission's action was correct and justified, which I am sure it was, the Commission can hardly ignore an outright refusal to comply with its orders. To do so would surely be to ask for more of the same in future litigations. Also, there is the question of the workability of the Commission's pretrial discovery rules if the procedure can be so easily frustrated by a respondent.

But it is not only the principle here that I am concerned with. The fact is, and we must assume, that complaint counsel need these records to prove their case. Does it really solve anything, therefore, to take the easy course and back away from an insistence upon compliance with a proper order? To do so would mean we could have a trial but would the Commission, in such an eventuality, be granting complaint counsel adequate opportunity to support the allegations? Going ahead without the documents would strike me as not being a wholly responsible action.

The other alternative which immediately comes to mind is to grant respondents' appeal in whole or in part and to order respondents to begin their pretrial disclosures.

Factors Involved in Ordering a Start on Respondent's Pretrial: The question before the Commission on the appeal concern only the issue of whether or not to proceed with respondents' part of the pretrial prior to the completion by complaint counsel of their discovery. The examiner's analysis of the problems and his reasons for denying the motion point up the difficulties. Respondents' brief in opposition to the appeal reiterate more or less the same points. Additionally, see discussion of the issues in my memorandum of March 18, 1966, attached.

The difficulties would seem to boil down to two main things: (1) whether or not it would be fair to respondents, particularly in view of the hearing examiner's Pre-Hearing Order No. 1, to direct them to commence their pretrial procedures when complaint counsel, because of the failure of respondents' production of documents, have not fully completed their pretrial; and (2) the fact that this might result in some duplication of effort in the recalling of witnesses, etc. The second point appears to me to be of very little merit. Even if there is some repetition on recalling of witnesses, this would surely be a minor factor compared to the harm to this case resulting from an indefinite suspension of hearings. The first point on the question of fairness to the respondents presents a more difficult problem. I have attempted to answer this in the proposed opinion circulated with this memorandum. In view of the examiner's stand. I don't suppose this question can ever be entirely satisfactorily resolved until the matter of the production of records is finally settled. Nevertheless, it does not seem to me that any possible difficulties of inconvenience which a continuance of the pretrial might present to respondents would be of such a nature as to result in any abridgement of fundamental rights.

I recommend, therefore, that the Commission return this matter to the hearing examiner, with directions to order respondents to commence their pretrial procedures. I have attached hereto a proposed opinion and order to this effect. I move that these be approved by the Commission.

EVERETTE MACINTYRE, *Commissioner.*

MEMORANDUM

JANUARY 4, 1967.

To: The Commission.

From: Commissioner Reilly.

Subject: *U.S. v. Associated Merchandising Corp., et al.*, 66 Civ. 1156 (SDNY)—FTC Docket No. 8651 Staff. Recommendation that appeal be taken from adverse ruling of the District Court.

The appellate staff seeks Commission approval of a recommendation to the Civil Division of the Department of Justice that an appeal be taken from that part of the ruling of the Southern District of New York adverse to the Commission in the Commission's enforcement action against AMC arising out of the latter's refusal to comply with an order to produce documents issued pursuant to § 3.11 of the Commission's Rules. The U.S. attorney for the Southern District strongly suggests an appeal.

In denying the Commission's petition for enforcement the Court construed the § 3.11 requirement that documents subject to production "constitute or contain evidence" as virtually requiring a prior determination of probative weight. I agree with the staff that the Court was in error in so holding.

I am not sure I agree with staff counsel's contention that "summary proceedings" of the kind here involved do not admit of any degree of independent fact finding by the District Court. Since this is a petition to the court by the Commis-

sion for enforcement and not an appellate proceeding, it seems to me the District Court can make whatever factual inquiry it feels is necessary to determine for its own satisfaction whether a finding of relevance is proper. Accordingly, I move that the last paragraph on page nine and the second paragraph on page ten of the staff's proposed letter be stricken.

I do believe, however, that it applied the wrong criterion of relevance and that the court erroneously permitted the question of burdensomeness to intrude into its determination of relevance.

The decision could occasion delay and difficulty in future Commission proceedings, and I move that the staff recommendation be approved.

The letter to the Civil Division requires minor corrections as follows:

Page 1, paragraph 1, 5th line from the bottom: the date should be November 18 rather than December 18.

Page 1, paragraph 2, line 4: the first word should be "be" rather than "by".

Page 4, paragraph 1, 5th line from the bottom should be changed to read "... and nothing derived from a complete reading . . .".

Page 12, first full paragraph, line 5: the word "matter" should be substituted for the phrase "troublesome litigation".

JOHN R. REILLY, *Commissioner*.

SPECIAL MATTER

OCTOBER 13, 1967.

Re Associated Merchandising Corp., et al., Docket No. 8651.

(Previously circulated by Commissioner MacIntyre as a special matter on October 12, 1967.)

From: Commissioner Elman.

To: Comm. Dixon; Comm. MacIntyre; Comm. Reilly; Comm. Jones; Secretary; General Counsel; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs.

This is a special matter (not listed on the regular agenda) which I shall present at the next Commission meeting.

Commissioner MacIntyre has circulated an order granting the requested production of documents, but excluding "all documents and information coming within the terms of § 4.10(a) (1) through (5), and (7)". No explanation or justification is stated for the exclusion, and I am at a loss to know why it is proposed.

MEMORANDUM

NOVEMBER 1, 1967.

To: Commission.

From: Everett MacIntyre, Commissioner.

Subject: Docket 8651; In the Matter of Associated Merchandising Corp. Hearing Examiner's Certification of Respondents' Motion for Production of Documents.

I am circulating herewith an order denying respondents' motion for the production of documents made pursuant to § 3.11 of the old rules. Respondents' motion encompasses "all books, records and other documents" obtained by complaint counsel or any employee or agent of the Federal Trade Commission from ten suppliers specified in respondents' application. It is my recommendation that the application be rejected on the ground that it does not comply with the requirement in the rule that the material or information sought be identified as exactly as possible. § 3.36 requires a Commission review of requests for disclosure under this rule and this of course contemplates a meaningful evaluation of such requests. Obviously, it is impossible to intelligently review an application as broadly phrased as the one under consideration here. It is further obvious from respondents' motion that they could, if they so desired, identify the documents they seek far more exactly than they have done in their motion. Respondents have already had a measure of discovery against the suppliers, and have been informed by them that certain documents have been turned over to the Commission, while certain documents were destroyed. Under the circumstances, it is obvious that respondents have made little, if any, effort to comply

with the requirement that the materials sought be described as exactly as possible. Since this is one of the first cases to come up under § 3.36, the Commission should obviously make an effort to make it clear that applications for disclosure must meet its requirements. I therefore move the Commission adopt the attached order.

There is also in my office at this time, respondents' appeal from the hearing examiner's order denying their application for depositions and subpoenas *duces tecum* to non supplier companies and persons filed October 16, 1967. This appeal does not involve an interpretation of § 3.36 and I believe it should be handled separately.

EVERETTE MACINTYRE, *Commissioner*.

SPECIAL ADJUDICATIVE MATTER

NOVEMBER 6, 1967.

Re Docket No. 8651; In the Matter of Associated Merchandising Corp., et al.
Order denying appeal from examiner's denial of application for depositions and subpoenas and opinion of the Commission.

From: Everette MacIntyre, Commissioner.

To: Comm. Dixon; Comm. Elman; Comm. Reilly; Comm. Jones; Secretary;
General Counsel.

This adjudicative matter will be presented to the Commission at the next meeting.

Attached is a copy of an order of the hearing examiner of October 5, 1967, which denied respondents' application for depositions and supporting subpoena *duces tecum*. Also attached is a copy of the respondents' appeal from such order, complaint counsel's answer and respondents' reply to the complaint counsel. I have prepared an order denying appeal from the examiner's denial of application for depositions and subpoenas and an opinion supporting such order. Copies of that proposed order and opinion also are attached. They fully explain the situation.

I recommend and move the approval of the order and the opinion.

MEMORANDUM

FEBRUARY 14, 1968.

To: The Commission.

From: Philip Elman.

Subject: *Associated Merchandising Corp. v. William K. Jackson*, Civil No. 18993 (D. Md.)—FTC Docket No. 8651.

Associated Merchandising Corporation and the other respondents in Docket No. 8651 have submitted the attached settlement proposal, covering both the proceeding in Docket No. 8651 and the collateral lawsuit now pending before the federal district court in Baltimore. The General Counsel's office recommends that the Commission withdraw this case from adjudication, pursuant to Section 2.34(d) of the Rules, in order to permit consent negotiations between the staff and respondents' counsel.

Because of the unusual complexity of this case, the difficulty of assessing the merits of the present proposal, and our lack of information as to the position of the Bureau of Restraint of Trade on the question whether this matter should be withdrawn from adjudication, I think it wise to refer the present proposal to the examiner.¹ When he has ascertained and analyzed the relevant information he can certify the matter to us with his recommendation.

I move the attached order.

My office has been informed by the General Counsel's office that prompt action by the Commission may obviate the necessity for the General Counsel to file extensive papers, due in early March, in the pending collateral litigation in district court. I am therefore circulating this as a walkaround.

¹ Indicative of the difficulty of assessing the questions raised by this proposal is that my office was informed that as recently as last night respondents agreed to make certain amendments in its settlement proposal.

MEMORANDUM

JUNE 10, 1968.

To: Commission.

From: Commissioner MacIntyre.

Subject: In the Matter of Associated Merchandising Corp., et al., Docket No. 8651.

On June 3, 1968, the Commission, upon my recommendation, extended the time in which this matter is withdrawn from adjudication, from June 3, 1968 to June 17, 1968. Attached to my June 3 circulation were copies of the memorandum from the Bureau of Restraint of Trade, recommending that the Commission accept the proposed consent agreement, memorandum from the Division of Consent Orders concurring with that Bureau's recommendation, and a copy of the conformed agreement.

I have been unable to make a recommendation in this matter due to the fact that not all papers have yet been received. It is my understanding that Frank Mayer, Chief of the Division of Discriminatory Practices, intends to file a memorandum opposing the proposed settlement. This memorandum has not yet been received by my office.

I am circulating this to the Commission for its immediate consideration in view of the fact that the extension of time withdrawing this matter from adjudication runs out Monday, June 17. I also understand that Basil Mezines, attorney in the case, will be in California next week and thus not be available to the Commission. Accordingly, I hereby recommend to the Commission that this matter be placed on the agenda for consideration by the Commission this coming Wednesday, June 12, or Thursday, June 13, and that the interested staff members, including Basil Mezines and Frank Mayer, be called to present their views.

I have attached hereto certain additional pertinent papers in this matter. They include copy of memorandum dated February 13, 1968 to the Commission from the Assistant General Counsel: letter to Chairman Dixon dated April 16, 1968; and draft of Order Dismissing Joseph Horne Company as a Respondent to This Proceeding. Mr. Mayer's memorandum, as noted, is not included.

EVERETTE MACINTYRE, *Commissioner*.

SPECIAL MATTER

JULY 23, 1968.

Re Associated Merchandising Corp., et al., Docket No. 8651.

From: James M. Nicholson.

To: Comm. Dixon; Comm. Elman; Comm. MacIntyre; Comm. Jones; (J. Kuzew); General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Charles A. Tobin.

Attached is my dissenting statement to accompany the letter informing respondents that their offer of settlement has been rejected.

ASSOCIATED MERCHANDISING CORP., DOCKET NO. 8651

DISSENTING STATEMENT OF COMMISSIONER NICHOLSON

I must record my disagreement with the action of the majority in refusing to accept the consent order which has been negotiated with the respondents. The order proposed is surely an adequate, if not completely satisfactory, disposition of the matter. As in any settlement, it represents reasonable concessions by both sides—the Respondents and the Commission. The concessions by the Commission are not contrary to the public interest, but, in fact, best serve that interest.

This case was initiated, according to the complaint, for the purpose of terminating alleged inducements of discriminatory prices by the individual members of AMC from their suppliers. These inducements were allegedly made, not individually, but through the wholly-owned subsidiary buying organization of AMC, known as AWC. Termination of those alleged violations has been achieved by the proffered settlement, which would effectively prevent all the group buying activities which gave rise to this complaint and which would, additionally, provide for the permanent divestiture of AWC by the individual members who comprise AMC.

The Commission has already expended a great deal of time, effort and expense in bringing this case to the point where it now rests. We are now confronted with a very simple choice. I can appreciate the majority's apparent desire to obtain an order, at this time in this decision, to which a number of individual retail corporations are parties, broad enough to block all other paths by which the respondents might reach the same objectives. Assuming that the individual retail corporate respondents now engage, or intend to engage, in the individual inducement of discriminatory prices in violation of Section 2(f) [neither of which, fact or intention, is alleged in the complaint], it is far from clear that the pleadings, as now constituted, would provide sufficient basis for such a prohibitory order. But, assuming further, that an individual order might be obtained, the breadth of that order is conjectural. Would it apply to all purchases by individual respondents? Would it apply only to those lines where there is some evidence group buying violations are proved? Or, would it be limited to those ten (10) or so lines where in depth proof of violations will purportedly be made? I am concerned that the price we will have to pay to achieve *any* individual order will be out of all proportion to the benefit which might accrue to the public.

No member of the Commission would stop short of any solution to this matter, nor would any compromise be accepted, which did not discharge the duty to protect the public interest and enforce the law. In weighing the alternatives before us, however, I am persuaded that, by accepting the proposed settlement, we would have achieved the major goal which we set. The public interest will be little served by the rejection which is based upon a tenacious insistence upon a catch-all provision covering some activities of the members of AMC acting in their individual capacities.

The complaint in this matter, as issued by the Commission in 1964, was accompanied by a form of order containing two prohibitions. One was designed to prevent the direct inducement of discriminatory prices by the individual stores comprising AMC and the other was aimed at their group buying activities. However, the direct-buying activities of the individual store members were not challenged in the complaint, which was based solely upon the use of AWC as a "wholesale" front for purchases by the AMC member stores. The direct-buying provision apparently was included since it had become standard practice from the orders growing out of the so-called "automotive parts" cases.¹ However, it should be noted that in those cases the buying groups were formed and existed solely for the purpose of inducing and receiving lower prices, whereas AMC, of which AWC is merely the buying arm, was formed to render a broad range of other services to its members. Thus there is doubt as to the wisdom of using these "order desk" situations as models for all subsequent buying group orders.

Further, the initial automotive parts cases were concluded only after protracted litigation, during which the respondents contested every foot of the ground, following which broad orders were drafted which were coextensive with the Commission's power to prohibit illegal practices in whatever form they might become manifest.

I have no quarrel with this approach following litigation and believe that in that posture the Commission is well justified in drafting orders which are broad enough "effectively to close all roads to the prohibited goal."² But this is not to say that we need to insist dogmatically upon this approach in all cases which come before us. We should not extend this solution to necessarily include those matters where the parties are able to reach an agreement without litigation and which will effectively terminate all the practices we challenged and concerning which evidence can be produced. In such circumstances, a stubborn insistence upon an exact reproduction of past orders issued in other cases and under different conditions constitutes an issuance of orders by vote, sacrificing our discretion to choose a remedy deemed adequate to cope with the unlawful practices found to exist.³ It is, furthermore, in contravention of the mutual concessions necessary to any compromise settlement procedure. The majority wants by way of settlement, the whole cake which *might* be obtained from litigation.

¹ *American Motor Specialties Co., Inc. v. F.T.C.* (2nd Cir. 1960) 278 F. 2d 225, cert. den. 364 U.S. 884 (1960); *Alhambra Motor Parts v. F.T.C.* (9th Cir. 1962) 309 F. 2d 213; *General Auto Supplies, Inc. v. F.T.C.* (7th Cir. 1965) 346 F. 2d 311; *Mid-South Distributors v. F.T.C.* (5th Cir. 1961) 287 F. 2d 512.

² *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952).

³ *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

The history of this matter goes back more than a score of years to an earlier consent order obtained prior to the Finality Act.⁴ The record of respondent's activities in this history is much less tarnished than that of the Commission. In 1956, after an extended investigation of compliance in which the respondents disclosed the establishment of AWC as a means of complying with the order, a responsible member of the Commission staff (albeit without "official" Commission action) informed respondents that there would be no Commission action with respect to the establishment of AWC.

A new investigation was commenced some four years later, which culminated in issuance of the complaint herein. To date, in this most recent effort alone, the Commission has expended approximately \$500,000 of its limited resources and eight years time. Yet, even now, administrative hearings herein are not on the horizon.

As pointed out by Commissioner Elman in his dissenting statement, respondents have barely begun to utilize the discovery procedures available to them, or to exhaust the potential collateral lawsuits which they might institute, the third of which is even now pending in a federal district court in Maryland. Further, as Commissioner Elman has also observed, the administrative hearings themselves promise to be "exhausting if not exhaustive" and will undoubtedly take years to complete, considering the number of localities in which hearings must be held, the number of witnesses who must be called, the number of documents to be introduced and the number of individual transactions to be considered. Completion of all these necessary steps promises to take this proceeding well beyond *the expiration of the terms of all the present members of the Commission*, if indeed the administrative hearings themselves can be commenced within that period of time.

This should not be interpreted as an invitation to the litigating anti-trust bar to advise their clients to use all devices to fight and delay the Commission, in the hope that the Commission will eventually "cave-in". In appropriate cases the Commission should not, and I am sure would not, hesitate to devote extensive resources to obtain the relief sought at the time complaint issued. This is just *not* the appropriate case for such a position.

The majority here is willing to pay the price of this indeterminate delay in enforcement of the law for the sole purpose of obtaining orders against the direct-buying practices of the individual stores. In so doing, it is obviously willing to devote a considerable portion of the Commission's limited resources and key personnel to the pursuit of this debatable objective, when such resources and personnel could and should, in my view, be more advantageously devoted to a broad-scale, industry-wide attack on the many problems which purportedly exist in connection with the buying practices of large department stores and buying groups throughout the country. That is the real task before us in this area, now that the solution to the particular problem of this case is within our grasp.

In the hearings in December of last year on the confirmation of my appointment to the Commission, a number of the Senators on the Commerce Committee asked me whether I would devote my efforts to a more prompt disposition of matters before the Commission. I did not hesitate to pledge my efforts to that goal, nor, having become aware of the new programs which began to be initiated in 1961, and which were designed to expedite matters before the Commission, did I doubt my ability to make a meaningful contribution. The decision of the majority herein, with the necessary commitment of personnel and funds, represents a substantial retreat from declared Commission, and Congressional, policy.

We should not sacrifice broad Commission policy of expedition and the ultimate objective of industry-wide solutions for the limited and dubious purpose of adding one more provision to an order which already accomplishes substantially everything we set out to achieve.

Three years ago, Commissioner Jones dissented from the rejection by the Commission of a settlement, substantially identical to that now before us, offered by only *one* of respondents. How that position can be reconciled to the majority determination, and, on what basis the majority justifies the substantial commitment of funds and personnel to continuation of this matter, will remain a mystery since they have declined to enter a formal order and opinion.

The price the majority would pay is too high, and, apparently, cannot be justified by them. For the reasons set forth above, I would not pay it.

⁴ 73 Stat. 243 (1959), 15 U.S.C.A. 21 (Supp. 1960).

MEMORANDUM

AUGUST 7, 1968.

To: The Commission.

From: Everette MacIntyre, Commissioner.

Subject: Federal Trade Commission Docket No. 8651: In the Matter of Associated Merchandising Corp., et al., in connection with the pending proposals for settlement and an alternative solution.

INTRODUCTION

It will be recalled that the Commission has had before it a proposal for settlement of this matter for some time. The proposed settlement falls far short of the relief that would be provided by the proposed order that the Commission sent out when it issued the complaint. For this reason the matter has troubled the Commission in its consideration of the proposed settlement. The principal arguments which have been advanced in support of the proposed settlement is that in the light of the wording of the present complaint it would require years to complete the litigation in order to secure the relief such as that which was proposed when the complaint was issued. This factor has been the basis for the argument that the Commission ought to accept the proposed settlement. However, during these discussions I made a proposal for an alternative solution which, as the Commission knows, was on a previous occasion rejected. One of the purposes of this memorandum is to renew my proposal for an alternative solution to the problem. I set forth in detail that alternative proposal near the conclusion of this memorandum.

THE PROBLEM

The Immediate Problem. The immediate question before the Commission is whether it should accept or reject a proposed consent settlement in this matter. The majority of the Commission has provided an answer to that question by having voted to reject the proposed consent settlement as inadequate.

The Larger and Longer Range Problem. The larger and longer range problem before the Commission and which really prompted the Commission to undertake inquiry into the operations of the Associated Merchandising Corporation and its large department store operating members were allegations that such members were inducing and knowingly receiving advertising allowances from suppliers which were not being made available on proportionally equal terms to competing retailers. Such allegations, if they should be proven to be well founded, would establish beyond question violations of law. In that connection reference is made to Title 15, U.S. Code, Sec. 13(d), which is quoted as follows:

"That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Added to such allegations on October 17, 1962, more than two years before the complaint herein was issued on November 24, 1964, was a large amount of information presented to the Commission in the course of the public hearing. The record of that information contains a great volume of statements by representatives of firms which were supplying department stores with merchandise. These representatives alleged that the large department stores who were buying from them were inducing and requiring them to grant advertising allowances which they were unable to grant to competing retailers on proportionally equal terms and in many instances not at all. It is the record of this hearing to which Commissioners Elman and Higginbotham referred in their statement which was published and released by the Federal Trade Commission on January 2, 1963 concerning this problem. In that statement those two Commissioners recognized the existence of a large and long range problem before the Commission in the light of the allegations and information which had been placed before us in the course of that hearing. They contended it demanded solution. What sort of solution? It is clear that they meant a halt to the practices which were said to exist.

The Commission had received complaints to the effect that respondents in this case had engaged in this practice of inducing and knowingly received advertising allowances from suppliers who did not make such allowances available on proportionally equal terms to competing retailers. It was complained to the Commission that one of the methods by which this practice was being carried on by these respondents was through the use of the Associated Merchandising Corporation and the Associated Wholesale Corporation in the making of purchases of merchandise from various suppliers. As a consequence of those complaints made to the Commission, the Commission's staff was informed that such activities were, in fact, being practiced by these respondents. The staff so informed the Commission and recommended that it issue a complaint. The Commission having before it information which led it to believe that the allegations in the complaint were well founded, issued its complaint herein which was made the subject of the consent settlement negotiations to which reference is made above.

The proposed order which accompanied that complaint provided that the respondents Associated Merchandising Corporation, Associated Wholesale Corporation, and the large department store members thereof, be enjoined from inducing or knowingly receiving advertising allowances from suppliers which were not made available on proportionally equal terms to competing retailers, whether or not such allowances were induced or knowingly received on purchases by these respondents directly or through the offices of Associated Merchandising Corporation and Associated Wholesale Corporation. Provisions of such proposed order that accompanied the complaint are quoted as follows:

IT IS ORDERED that respondents Associated Merchandising Corporation; Aimcee Wholesale Corporation, a corporation; Federated Department Stores, Inc., a corporation; The J. L. Hudson Company, a corporation; Carson Pirie Scott & Co., a corporation; The Dayton Company, a corporation; Rich's, Inc., a corporation; Strawbridge & Clothier, a corporation; The Emporium Capwell Company, a corporation; Joseph Horne Company, a corporation; L. S. Ayres & Company, a corporation; The Higbee Company, a corporation; Hutzler Brothers Co., a corporation; Thalhimier Bros., Inc., a corporation; B. Forman Company, a corporation; Woodward & Lothrop, Inc., a corporation; and their respective officers, agents, representatives, and employees, jointly or severally, directly or through any corporate or other device, in or in connection with the purchase of goods, wares, and merchandise in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products.

(2) Maintaining, operating, or utilizing respondent Aimcee Wholesale Corporation or any other organization as a means or instrumentality to induce or receive discounts or rebates which result in a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products.

On Page 2 of Commissioner Elman's dissent to the Commission's current rejection of the respondents proposed consent settlement, is his statement that:

"Three years ago, when Mr. Abe Fortas on behalf of [respondent] Federated, offered a consent order which was less favorable to the Commission . . . Commissioner Jones and I dissented from its rejection by the Commission, stating that it constituted 'a reasonable basis for working out a settlement without protracted litigation on terms that would effectively prevent continuation or recurrence of the practices charged against Federated in the complaint'. Neither the consent order proposed by Federated nor the one now before us contains a boilerplate 2(f) direct buying prohibition covering each individual department store's direct buying from a supplier, as distinct from indirect buying . . ."

Thus it is beyond dispute that the proposed consent settlement which respondents, their counsel and Commissioner Elman would have had the Commission approve three years ago and one they would have the majority of the Commission approve now, would not provide injunctive relief from the practices which complaints and information filed with the Commission indicate exist.

It was with respect to such practices that the Commission had reason to believe existed that this proceeding was undertaken and against which the Commission's proposed order was directed.

This is a vital defect which would operate against the solution of the large and long range problem which those most interested in this proceeding acknowledge should be achieved, namely, an injunction which would stop practices, if in fact they exist, clearly in violation of law whether carried on by a particular respondent through Agent AMC, Agent X, or through direct transactions without the benefit of any agent. Let there be no mistake about the fact that this is the large and long range problem with which we are concerned here.

ADDITIONAL DEFECT

An additional substantial, if not vital, defect in the respondents' proposed consent settlement is the provision appearing in Item 11 on Page 6 of the proposed consent agreement to the effect that provisions of the order "incorporated in this agreement shall apply only to net prices *which are unlawfully discriminatory.*" (Italics supplied.) What is the effect of this language? Those who proposed it have not answered that question. Yet among them are those who are teaching courses on this subject in law schools and writing law review articles on this subject which are appearing in the legal literature of the country. When they were pondering whether and how to answer this question, if Commissioner Elman ascertained their thinking about the meaning of this ambiguous language, I am unaware of it.

One thing I do know: In my limited experience at the Federal Trade Commission and as a lawyer, dealing with matters of this kind in cases of this kind, the Courts have ruled that the meaning and effect of language such as was insisted upon by respondents and their counsel in their proposal, may not be determined by any Court in any enforcement proceedings which could be brought to enforce the order such as proposed here without relitigating the issues raised by the pleadings now before us in the first instance.

OUR RESPONSIBILITIES

Our responsibilities require us to secure effective relief from what is presented to us and which we have reason to believe are in fact unlawful acts, practices and conditions. This is our responsibility even where litigation is required to get the needed relief. We should not fail in the discharge of that responsibility even if the prospective litigation should be threatened or predicted to be long or costly.

In my work as a lawyer over a period of almost four decades, I have sought to avoid litigation wherever and whenever wrongs could be righted and appropriate relief secured without litigation. Perhaps it isn't well known, but more than any one of my colleagues on the Federal Trade Commission and perhaps as much if not more than any member of the Commission's staff, I have participated in and secured resolution of issues in Federal Trade Commission cases through negotiation of agreements and without litigation. I have done this over a period of many years in the role as a trial attorney, as Chief Trial Counsel for a sizeable division of attorneys representing the United States Government, and I have participated as a member of the Federal Trade Commission in many such matters.

AN ALTERNATIVE SOLUTION

There is an alternative to the prospect of threatened, lengthy and costly litigation under the present complaint, other than the minimal relief which would be provided by respondents' offer of settlement. I have already proposed that alternative but my motion met with little success. I hope that the Commission will reconsider. The root of the problem evidently arises from the fact that it is argued that the complaint as now worded does not explicitly cover violations of Section 2(f) for which the respondents may be responsible on an individual basis. For that reason I propose that the Commission now withdraw the present complaint and take the necessary steps to determine whether respondents' solicitations of discriminatory prices have been confined to collective action or whether the alleged violations of law through the medium of AMC have been supplemented by the receipt of discriminatory prices on an individual basis. I move, therefore, that the Commission withdraw the com-

plaint on the condition that simultaneously a 6(b) investigation is instituted to determine whether respondents' alleged illegal activities have been confined to group buying through AMC. Should it turn out that respondents in the two-year period covered by the proposed investigation have not violated the law through inducing or knowingly receiving unlawful allowances or price discriminatory treatment in that two-year period, then I would think we should drop or close the matter. On the other hand, if the illegal activities documented by the investigation go beyond group buying, then a new complaint should issue covering those activities unequivocally. In my view, this course of action will avoid the long and costly litigation predicted by other members of the Commission and which has been threatened by respondents if litigation continues under the existing complaint. I hope that the Commission will be sufficiently flexible to resolve these admittedly difficult problems in a clear-cut manner. I think my proposal would go a long way in achieving that objective.

CONCLUSION

I will be absent for a two-week period beginning August 12. Therefore, I request that unless the Commission approves my motion in the meantime, no papers be filed on the public record in this matter until my return. I make that request since, if some other course of action should be adopted, I shall undertake to state my views on the public record. In that connection, I shall want it known that I have moved that the Commission undertake to determine facts and the nature of problems committed to it for solution under applicable existing law. This is in keeping with my record over the years; we should attack problems committed to the Commission under laws entrusted to the Commission.

EVERETTE MACINTYRE, *Commissioner*.

MEMORANDUM

AUGUST 8, 1968.

To: Commission.

From: Everette MacIntyre, Commissioner.

Subject: Docket No. 8651: In the Matter of Associated Merchandising Corp., et al.

This supplements my circulation of August 7, 1968. I have prepared a resolution authorizing a 6(b) investigation of respondents', and an order simultaneously withdrawing the complaint. For the reasons stated in my previous circulation, I move their adoption. I further move that if the Commission decides to withdraw the complaint and authorize such an investigation, that the staff be directed to prepare appropriate 6(b) orders to carry this resolution into effect.

EVERETTE MACINTYRE, *Commissioner*.

MEMORANDUM

AUGUST 20, 1968.

To: The Commission.

From: James M. Nicholson, Commissioner.

Subject: Federal Trade Commission Docket No. 8651: In the Matter of Associated Merchandising Corp., et al., in connection with the pending proposals for settlement and in alternative solution.

INTRODUCTION

First, I would like to express my appreciation to Commissioner MacIntyre for his considerate and thoughtful circulation of August 7 in this matter. As indicated to the members of the Commission individually, my proposed dissent in this matter was prepared as a means of disciplining my thinking, and for the purpose of provoking a discussion of problems which I did not feel had received adequate discussion at the table. Without the benefit of directly participating in the extended history of this matter (with respect to which I made an effort to familiarize myself), concerned about our ability to achieve the goal sought by the majority within the present pleading context, shocked by the financial com-

mitment already made—and by the prospective costs, doubtful that individual discriminatory pricing orders (even if attainable) in this matter would be either fair or a significant step toward solution of what appeared to be a broader problem. I have felt the acceptance of the proposed consent order was appropriate and desirable.

Commissioner MacIntyre, through his circulation of August 7 has raised broader considerations which I found of considerable help to my understanding of this matter and the broader problems involved. Since I am inclined to believe that any decision here should be made within the context of a broader policy, which includes considerations somewhat beyond those suggested by Commissioner MacIntyre, I should like to raise those questions of policy for consideration at the table.

VIOLATIONS OF THE ROBINSON-PATMAN ACT IN THE RETAIL DEPARTMENT STORE INDUSTRY

It is my understanding that our investigations of the ready-to-wear industry, as well as our investigations of AMC-AWC and their members, provide a basis for the Commission to have reason to believe that:

1. AMC-AWC, their members and other unnamed retail department stores and chains have induced or knowingly received, individually and through group devices, advertising and promotional allowances either not available, or not available on proportionally equal terms, to competitors of the recipients (which, of course, are violations of Section 5 of the Federal Trade Commission Act, not the Robinson-Patman Act); and

2. AWC, as a group buying device, has knowingly received or induced discriminatory prices in violation of Section 2(f).

It is my further understanding that, although direct evidence is not in hand to provide a basis for the Commission to have reason to believe, it is the considered opinion of the staff that:

1. The members of AMC-AWC and other department stores and chains, individually, have knowingly received or induced discriminatory prices in violation of Section 2(f).

With respect to the significance of the discriminatory allowances, I understand that substantial dollar amounts are involved. In an industry of relatively low profit margins this can have a substantial adverse impact upon non-favored competitors. [In this connection, it might be well to consider some evidence in our newspaper investigation files that some large stores are receiving allowances based upon fictitious advertising charges, thus obtaining a further competitive advantage.] I am not clear, however, whether our rather limited investigation of discriminatory prices indicates that there is substantial significance to the advantage acquired by the favored stores.

POLICY CONSIDERATIONS

1. In General

I agree with the statement of our responsibilities found on page 6 of Commissioner MacIntyre's circulation of August 7:

"Our responsibilities require us to secure *effective* relief from what is presented to us and which we have reason to believe are in fact unlawful acts, practices and conditions. This is our responsibility even where litigation is required to get the needed relief. We should not fail in the discharge of that responsibility even if the prospective litigation should be threatened or predicted to be long or costly." [My emphasis]

The emphasis is added to the word "effective" because I believe there are a number of policy considerations implicit in that word which bear heavily on the answers to particular questions which come before us.

Contrary to the opinions expressed by many of the critics of Robinson-Patman, I do not believe that the Act is intended to preclude "hard competition" (I would prefer "hard bargaining") and permit only "soft competition" (the atmosphere in which competing sellers consciously hide behind the Robinson-Patman Act to avoid price competition which might be justified on the basis of cost or meeting competing prices). It is the absence of these supposedly inherent concomitants of Robinson-Patman that presents difficulties in enforcement. If it were necessary to enforce the Act in a manner which fostered "soft competition," I would find it necessary to join the critics of the Act since that view would be in conflict with the policy of the antitrust laws, would entail higher prices to the consumer and higher profits to the sellers and would not subserve the general public interest.

The concept of the Commission that has been emphasized in the last seven years, and one which I embrace with a great deal of enthusiasm, is the enforcement of our obligations as fairly—and on as broad a base—as possible. However, our traditional budgetary limitations have required us to determine priorities in allocating our resources. Generally, this has resulted in efforts by the Commission to attack individual violations of more flagrant nature, and, where the violations are more broadly based, in attempting solutions which reflect a broader view. (Our recent determination to study and conglomerate merger phenomena is, in my opinion, a laudatory effort to resolve individual merger questions within the context of a better understanding of the overall problem.)

It is difficult to reconcile our responsibility for enforcement of the Robinson-Patman Act with our responsibility to promote competition and to reach broader solutions, but it is not impossible. I, for one, am not willing to throw up my hands in defeat and advocate either throwing out the Robinson-Patman Act or substantial tightening amendments which have been beaten down in the past in the Congress. Not having lived intimately with the Robinson-Patman Act for the past thirty-two years, perhaps some of my suggestions which follow will appear naive, or superficial or impossible, and if so I invite the response of my fellow Commissioners. I hope that, not having had that intimate relationship, there may be some merit to a less involved, or less committed, point of view.

Because it seems to me that the AMC case contains most of the frailties and the opportunities for resolution of our obligation to enforce the Act, to promote competition and to seek broad solutions, I suggest we consider the case within that framework.

2. The AMC-Retail Department Store Context

For purposes of this discussion, I am assuming the accuracy of the numbered paragraphs on pages 2 and 3 of this memo.

With respect to the assumption of violation of Section 2(f) through AWC and other group devices, the proposed order would (with the correction of the problem discussed by Commissioner MacIntyre under the heading "Additional Defect" on pages 5, 6 of his August 7 circulation) effectively preclude AMC-AWC and their members individually from using any group device in the future as a means of obtaining discriminatory prices. Acceptance of this settlement does not stop other buying group entities from obtaining discriminatory prices, but I have the impression from the staff discussion that most other buying groups have less bona fides than the AMC-AWC devices and that an order in the manner proposed by the settlement would facilitate and perhaps insure consent orders against other groups with substantially reduced commitments of time and effort. There are only two additional matters that I would suggest for broadening the consent order which would facilitate the other problems in this industry.

First, I would suggest an effort to obtain a provision precluding the use of a group device to induce or knowingly receive discriminatory advertising or proportional allowances.

Second, I would suggest that we consider seeking individual restrictions on discriminatory prices and advertising and promotional allowances which provisions would become effective upon the obtaining of similar restrictions from a mutually satisfactory segment of the department store industry. I made this suggestion sometime earlier, but do not believe it has been explored with the respondents.

I think that every effort should be made to obtain these additional provisions which I have some reason to believe may be obtainable. I am personally of the opinion that there are two very substantial reasons why a fight to the death will be made against broad individual orders: 1.) There is a concern about instances of a buyer, in hard bargaining, inadvertently violating the order (a problem which could be handled in the language of the order); and 2.) There is a very real concern that an individual order would unfairly put the individual members of AMC-AWC at a substantial competitive disadvantage with their competitors who remain free until the Commission acts against them, a concern which I believe can be handled through delaying the effective date of that part of the order.

If AMC-AWC and their members agree to both suggestions for expanding the proposed consent order, we can count the investment of 22,000 man hours since 1961 as well spent, and proceed with our efforts to obtain broader solutions in this industry.

Even if these two additional provisions are not included in a consent order with AMC-AWC and their members, I would accept the consent order (requiring only the correction of the language "unlawfully discriminatory"). I do not see how this interferes with an effort to pursue the members individually along the lines suggested by Commissioner MacIntyre. Although the group challenge enables the combination of individual charges in one action, the charge of individual violations requires individual proofs. We apparently have a good case against AMC-AWC group activity, and, in accordance with Commissioner MacIntyre's section on "Our Responsibilities," we should secure effective relief *from these provable violations*.

Whether the additions to the consent order are obtained or not, I would propose that we immediately seek group orders against the other buying groups in the department store industry. I would further propose that, if the individual pricing order against AMC-AWC members is not included, we conduct the investigation proposed by Commissioner MacIntyre.

In this connection, I would like to interject another consideration not referred to by Commissioner MacIntyre. Rather than investigating bobby-pins, or hot pads, or fireplace screens, I would suggest that the staff be instructed that the Commission requires evidence of some pattern of price discriminations of some substance in lines which represent some degree of substantiality in the department store industry. If a pattern of violation is found in significant lines, such as linens, or white goods (refrigerators, etc.) or furniture, or ready to wear items, I would concur that we would be failing in our responsibility "even if the prospective litigation should be threatened or predicted to be long or costly." But individual discriminations that are not substantial, or do not affect substantial lines, are not likely, in my opinion, to have a substantial effect on competition and therefore do not represent the kinds of violations to which the Congress wished the Federal Trade Commission to address itself.

The really difficult problem which the Commission will face, whether the AMC-AWC members agree to a postponed individual order or we proceed against them individually, is enforcement against individual violations by other department stores and chains. If there is a shortcoming of the Robinson-Patman Act that bothers me substantially, it is the historical inability of the Commission to deal, under the Act, with problems on a broader scope.

The only possibility that occurs to me, and I feel inadequate to judge it, is a trade rule proceeding. Is it feasible to conduct an investigation into discriminatory prices in the department store field which would show a general prevalence, and, from that, prepare trade rules which would facilitate enforcement efforts? Are there any other methods by which a prevalence of price discriminations in the department store industry may be challenged? Is there any method by which the Commission can evaluate discriminatory practices in various industries and establish some priorities related to significance and substantiality? Are there any new recommendations which we could make to Congress at this time for amending the Robinson-Patman Act, which would have a reasonable expectation of enactment?

These are a few of the questions which I believe should be discussed at the table and from which we may be able to develop decisions which we can all enthusiastically support.

MEMORANDUM

AUGUST 29, 1968.

To: The Commissioner.

From: Mary Gardiner Jones.

Subject: Associated Merchandising Corp., et al., Docket No. 8651. To be considered in connection with Special Matter Circulations by Commissioners MacIntyre and Nicholson.

I do not understand what advantage Commissioner MacIntyre believes will accrue to the Commission by withdrawing the complaint in this matter and not accepting any order. If confronted with the option of no order or a limited order, I am convinced that a limited order is far more preferable.

The proposed consent settlement under consideration would at least result in an order against each of the individual respondents (all of whom are important and major department store purchasers) prohibiting them from violating 2(f) so

far as their group purchases are concerned. Even this order proposed by respondents (which in my judgment is too limited) would have a stronger deterrent effect on these respondents as respects their future buying conduct than the withdrawal of the complaint. Respondents are sophisticated enough to appreciate that if an order was entered against them now under Section 2(f) even though limited, they would be extremely vulnerable to a broad and stronger order if they should ever be caught again violating 2(f) in their individual purchases. Hence entry of some order might well have a substantial effect on the future individual buying conduct of these respondents; withdrawal of the complaint altogether will probably not. Moreover, withdrawal of the complaint would be grossly contrary to the public interest in light of our reason to believe that in fact these respondents *have* violated the law *at least* as respects their AMC purchases. I could never justify to myself or to anyone else withdrawing that complaint and not entering *any* order.

Although I am still troubled, as are all the Commissioners, about the implications of rejecting the proffered settlement, I have not yet seen any hard or persuasive evidence of an acceptable alternative to such rejection. The staff has not come up with an investigatory program which would ensure that these respondents would hue closely to the line in their purchasing practices and which would also extend to the purchasing practices of other industry members.

I have some trouble with Commissioner Nicholson's proposal that we seek a provision binding individual purchases but delay its effective date until other companies are under the same order. While I think this is an imaginative suggestion—and one therefore which I doubt respondents would accept—I do not know whether we have information indicating that others in their individual purchases are violating these same laws apart from respondent's contentions to this effect. More serious than that is my reluctance to delay the effective date of an order which would require a company to stop violating the law merely because others may also be engaged in such violations. As I understand respondent's "competitive" argument, it is that if they were subject to such a 2(f) order for a substantial part of their product lines, this would require them to adopt stringent policing techniques which might curb their flexibility in their purchasing practices, i.e., might force them to obey the law. That this might put them at a competitive disadvantage vis-a-vis other department stores not under comparable orders is a possibility but one which I cannot find myself very sympathetic towards. It does behoove us to proceed with investigations of the industry in as equitable a fashion as possible but I cannot see that it should move us to hold off enforcing the law because of any so-called "competitive" disadvantage flowing to respondents because of their compliance with the law.

SPECIAL MATTER

SEPTEMBER 4, 1968.

Re Associated Merchandising Corp., et al., Docket No. 8651.

From: Commissioner Elman.

To: Comm. Dixon; Comm. MacIntyre; Comm. Jones; Comm. Nicholson; Secretary; General Counsel; Program Review Officer; Bur. of Economics; Bur. of Restraint of Trade; Bur. of Deceptive Practices; Bur. of Industry Guidance; Bur. of Textiles & Furs; Executive Director; Mr. Tobin.

Attached is a copy of the statement of my position to be appended to the order withdrawing the complaint, approved at yesterday's meeting.

DISSENTING STATEMENT OF COMMISSIONER ELMAN

One can only be mystified by the Commission's rejection of the consent order worked out by all the parties after months of patient negotiations. Acceptance of the order, which effectively prohibited the group-buying practices challenged in the complaint, would have brought this seemingly interminable litigation to a satisfactory conclusion. The Commission's staff, as well as counsel for respondents, should have received our thanks for arriving at a settlement of the case on terms that fully satisfied the public interest. Instead, the Commission is rejecting the settlement, withdrawing the complaint, and in effect starting out again from scratch. There may be some point in reversing course so drastically; but I am afraid it escapes me.

MEMORANDUM

OCTOBER 28, 1968.

To: The Commission.
 From: Commissioner Nicholson.
 Subject: AMC.

In connection with the revision of the Commission minutes of October 8 in this matter to accord with discussions at the table on problems within the proposed consent agreement, a situation has arisen which merits discussion at the table.

First, I find that the staff has serious question about the proposed investigation of the AMC members for individual violations. One view is that the Commission should pursue other buying groups in this industry. Another view is that the investigation of individual violations of AMC members would be a major project and our efforts might well be made in a different direction if we are to get the "most bang for our buck."

Second, Commissioner Elman has raised with me the question of the propriety of accepting the proposed consent order without disclosure of the determination of the Commission to conduct investigations of individual violations. I believe there is merit to his feeling that this could be somewhat in the nature of entrapment, and would suggest that if we proceed in the manner determined on October 8 that disclosure should be made.

I am more concerned with the staff attitude toward investigation of individual violations. At the table on October 8, I suggested that we adopt Commissioner Jones' proposals in this phase of the case instead of the direction of the investigation as proposed by Commissioner MacIntyre. Commissioner Jones had suggested that the staff report to the Commission on the scope and nature of an individual investigation—had this been adopted we would have received the comments which have been made to me privately. I, of course, provided the third vote in favor of Commissioner MacIntyre's proposal.

Although we seem to have hold of a basket of snakes and no reasonable solution suggests itself to me, I move that we once again discuss this matter at the table with Frank Mayer and Basil Mezines.

 MEMORANDUM

DECEMBER 6, 1968.

To: Commission.
 From: Commissioner Dixon.
 Subject: Associated Merchandising Corp., et al., Docket No. 8651.

As shown by the accompanying memoranda from the Assistant General Counsel (December 4) and the Division of Discriminatory Practices, Bureau of Restraint of Trade (December 6), the respondents have now withdrawn their offer to dispose of this proceeding through the entry of a consent order. This withdrawal apparently was prompted by the disclosure to the respondents, made in the staff's letter of November 5, pursuant to our direction of October 29, that the Commission, upon entry of the consent order, would simultaneously institute an investigation of the individual department store members of AMC.

In light of this development, the Division of Discriminatory Practices now recommends that we inform the respondents that we will accept the proffered consent order, modified to remove the problem arising out of the phrase "unlawfully discriminatory," with a decision as to whether or not further investigation of the stores will be instituted deferred for a period of twelve months during which the respondents will be required to bring themselves into compliance with the order. The Assistant General Counsel, expressing doubt that it is any longer feasible for the Commission to continue the present adjudicative proceeding, recommends that we accept any form of consent order the respondents are willing to offer.

Whether or not the respondents would be willing to submit a proposal on the basis contemplated by the Division of Discriminatory Practices is problematical. In any event, I doubt that the Commission would accept such a proposal even if made. I certainly would not recommend it. In this situation, I move that the

procedure proposed by Commissioner MacIntyre in his memorandum of August 7, 1968, be adopted. Specifically, I move—

(1) that the outstanding complaint be withdrawn;

(2) that the Commission simultaneously adopt a resolution directing an investigation to determine whether during the past two years the pricing and purchasing practices of the individual store members of AMC may constitute violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act;

(3) that if the investigation discloses that the stores have not during the two-year period violated either of these laws, the investigation be closed and the case dropped;

(4) that if the investigation discloses violations by all or any of such stores individually, a new complaint be prepared covering all such activities, including the alleged group buying violations covered by the withdrawn complaint.

PAUL RAND DIXON, *Commissioner*.

MEMORANDUM

DECEMBER 11, 1968.

To: The Commission.

From: Philip Elman.

Subject: Associated Merchandising Corp., et al., Docket No. 8651.

The attached order represents the first part of the two intertwined motions which I made at this morning's meeting. The other part is that the Bureau of Restraint of Trade, in consultation with the Bureau of Economics and the Program Review Officer, submit to the Commission in 60 days its recommendations, on the basis of information in the Commission's files or otherwise available to the staff, and having due regard to budgetary and other limitations on the Commission's resources, whether it would be in the public interest for the Commission to adopt a resolution directing an investigation of alleged violations of Section 2 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act by members of the department store industry in regard to their pricing and purchasing practices during the past two years.

As the Commission will recall, I made these motions only after all the other proposed alternatives had failed to muster a majority. The present impasse cannot continue indefinitely, and must somehow be resolved. I offered these two motions in the hope that they would provide a basis for action upon which we could all agree. If, however, it should transpire that there would be dissent from the attached order, I would want to reconsider my position in the matter. Since withdrawal of the complaint is a course of action which I do not favor, and which indeed seems to me far less in the public interest than unqualified acceptance of the consent order would have been, I would not want to be put in the position of having to defend withdrawal of the complaint if there were to be a dissent.



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